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Superior Court of California
County of Los Angeles

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Sherril R. Carter, Executive Officer/Clerk
By: Shantal Luqueño, Deputy

**DECISION ON PETITION FOR WRIT OF MANDATE
WRIT DENIED**

**COMMUNITIES FOR A BETTER ENVIRONMENT v. SOUTH COAST AIR QUALITY
MANAGEMENT DISTRICT, Real Party, TESORO REFINING AND MARKETING
COMPANY, LLC, Case No. BS 169841**

On May 12, 2017, the Executive Officer for the South Coast Air Quality Management District (the “District”) certified a final environmental impact report (“FEIR”) for the Los Angeles Refinery Integration and Compliance Project (the “Project”), and, on June 22, 2017, issued permits necessary for the Project. The Project will make upgrades to existing facilities and equipment so as to enable Tesoro Refining and Marketing Company LLC (“Tesoro”) to further integrate the operations of two adjacent refineries—straddling the border of Carson and the Wilmington area of Los Angeles—that Tesoro acquired separately, into a single integrated refinery (the “Refinery”).

On June 14, 2017, Communities for a Better Environment (“Petitioner”) filed this action alleging that the FEIR and the permits issued for the Project do not comply with the California Environmental Quality Act (CEQA), Public Resources Code section 21000 et seq. Petitioner asks this Court to issue a writ of mandate to void the Project FEIR and to set aside all Project approvals.

Oil refineries process crude oil into a range of fuel products. The refining process requires the integration and synchronization of individual processing units to heat, separate and blend the crude feedstock for the desired product configuration. The FEIR describes the major processing units now used at the Carson and Wilmington Operations. (AR 162-166.) According to the FEIR, “[t]here are limitations on the types of crude oil that can be processed in the Refinery due to the design limitations and capacities of the processing units.” (AR 163.) The District regulates oil refineries operating in the South Coast Air Basin. (Health & Safety Code sections 40001, 40412.) The District issues permits that impose conditions on the use of refining equipment to minimize harmful emissions. The Administrative Record (“AR”) describes the permits

issued by the District for the equipment in use at the Refinery. See, e.g. “Proposed Project Operational Emissions Summary.” (AR 309-10.)

This Court shall not describe the oil refining process nor the refining equipment in use at the Refinery in more detail--the parties are expert on the subject—but shall endeavor to describe the Project sufficiently so that the Court may explain the bases for its rulings to deny Petitioner’s challenges to the FEIR. The Court’s analysis is limited to the issues raised in Petitioner’s briefs and that were raised in the administrative process below; other allegations from the Verified Petition are deemed waived.

The purpose of an environmental impact report is to serve as an informational document that “will inform public agency decision-makers and the public generally of the significant environmental effect of a project, identify possible ways to minimize the significant effects, and describe reasonable alternatives to the project.” CEQA Guidelines § 15121(a).

The FEIR describes the Project objectives in detail. (AR 92, 96-98.) One is to complete the integration of the Carson and Wilmington Refineries to increase operational efficiency. (AR 92.) Another is “to comply with the federally-mandated Tier 3 gasoline specifications and with State and local regulations mandating emission reductions.” (AR 92.) The Project will shutdown the Wilmington Fluid Catalytic Converter Cracking Unit (“FCCU”), enhance the Carson FCCU, and build-out new oil transmission pipelines between the Carson and the Wilmington Operations.¹ The Project also includes equipment upgrades that are intended to give the Refinery greater flexibility to adjust production to obtain different petroleum products. The FEIR describes the equipment upgrades proposed for the Project. (AR 101-109.)

Petitioner argues the FEIR is deficient in failing to analyze adequately two Refinery facilities that will be enhanced by the Project. The first is the expansion of the Refinery’s storage tank capacity in constructing six new storage tanks at

¹ The revised Notice of Determination describes how the Project will reduce pollution (AR 1): “The [LARIC] Project is expected to substantially reduce greenhouse gas (GHG), sulfur oxides (SOx), nitrogen oxides (NOx), carbon monoxide (CO), and particulate matter (PM) emissions at the Refinery. This will be accomplished by reconfiguring the combined Refinery complex to enable shutting down the Fluid Catalytic Cracking Unit (FCCU) at the Wilmington Operations, by installing interconnecting pipelines, and by reconfiguring the combined Refinery complex to improve the gasoline to distillate production ratio from the integrated Refinery in order to expeditiously respond and adjust to ongoing changes in market demand for various types of petroleum products. Heat recovery will be optimized by installing new heat exchangers and modifying specified units to further minimize criteria pollutant and GHG emissions. All new and modified stationary sources with emission increases will be required to comply with Best Available Control Technology (ABCT) requirements in [SCAQMD] Rule 1301. Additionally, marine vessel emissions will be reduced due to the construction of [new tank storage capacity].”

