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Environmental Impact Report For Refinery Project Violated CEQA Because It Failed To Adequately Describe Project And Improperly Deferred Mitigation Measures

In *Communities for a Better Environment v. City of Richmond*, (--- Cal.Rptr.3d ----, Cal.App. 1 Dist., April 26, 2010), a California Court of Appeal considered whether an environmental impact report (“EIR”) for a refinery project violated the California Environmental Quality Act (“CEQA”). The Court of Appeal held that the EIR violated CEQA because (1) the project description in the EIR was unclear and inconsistent as to the specific grade of crude oil the refinery would process; and (2) the EIR improperly deferred greenhouse gas mitigation measures.

Facts

Chevron Products Company (“Chevron”) applied to the City of Richmond (“City” or “Richmond”) for a permit to proceed with an energy and hydrogen renewal project (“Project”). The objective of the Project was to upgrade or replace facilities at Chevron’s refinery (“Refinery”) located in Richmond to improve its ability to process a more varied mix of crude oil. Refinery processes crude oil into oil and fuel products. The Project would allow Refinery to increase by 6 percent production of gas that meets the standards of the California Air Resources Board (“CARB”). Refinery would decrease production by 6 percent of gasoline that did not meet CARB standards. Refinery would not increase its consumption of crude oil, but the “upgrades would expand the Refinery’s options for using a wider range of crude oils.” The crude and gas oil supplies that Refinery would process after the Project was approved would contain more sulfur and associated contaminants. The Project called for a hydrogen plant replacement, a power plant replacement, a catalytic reformer replacement, and hydrogen purity improvements.

City’s Planning Commission (“Commission”) certified the final EIR and the City Council voted to approve the necessary permits. Communities for a Better Environment and two

other organizations (collectively, “Communities”) filed a petition for writ of mandate against City and Chevron alleging the environmental review of the Project was flawed. The trial court granted the writ finding the EIR violated CEQA because it failed to provide an adequate project description or to consider the whole project and also failed to define mitigation measures for greenhouse gas emissions.

Decision

The court of appeal affirmed the trial court’s decision in part and reversed the decision in part. The court of appeal first found the Project’s description was unclear and inconsistent as to the specific gravity of crude oil that the Refinery could process. The Project’s stated objective was “to improve the Refinery’s ability to process a more varied proportional mix of crude oil types than it currently processes, including crude oil with higher sulfur content.” The trial court found discussion in the EIR of the types of crude Refinery processes now and what it will process after the Project is complete is “so ‘unclear and inconsistent’ that the EIR failed to provide an ‘accurate, stable, and finite project description.’”

Currently, the Refinery cannot process “heavy” crude and is configured to process light-to-intermediate crude. The EIR stated that “[i]t is reasonably foreseeable that” after the Project “Chevron would run a crude slate similar to that which is currently processed at the Refinery— but in a mixture that has higher sulfur levels.” Communities asserted Chevron was obscuring the fact that the changes in equipment at the Refinery “while not allowing the processing of heavier crude, would nevertheless significantly increase Chevron’s ability to process lower quality, heavier crude as compared with the crude the Refinery currently processes.” They claimed the crude that is heavier and lower in

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quality, creates serious public health risks.

The EIR disclosed an increase in the sulfur content of the crude that would be processed at Refinery but denied “that the Project will increase the Refinery’s ability to process heavier, lower quality, more contaminated crude which could potentially create serious environmental consequences.” The court concluded the EIR fails to “address the public health or other environmental consequences of processing heavier crude, let alone analyze, quantify, or propose measures to mitigate those impacts.”

The court found the EIR contained conflicting statements about the Project’s objectives. On the one hand, the EIR stated there were no changes under the Project that would facilitate Refinery processing heavier crude. On the other hand, the EIR stated that the Project was “designed to allow more flexibility in refining future crude supplies that the EIR describes as ‘increasingly heavier.’” In a filing with the Securities and Exchange Commission, Chevron stated the Project’s central purpose was to enable the processing of heavier crude. Chevron also fought a conditional use permit provision that would ensure Refinery would not switch to heavier crude.

Furthermore, after the EIR became final, three experts rendered opinions on the question of whether or not the Project would result in Refinery being able to process heavier crude oil. The court noted this should have been done before the EIR became final. After two of the experts concluded Refinery would be able to process heavier crude, City retained a private consultant to examine the issue. This consultant, Dr. Sahu, ultimately concluded the Project would not enable Refinery to “have greater capacity to process a crude slate different from that which is currently being processed.” Dr. Sahu reached this conclusion utilizing calculations and analysis that “were based, in part, on confidential data supplied by Chevron that was not made available to anyone else.”

The court concluded, “Even if this post-EIR information could somehow be used to cure the EIR’s shortcomings, Dr. Sahu’s reliance on

undisclosed data from Chevron does not meet the ‘informational’ goals of CEQA.” Although full environmental disclosure is required pursuant to CEQA, “Chevron apparently decided that the public and the decisionmakers did not need to see proprietary data given only to Dr. Sahu and relied on by [Dr. Sahu].” The public and the decisionmakers should have had access to the same data. The court emphasized, “If Chevron’s position becomes the rule—that a project proponent can pick and choose who sees pertinent data—then a stake is driven into the ‘heart of CEQA’ by preventing the information necessary for an informed decision from reaching the decisionmakers and the public.”

The court of appeal held that the EIR failed as an informational document because the description of the Project was inconsistent and obscure on the question of whether Refinery would be able to process heavier crude. The EIR also “fails to properly establish, analyze, and consider an environmental baseline.”

Additionally, the court held that the trial court did not err in finding that the EIR improperly deferred greenhouse gas (“GHG”) mitigation measures. The EIR initially “stated that making a significance determination for [GHG] impacts of the Project would be too ‘speculative.’” After public comment, City issued a finding that the Project would cause 898,000 tons of new GHG emissions per year. City made revisions to the EIR to provide that Chevron must submit within one year a plan for achieving complete reduction of the 898,000 metric tons of GHG emissions. The mitigation plan also proposed “a handful” of mitigation measures.

CEQA Guidelines provide “[f]ormulation of mitigation measures should not be deferred until some future time.” The court of appeal held the mitigation plan for GHG was deficient because it proposed a generalized goal of no net increase of GHG emissions and proposed mitigation measures for future consideration which were “nonexclusive, undefined, untested and of unknown efficacy.”

A lead agency has previously been permitted to defer formulation of specific mitigation measures after the agency completed an

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analysis in the significance of the environmental impact, proposed early in the planning process the potential mitigation measures, and stated specific performance measures that would insure adequate mitigation measures would eventually be implemented. Here, City delayed making a finding of significance until late in the CEQA process, did not give sufficient information about how it quantified the Project's GHG emissions, and did not offer assurance that the plan for mitigation was feasible and efficacious. The court concluded that "City's decision to approve the project, after giving the City Council final approval over a mitigation plan that Chevron formulates a year later outside the EIR process, does not satisfy CEQA's requirements."

The court also concluded that a hydrogen pipeline project being undertaken to transport excess hydrogen to other hydrogen consumers in addition to Chevron was not part of the Project. The trial court concluded that the City improperly piecemealed Project by not including the hydrogen pipeline as part of the Project. The court of appeal reversed this decision. The appellate court found the hydrogen pipeline and the Project were not interdependent because their principal purposes were not the same.

Questions

If you have any questions concerning the content of this Legal Alert, please contact the following from our office, or the attorney with whom you normally consult.

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