the Carson Terminal, each with a maximum capacity of 500,000 barrels, and replacing two existing 80,000 barrel storage tanks with two 300,000 barrel tanks at the Wilmington Terminal. (AR 105 and 108.) Altogether, the new storage tanks would increase Tesoro's crude storage capacity by 3,440,000 barrels, if built-out and filled to capacity. The Refinery's present tank storage capacity is about 4 million barrels. (AR 56080.) Petitioner contends that the storage expansion will allow an increase in refining capacity, that is, will permit an increase in the quantity of crude that is processed each day, and that the FEIR fails to analyze the effect that the increase in storage capacity will have on refining capacity. The FEIR, on this point, provides that the increased storage capacity will not enable the processing of more crude oil "because the limitation of how much crude oil can be processed lies within the refining equipment itself." (AR 1912.)

Petitioner, secondly, challenges the FEIR with respect to its analysis of the emissions that would be generated by the heat increase permitted for the H-100 Heater (part of the Delayed Coker Unit at the Wilmington Operation).² With the revised permit for the H-100 Heater, the Refinery could be operated to process up to 2 percent more crude (6,000 bbl/day) or to process a slate of slightly lower quality crudes. (AR 295.)

Petitioner argues that the FEIR is insufficient as an information document in its analysis of the proposed increase in crude storage capacity and in its analysis of the proposed greater heating capacity from the H-100 Heater. Petitioner contends, particularly with respect to these facilities, that the FEIR: (1) fails to provide an accurate description of the Project; (2) fails to use the correct baseline information to analyze environmental effects of the revised permit for the H-100 Heater; and (3) is not based on the District's exercise of its independent judgment with reference to the revised permit for the H-100 Heater.

APPLICABLE LEGAL STANDARDS:

CEQA requires an EIR to provide particular information about a project. An EIR's analysis must address not only the immediate environmental consequences of proceeding with a project but also all "reasonably foreseeable

² Harmful emissions are released into the atmosphere by the normal operation of oil refineries. The burning of fuel oil to heat crude as part of the refining process releases combustion emissions. Other emission sources, and generally of lesser significance, are "fugitive" emissions (from leaks in the crude handling systems) and evaporative emissions (principally from oil storage tanks). The District imposes controls to limit emissions through the permitting process. "The District rules ... regulate each particular piece of equipment and impose requirements such as emission limitations, operating conditions, and so on." June 15, 2018 Hearing Trans., pp. 6, 7 and 19. The Project's proposed operational emissions are charted in Table 4.2-4. (AR 309-310.)

consequence[s] of the initial project.” Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordoba (2007) 40 Cal.4th 412, 428; Public Resources Code section 15378(a).

A. Judicial Review Standard

The Court in deciding Petitioner’s challenges to the FEIR must apply Public Resources Code section 21168.5. That section provides that judicial review “shall extend only to whether there has been an abuse of discretion.” Abuse of discretion arises under two circumstances: “if the agency has not proceeded in a manner required by law or if the determination is not supported by substantial evidence.” The standard of judicial review for the two issues is different. When evaluating whether the agency’s determinations is supported by evidence, a court’s review is deferential to the agency findings; but when deciding whether the agency has addressed the relevant issues in the EIR, a court’s review is not deferential. A court then exercises non-deferential review for abuse of discretion (often referred to as a “de novo” standard of review).

B. Exhaustion Doctrine

Objections that a project does not comply with CEQA mandates must be presented “orally or in writing during the public comment period” (though not necessarily by the petitioner bringing suit) before the agency takes final action on the project. If the objections are not presented in the public comment period, they are waived. Public Resources Code section 21177(a). This is a fair provision because it provides the agency with an opportunity, once it receives a comment, to take a different final action or to make a response that will be available in the Administrative Record. A petitioner under the exhaustion of administrative remedies doctrine, therefore, must show that any objection raised in litigation was previously presented to the agency before it took final action. That is a jurisdictional prerequisite for claims brought under CEQA.

THE PROJECT DISCRPTION IS NOT INADEQUATE BASED ON DIFFERENT ESTIMATES OF REFINING CAPACITY THAT ARE DISCLOSED IN THE FEIR:

Petitioner challenges the adequacy of the Project description. An “accurate, stable and finite project description” is the “sine qua non of an informative and legally sufficient EIR.” San Joaquin Raptor Rescue Center v. County of Merced (2007) 149 Cal.App.4th 645, 655. A “project” refers to “the whole of an action, which has a potential for resulting change in the environment, or a reasonably foreseeable indirect physical change in the environment” CEQA Guidelines § 15378(a); also Public Resources Code section 21065.

Petitioner argues that the FEIR does not provide an accurate and stable description of the Project because, Petitioner claims, there is a material inconsistency in the representations made about the Refinery's present refining capacity. See, Verified Petition, paras. 56 and 57. The draft EIR (DEIR) states the Refinery's daily capacity is 363,000 bbl/day, while Tesoro in a later SEC filing Tesoro states the Refinery's capacity is 380,000 bbl/day. (AR 47714.) Petitioner argues that the 17,000 bbl/day difference is an inconsistency that invalidates the FEIR.³ Petitioner relies on Communities for a Better Environment v. City of Richmond (2010) 184 Cal.App.4th 70. Upon closer examination, the City of Richmond decision is not applicable to the present facts.

In City of Richmond, the EIR said that Chevron's proposed Refinery project that would process crude oil having a higher sulfur content. The EIR did not analyze the likelihood that the project would increase the Refinery's ability to process heavier, lower quality crude that would increase polluting emissions. However, a filing that Chevron made with the SEC identified the "central purpose of the project as enabling the processing of heavier (lower gravity) crude." The fact that the project would permit the processing of lower quality and more-contaminating crude was held by the trial court to be a material omission in the EIR, not only because the change in the crude slate could have a significant environmental effect but also because the greater pollution would require the agency to consider the applicability of mitigation measures. The EIR's failure to quantify and to analyze the crude slate that the Refinery could process without the project as compared with the Refinery's ability to process a heavier crude slate after the project completion was a failure to proceed in a manner required by law. That made the final EIR inadequate as a matter of law.

The FEIR under review here is materially different. The FEIR here disclosed that Tesoro had in a SEC filing represented the capacity of the joint refineries at 380,000 bbl/day. (AR 164, 1909.) The FEIR, therefore, provides a full disclosure of the later calculation of the Refinery's capacity. The later calculation was based on the Solomon Survey conducted in 2015. As the EIR explains, the variance is based on different ways in which a refinery's capacity may be estimated: either based on the maximum operational capacity for the equipment used; or based upon the manufacturers' recommended usage (the "design capacity") for that equipment. The same equipment, under either calculation, is being used to refine the same slate of crude oil. The intensity of the use of that refining equipment is controlled by the air quality permits issued by the District. (AR 1909.)

³ Petitioner's Brief at 4: 1-3, argues: It is undisputed that a potential 17,000 barrel-per-day increase in oil refining would increase the Refinery's entire environmental impact profile and invalidate the EIR's emissions estimates. (*Id.* at AR 56059.)"

But, more fundamentally, Petitioner is mistaken in its framing of the issue. In City of Richmond the EIR was deficient because it did not reveal that the project would change the crude slate to permit the processing of a different and lower quality crude. The variance of which Petitioner complains here—whether the present refining capacity is properly described as being 263,000 barrels per day or 280,000 barrels per day—relates to the current operation of the Refinery. The current operation of the Refinery is not the “project” referred to in the FEIR (or CEQA). CEQA requires the study of “an action” that foreseeably may cause environmental change if a project that is envisioned is implemented.

Petitioner may be arguing that an environmental change caused by a project cannot be evaluated unless the existing condition on which the project acts is adequately defined. That argument, if made, would be unavailing to the extent it relies on the two different but similar estimates of the current refining capacity of the Refinery. There is no evidence that the difference in the estimates given for refining capacity—between 363,000 bbl/day and 380,000 bbl/day—has any effect on environmental change that may be caused by the Project. The Refinery’s throughput, under either estimate, will be increased by up to 6,000 bbl/day by the Project. The District throughout the 5-year EIR process described the Refinery’s capacity to refine crude to be 363,000 bbl/day (AR 164), with the later caveat that using a different method of calculation the estimate is 380,000 bbl/day (AR 1906). The Court finds there is substantial evidence to support the FEIR’s conclusion that the refining capacity is 363,000 barrels per day. Said, in the alternative, the Court finds that the FEIR is not inadequate because it disclosed that under a different method of calculation the refining capacity is 380,000 barrels per day.

The Court, before leaving this issue, notes that Petitioner’s arguments on this point are flawed: Petitioner fails to distinguish between an environmental condition existent before a project and an environmental change caused by a project. As one example, the Petitioner’s brief (at 4:1-3) argues as follows:

“It is undisputed that a potential 17,000 barrel-per-day increase in oil refining would increase the Refinery’s entire environmental impact profile and invalidate the EIR emissions estimate. (Id. at AR 56059.)”

The argument is off target because any 17,000 barrel “increase” refers to a difference between two estimates in refining capacity now existent, that is, before the project is undertaken. It is not an increase caused by the Project. The AR citation upon which Petitioner relies magnifies this confusion. AR 56059 contains this misleading statement:

“This could mean that the Project will increase from 363,000 to 380,000, which is 17,000 additional barrels per day, almost three times the

described increase of 6,000 barrels (which is in itself a significant increase).” (AR 56059.)

The statement is mistaken because the 17,000 barrel “increase” is not caused by the Project; and it is entirely unrelated to the 6,000 barrel-per-day increase which is caused by the Project (by the increased heat permitted from the H-100 Heater). So Petitioner’s argument is incorrect in suggesting the 17,000 bbl/day “increase” is due to the Project; the figure relates to the present capacity of the Refinery.

This mismatch of the facts that exist before and that will exist once the Project is completed reoccurs throughout Petitioner’s briefs.

SUBSTANTIAL EVIDENCE SUPPORTS THE FEIR’S DETERMINATION THAT AN INCREASE IN TANK STORAGE WILL NOT INCREASE PROCESSING CAPACITY:

Petitioner alleges that the Project’s build-out of up to eight new crude storage tanks is “unexplained” and masks an intent to increase the amount of crude that is refined. Verified Petition, paras. 58 and 59. From this premise, Petitioner argues that the FEIR is deficient because it does not analyze the environmental effects of a huge increase in crude refining which Petitioner supposes will occur because of the projected increase in crude storage capacity. Petitioner argues the new tanks could increase the crude quantities the Refinery may process by an additional 419,000 bbl/day. (Pet. Br., p.10: 9-13.)⁴ Petitioner represents this extraordinary 419,000 bbl/day increase to be simulated from computer modelling based on tank permits “as allowable in the DEIR.” (AR 56080-082.) If so, the computer was not programed to consider the downstream limitations on the Refinery’s ability to process more crude.

There is substantial evidence to support the FEIR’s determination that the proposed increase in storage capacity will not change the quantity or composition (slate) of crude oil that can be processed through the Refinery.

To begin with, the increase in tank storage capacity is not “unexplained.” The increased storage capacity is designed to reduce the delay in the off-loading of crude from very large tankers. The present supply of tank storage is not sufficient to permit the off-loading of full loads from today’s very-much-larger tanker ships, thus requiring the tankers to return to the harbor after partial unloading to await the emptying of storage capacity so that they can return to complete the delivery. (AR 196-98, 7796.) (Crudes from different

⁴ Petitioner’s brief at 10: 9-13 argues: “The EIR fails to disclose whether the Refinery, as a whole, has unused refining capacity that may be filled by the Project’s increased crude oil storage capacity and accelerated release of crude oil from storage (419,000 barrel-per-day storage tank throughput increase (AR 56081)). The EIR thus obscures the Project’s changes to Tesoro’s daily refining volume—a critical element of the EIR’s Project Description.”

sources require storage in different tanks, so not all partially empty tanks can be filled with newly arriving crudes.⁵) “The Refinery and the Carson Crude Terminal currently lack adequate storage capacity to accept full cargos when marine vessels deliver crude oil.” (AR 196-98, 4171.) Tesoro by increasing its storage facilities will be reducing emissions from the tankers while waiting offshore to complete their deliveries and reducing the “hoteling” expense owed to the tankers that are delayed in emptying their crude deliveries. The FEIR provides: “Decreasing the amount of time the vessels spend within the port and at anchor will substantially reduce annual vessel emissions.” (AR 196.)

The increased storage capacity will permit more crude to be stored at the Refinery to await processing, but it will not increase the quantity of crude that is processed by the Refinery because that is limited by the capacities of the downstream processing units. The limitations of the existing equipment used for processing crude, as well as the limitations in the permits that have been issued, prevent the Refinery from processing greater quantities of crude. (AR 100, 163-166, 196, 1911-1913.) Dr. Stephen McGovern, an expert retained by the District to study the Project, also concluded that the Refinery’s ability to process crude is limited by the existing capacities of the processing units and that an increase in crude storage capacity will not enable the processing of more crude. (AR 7790-93.)

The FEIR contains very specific passages that inform the public why the refining equipment is not adequate to increase refining throughput. The Court has selected this passage to make that point:

“The crude oil rate for Wilmington Operations is primarily constrained by Crude Unit and Coker feed heater duty conditions described in the existing SCAQMD permit. Therefore, the Wilmington Operations is heat limited in its ability to process additional crude oil, which will be modified by the revision to the Heater H-100 permit. The Carson Operations crude rate is constrained by physical limitations of the equipment, including heater duty and pump/piping capacity limitations. In order to increase crude oil processing rate at Carson Operations, physical modifications to the heaters, pumps and piping would have to be made and the appropriate SCAQMD permits would need to be obtained. No such modifications are included as part of the proposed project.” (AR 164.)

Petitioner, in its briefs, utterly ignores this statement and others like it in the FEIR that inform the public that limitations in the downstream refining equipment will prevent the Refinery from refining the crude volumes that

⁵Statement of Tesoro’s counsel. June 15, 2018 Hearing Trans., p. 61.

Petitioner argues can occur from the increase in the crude storage capacity projected by the Project.

Petitioner's argument that an increase in crude storage presages an increase in crude refining has no evidentiary basis.⁶ This Court finds that substantial evidence supports the District's determination that the increase in crude storage capacity included in the Project is not intended to and does not permit an increase in crude processing at the Refinery.⁷

SUBSTANTIAL EVIDENCE SUPPORTS THE FEIR'S DETERMINATIONS WITH RESPECT TO THE REVISED PERMIT FOR THE H-100 HEATER:

The Project provides that the District will issue a revised Title V permit to permit higher temperature usage for the H-100 Heater.⁸ There will be no physical change in the H-100 Heater; however, the revised permit will permit the Refinery to fire the Heater at a higher operational capacity to create a higher temperature. The H-100 Heater with the revised permit will increase heat generated at the Wilmington Delayed Coker Unit from 252 mmBtu/hour to 302.4mmBtu/hour—an increase of 20 percent. (AR 186; and AR 63661-16 for Permit Conditions A63.11 and A63.121.) But the District imposed a restriction: the air emissions level from the Heater are not allowed to increase beyond their present level. The FEIR provides:

“In order to ensure that this assumed increase in operations would not result in any increase in emissions, the SCAQMD imposed a new permit condition that limits daily emissions of criteria pollutants for the H-100 heater to levels than would be generated if the heater were never operated above 252 mmBtu/hr.” (AR 186; also 295.)

⁶ Petitioner argues that the Project will increase storage flow-through by an additional 419,000 barrels per day, but this supposition is not grounded in any evidence. Before Petitioner's argument could be given any credence, Petitioner would have to show that the Project includes some means by which an additional 419,000 barrels of crude oil stored in the projected new storage tanks could be disposed of each day.

⁷ Petitioner argues as well that Tesoro will sell unneeded crude to other oil refiners. Petitioner offers no facts to suggest such transactions would be possible or profitable. As pointed out in the FEIR, the Refinery is not designed to transfer crude in the storage tanks to other refineries or third parties and has not obtained permits to allow such transfers. (AR 4171.)

⁸ The U.S. Environmental Protection Agency (“EPA”) is required to review a revised Title V permit to allow the Refinery to increase in heating capacity for the H-1 Heater. The EPA approved the revised Title V permit in May, 2017.

Tesoro accepts that post-project heater emissions are to be “at or below the current maximum levels.” To achieve this, among other means, “[t]his heater will be modified to allow the installation of ultra-low NOx burners.” (AR 1083.)

With the revised permit, the H-100 Heater will give Tesoro greater flexibility in the refining the crudes that are within the Refinery’s existing operating envelope: the extra heat can be used to process more lower quality crudes that are within the Refinery’s existing envelope or to process up to two percent more of higher quality crudes within the existing envelope. (AR 295-97.)

Petitioner challenges both determinations, asserting that the higher temperature of the H-100 Heater will permit the Refinery to process significantly lower quality crudes, or, alternatively, to process a significantly increased quantity of crude. Either alternative, Petitioner argues, will significantly increase harmful emissions. These crude quality/quantity issues present predominately factual disputes. They are, under Resources Code section 21168.5, to be decided based on whether substantial evidence supports the FEIR’s determinations.

A. With the Revised Heater Permit, the Crude Slate Processed at the Refinery Will Remain Within the Current Operating Envelope.

The heat increase gained by revised permit from the H-100 Heater will not permit the Refinery to process crudes of lower quality than presently obtainable from the Refinery’s existing equipment and permits. “There are limitations on the types of crude oil that can be processed in the Refinery due to the design limitations and capacities of the processing units.” (AR 163.)

“With respect to Refinery processing equipment, crude oil blends must meet the physical and permit constraints associated with the processing equipment. Emissions from Refinery operations stem primarily from the operation of the heaters and boilers, which operate within these permit limits on emissions, and not from the crude oil itself. The crude oil blends must be within the operating envelope of the Refinery.” (FEIR, 1897-1905 at 1901.)

And, the FEIR provides a very specific description of the limitations imposed for the Carson and Wilmington Operations:

“The basic crude oil operating envelope, or acceptable ranges of several properties, for the Carson Operations is an API gravity range of 28 degrees to 35 degrees and sulfur content of 0.6 to 3.5 weight percent sulfur. The basic crude oil operating envelope for the Wilmington Operations Crude Unit is an API gravity range of 19 degrees to 37

degrees and sulfur content of 0.0 to 25 weight percent sulfur. The feed operating envelope for the Delayed Coker Unit is an API gravity of 9 degrees to 23 degrees and sulfur content of 0.8 to 3.5 weight percent sulfur....” (AR 163.)

Petitioner suggests that the revised H-100 Heater permit might allow the Refinery to change its blends to process more crude from Bakken (North Dakota) oil shale or Canadian (Alberta) oil sands. As noted in the FEIR, “Bakken and heavy Canadian crude oils are already received, blended, and processed by the Refinery, so any challenges related to refining heavy Canadian and light Bakken crude oils are part of the existing setting.” (AR 4451.) Dr. Stephen McGovern, an oil refining expert retained by the District, responded to inquiries about the suitability of the Refinery to process Bakken or Canadian crudes by stating “this project will not facilitate a switch to any particular crude slate, nor will any purported switch produce impacts that were not examined in the DEIR.” (AR 4451, 7797-800 at 7799; 7792-95.)

The District in the FEIR determined that the operating limitations of the existing equipment prevent the Refinery from “switching” the blend of crudes to process a slate outside its existing crude operating envelope. (AR 1891.) The FEIR addresses the boundaries for the range of crudes that the Refinery can process by its existing equipment. First, as to lighter crudes, the DEIR, section 2.5.4.1 (Crude Oil Processing) states (AR 161-166):

“If either the Carson Operations or Wilmington Operations attempted to run a lighter crude oil slate, it would be restricted by hydraulic limits or ‘lift’ in the Crude Unit. The design of the Crude Unit distillation columns or towers has a limit on its capacity to ‘lift’ the lighter portion of the crude oil.... [Table 2.5-3 omitted] ...If new Crude towers were to be installed, the entire overhead system of pipes, heat exchangers, accumulator vessels and naphtha pumps would also have to be replaced. Equipment modifications of this nature would require Tesoro to submit applications to modify the Refinery Title V operating permit with the SCAQMD. No such modifications of the Crude Unit are included as part of the proposed project.” (AR 165.)

And, secondly, as to processing heavier crudes, the DEIR states:

“If the Carson or Wilmington Operations were to run heavier crude oils, the amount of crude oil that could be processed at both Operations would be limited by the downstream Coke Units.... Both Carson and Wilmington Operations modifications to relieve these limits would require new larger coker drums. Equipment modifications of this nature would require Tesoro to submit applications to modify the Refinery Title V

operating permit with the SCAQMD. No such modifications to the coke drums at the Coker Units are included as part of the proposed project.” (AR 165-66.)

Dr. McGovern, in his independent study hired by the District, concluded that the existing refining equipment prevents a significant change in the processing configuration at the Refinery. (AR 167-168.) McGovern’s conclusion, based on the Project’s projected equipment upgrades and project permits, is that “the LARIC project will not allow Tesoro to access crudes that are not currently available to the refinery. The LARIC project will ... not increase the refinery’s ability to process higher sulfur crudes or significantly change the refinery’s ability to process lighter or heavier crudes. Therefore, the average quality of the crudes processed by the refinery will not change significantly as a result of the LARIC project.” (AR 1757.) Dr. McGovern adds: “Tesoro will continue to purchase crudes within the current range after implementation of the LARIC project, regardless of any change in the sources of the crude. Therefore, the air pollutant emissions from process equipment attributable to various crude types will remain substantially the same.” (AR 1757.)

There is, thus, substantial evidence for the FEIR’s determination that the increased heat obtainable through the H-100 Heater under the revised permit will not allow the Refinery to process and/or blend a crude slate other than as is already permitted by the District under the Refinery’s present operating envelope. The enhancement to the H-100 Heater, therefore, will not increase air emissions beyond that at present. Moreover, as noted above, the Title V permit in allowing the usage of the H-100 Heater at higher temperatures requires that there be no increase in the emissions from that usage.

B. With the Revised Heater Permit, the Quantity of Crude Processed at the Refinery Will Not Increase Beyond an Additional 6,000 bbl/day.

The greater heat that will be permitted to the H-100 Heater will permit the Refinery to increase production up to two percent (up to an additional 6,000 bbl/day), when processing higher quality crudes within its operating envelope. (AR 196, 295.) This increase was calculated by Tesoro using its “proprietary Linear Program model of refinery processes to predict the impact of increasing Wilmington Operations crude and crude feedstocks capacity by 6,000 bbl/day.” The program showed that many of the downstream units “were at capacity under current conditions.” (AR 296.) Dr. McGovern, in his expert report to the District, concluded that Tesoro’s calculations were correct, that “the project will not increase the Refinery’s crude oil processing capacity by more than 6,000 bbl/day.” (AR 7790-91.) Dr. McGovern also concluded, for various technical reasons, that the use of the heater permit to increase

production “will not increase the refinery’s overall production of petroleum products.” (AR 7791-92.)

Challenge to the FEIR’s Capacity Determination Not Exhausted.

Petitioner’s brief challenges the FEIR in its determination the revised permit for the H-100 Heater will allow no more than a two percent increase in refining capacity. (Pet. Br., pp.13-14.) This issue was waived, the District argues, because it was not presented in comments (whether or not from Petitioner) to the District. (Dist. Br., p.12.) The Court agrees with the District: the issue is waived. Petitioner (or others) did not raise during the comment period that either the 6,000 bbl/day increase due to the increased heat from the H-100 Heater was incorrect; or that it could not determine from the FEIR how that calculation was made.

Petitioner argues that the issue was preserved in a comment submitted by Petitioner’s expert, Dr. Phyllis Fox. Petitioner’s Reply Br. at pages 15-16 quotes Dr. Fox’s comment taken from AR 55255-56. The quotation from Dr. Fox on which Petitioner relies leaves out a page of context between the beginning of the quoted portion and its conclusion. Dr. Fox, when her comment is put in context, was referring to the difference that has been previously discussed as to whether the Refinery’s present capacity is 363,000 bbl/day or 380,000 bbl/day.

The District would have been able to provide further information to justify its calculation that the revised permit for the H-100 Heater would allow an increase not exceeding 6,000 bbl/day because that calculation was based on the fact “that many of the downstream units were at capacity under current conditions.” (AR 296.) The “exact issue” not having been raised, Petitioner’s challenge on this issue is waived. Public Resources Code section 21177(a).

There is, this Court finds, substantial evidence to support the FEIR determination that the H-100 Heater, with the revised permit, will allow an increase in refining capacity (of crudes within the existing operating envelope) of up to two percent (up to 6,000 bbl/day). The Court also holds that Petitioner has waived any challenge to that determination.

DISTRICT EXERCISED INDEPENDENT JUDGMENT IN FEIR DETERMINATIONS:

The District is required to exercise its independent judgment in preparing and certifying the FEIR. “The lead agency shall ... (1) independently review and analyze any report ... [and] (3) ... find that the report ... reflects the independent judgment of the lead agency.” Public Resources Code section 21082.1(c); CEQA Guidelines §§ 15084(e) and 15090(a)(3).

Petitioner argues that the District did not exercise independent judgment in assessing the Project's impact on the quality of Tesoro's crude blends. (Pet. Br., pp. 23-25.)⁹ Petitioner asserts that, because Tesoro did not provide its operational data to disclose the sources of the crude that it had processed over the recent years, the determinations in the FEIR that the revised permit for the H-100 Heater does not permit the processing of lower quality crudes outside the present operating envelope is not based on the District's independent analysis. The District, in responses to public comments, responded directly, saying that it did not use such operational data, and considers such operational data as unnecessary, to determining the effect the revised permit for higher-temperature firing of the H-100 Heater would have on the crudes processed by the Refinery. The District advised:

"[T]he proposed project does not include any elements that would cause a change in the crude oil slate (the list of crude oils processed by the Refinery at a given time) or blend (the proportional mixture of crude oils processed by the Refinery at a given time) or the Refinery capacity, other than the 6,000 bbl/day increase in crude oil capacity, the impacts of which were analyzed in the DEIR. Therefore, this additional information is not relevant. Further, the SCAQMD did not rely on any of this crude information in the required CEQA analysis in the DEIR." (AR 1888.)

The District's determination, in the FEIR, that it did not need the Refinery's operational data to determine the impact that the revised permit for the H-100 Heater would have on the crude slate is supported by substantial evidence.

The District is recognized as an independent, knowledgeable, adequately staffed, and respected agency charged with the protection of the air quality in the Basin. See, Western State Petroleum Assn. v. Superior Court (1995) 9 Cal.4th 559, 572-73. The District, in the FEIR, stated that it could make, and did make, determinations with respect to emissions relating to higher-temperature use of the H-100 Heater based its expert knowledge of the equipment constraints and air quality permits applicable to the refining process at this Refinery. The FEIR identifies specific restrictions in the processing units that would preclude any throughput increase or quality change (outside the existing envelope) without making equipment modifications and obtaining permit approvals. These refining boundaries are discussed above. See, *supra*, pages 8, 10, 11. The Project does not include the equipment modifications and permit approvals that

⁹ Petitioner's brief argues: "By openly admitting that it failed to gather or rely on baseline crude oil data for the Refinery, the Air District demonstrates a fundamental misunderstanding of its role in the CEQA review process, including its mandatory obligation to ensure that the EIR's conclusions reflect the Air District's independent judgment." Pet. Brief at 23:17-19.

would be needed to process a lower quality crude slate. (AR 163-166.) Petitioner does not point to any evidence to dispute the District's core analysis: that for the Refinery to process a crude slate of lower quality than the current operating envelope would require equipment changes and permit approvals that are not part of the Project. To upgrade to process a lower quality crude slate, Tesoro would have to apply to the District for appropriate permits and then comply with whatever conditions the District imposed to protect air quality. See, *supra*, p.3, fn. 2. The District's determinations were independently reached and are fully justified.

The District, secondly, imposed a restrictive permit upon the Refinery's operation of the H-100 Heater at a higher temperature. The permit "limits daily emissions of criteria pollutants for the H-100 heater to levels that would be generated if the heater were never operated above 252 mmBtu/hr." (AR 186, 295.) The fact that the District will issue a limiting permit for the H-100 Heater shows a basis for the District's independent conclusion that the Project will not increase the combustion emission of criteria pollutants.

Finally, as to administrative independence, the District's Executive Officer certified as to this FEIR that "its findings are based on full appraisal of all of the information contained in the FEIR, as well as the evidence and other information in the record" (AR 22) and that the FEIR "reflects his [the Executive Officer's] independent judgment and analysis." (AR 17.) There is no reason to doubt that the Executive Officer and the District staff performed their duty to exercise their best and independent judgment in preparing and certifying the FEIR. Petitioner does not suggest any evidence for even a suspicion to the contrary.

The Court concludes, based on substantial evidence, that the District exercised its independent judgment in reaching conclusions concerning the effect that the Project would have on the qualities and quantities of crude that will be processed by the Refinery if the Project is completed.

THE BASELINE SELECTED FOR EMISSIONS IS COMPLIANT WITH THE FEDERAL CLEAN AIR ACT AND WITHIN THE DISTRICT'S DISCRETION:

To monitor the significance of any increased emissions post-project, the District will use as the baseline for prior-year emissions from Refinery's operations the 98th percentile of peak emissions for each piece of equipment in 2012 and 2013. (AR 314, 1083.) The District compared this baseline level with emissions from the maximum operation of the equipment as modified, to determine the increase in incremental emissions over baseline. (AR 314.) The District then compared the incremental emissions increase to the District's published thresholds based on daily peak emissions. (AR 300-302.) The District employs this methodology—using peak and near peak baseline, in unison with

the District's published significance thresholds measured in peak daily emissions--for CEQA review of public and private projects throughout the South Coast Air Basin.

Petitioner argues, however, that the District's use of the 98th percentile baseline violates CEQA because the baseline is "artificially inflated," and the District "makes no attempt to explain" why it was chosen. This argument is unavailing for several reasons.

Petitioner misstates the standard of review. The selection of "existing conditions" baseline, in this case, is judicially reviewed by the substantial evidence standard, not the "failure to proceed" standard. Communities for a Better Environment v. South Coast Air Quality Management District (2010) 48 Cal.4th 310, 325, 328 ("CBE v. SCAQMD"). CBE v. SCAQMD is distinguishable, however, on its facts. The Supreme Court there reversed the District's failure to prepare an EIR. In this case, since the District prepared and certified an EIR that analyzed the emissions caused by the Project, the issue is whether the District's selection of a baseline measurement is supported by substantial evidence. CBE v. SCAQMD did not hold, as Petitioner suggests, that an existing baseline must be constructed of an average level rather than a peak or near peak level. To the contrary, that court noted "[i]n some circumstances, peak impacts or recurring periods of resource scarcity may be as important environmentally as average conditions." *Id.* at 328. The Supreme Court added this guidance:

"[A]n agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence." *Id.*

The District's baseline determination based on near-peak conditions is supported by substantial evidence and is well within the District's discretion. The use of peak or near-peak baseline, in conjunction with a significance threshold, is consistent with the federal regulatory scheme for protecting air quality. The Clean Air Act (the "Act") sets forth the federal regulatory scheme for improving air quality throughout the country. (42 U.S.C. section 7401 et seq.) The Act is designed to achieve and maintain compliance with the "National Ambient Air Quality Standards" ("NAAQS") set by EPA. The EPA has established NAAQS for each of the criteria pollutants. The NAAQS define air quality based on the worse days. That is, compliance is not measured in terms of average air quality over a period of time but rather by the maximum or peak emissions per time period. (40 C.F.R. part 150.) In order to achieve and maintain the NAAQS within each region, the Act requires the states to develop, adopt, and enforce "State Implementation Plans" ("SIPs"). (42 U.S.C. section 7407(a).) As required by the Act, the District prepares the SIP for the South Coast Air Basin; and issues

air quality permits for uses to enforce the SIP. The District's long-standing and widely understood significance thresholds are based on the NAAQS. (AR 64917.) Thus, because the NAAQS are based on peak or near-peak emissions per time period, the District's significance thresholds are based on daily near-peak emissions. (AR 1083.)

The District's selection of near-peak emission levels is not arbitrary nor unexplained. It is a standard supported by federal law and EPA guidelines and is used by the District is evaluating all projects that require CEQA review. This is an issue within the District's expertise. The District's selection of this baseline is supported by applicable regulatory standards and, thus, by substantial evidence.


PREPARATION OF JUDGMENT:

The Court shall enter Judgment on the Verified for Writ of Mandate for respondent South Coast Air Quality Management District and real party Tesoro Refining and Marketing Company, LLC. The District's counsel is to prepare, serve and lodge a form of Judgment that is consistent with the Court's Statement of Decision within 10 days.

Once the Judgment is signed the parties are directed to retrieve and retain in their offices the binders containing the administrative record and the Joint Appendix submitted by each side.

The Clerk is directed to serve this Decision on Petition for Writ of Mandate by U.S. Mail this date.

DATED: September 21, 2018


RICHARD L. FRUIN, JR.
Superior Court of California
State of California