SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

COMMUNITIES FOR A BETTER ENVIRONMENT and CENTER FOR BIOLOGICAL DIVERSITY,

Petitioners,

v.

COUNTY OF CONTRA COSTA; BOARD OF SUPERVISORS OF COUNTY OF CONTRA COSTA; CONTRA COSTA COUNTY DEPARTMENT OF CONSERVATION AND DEVELOPMENT and DOES 1 - 20,

Respondents,

MARATHON PETROLEUM CORPORATION, an Ohio corporation; and TESORO REFINING & MARKETING COMPANY LLC, a California limited liability company, and DOES 21-40, inclusive,

Real Party in Interest.

Case No. N22-1091

STATEMENT OF DECISION FROM 5-24-23 SUBMISSION

Judge: Hon. Edward G. Weil
Dept. 1/39

The Court heard oral argument in this case on May 24, 2023 and then took the matter under submission. After considering all documents filed in this case, along with oral argument, the Court rules as follows[1]:

[1] Although the Court titles this order "Statement of Decision," it did not follow the process of issuing a tentative decision and proposed statement of decision under Rule of Court 3.1590, because the requirements of Code of Civil Procedure section 632 do not apply to this action. That provision applies where the court holds a trial resolving issues of fact, which does not occur in a

I. BACKGROUND

Real Party in Interest Marathon Petroleum Company operated an oil refinery in Martinez. The refinery operated for 107 years, until it stopped operating in April of 2020. It now proposes to repurpose the refinery into a renewable fuels' refinery, i.e., a refinery that will make fuels out of agricultural feedstocks, such as soybean oil, corn oil, and other vegetable oils. Respondents Contra Costa County, its Board of Supervisors and its Department of Conservation and Development, prepared and certified an Environmental Impact Report for the Project. Petitioners Communities for a Better Environment and Center for Biological Diversity contend that the EIR did not comply with CEQA for a variety of reasons. (For ease of reference, Real Party in Interest Marathon Petroleum Company and the county agency respondents are collectively referred to as "Respondents." Since they filed a joint brief, their contentions are the same.)

Petitioners contend that the EIR is inadequate in five different ways. First, in assessing the "baseline," i.e., the activities that provide the background level of environmental effects against which the project should be measured, Respondents used the previously-existing operating facility, when they should have used the currently closed facility as the appropriate measurement. Second, they contend that it failed to consider the mix of feedstocks that will be used at the facility, which in turn changes the effects of the project. Third, that it failed to consider "Indirect Land Use Changes" (ILUC) caused by the project, which consist of changes to agricultural activity by growing crops that will be used as feedstock. Fourth, that it does not provide adequate mitigation

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mandamus action under CEQA. (*City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 237.)

of odor that will be generated by the product. And fifth, that it failed to consider greenhouse gas emissions from the project.

The refinery has existed since 1913, and as of 2020 had the capacity to produce 161,000 barrels per day of petroleum products. In April of 2020, it either "closed" or "suspended operations," depending on one's point of view.

In August of 2020, Marathon decided to modify the refinery to produce diesel fuels from renewable sources: rendered fats, corn oil, and other cooking oils. Much of the old equipment from refining crude oil remains, but new construction and modification was necessary. The construction was completed in late 2022. Eventually, it will produce 48,000 barrels per day of renewable fuels. (This is a maximum allowed by the facility's permits.) Some parts of the facility that were used for processing petroleum are no longer used in the modified refinery and have been shut down.

II. STANDARD OF REVIEW

In reviewing a challenge to approval of a project under CEQA, the Court determines whether there has been a prejudicial abuse of discretion by the public agency, which is established " 'if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.' [Citations, internal quotation marks omitted.]" (*Citizens Committee to Complete the Refuge v. City of Newark* (2021) 74 Cal.App.5th 460, 469 ("*City of Newark*") [quoting *Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301, 1310].)

Under the substantial evidence test, the agency's factual determinations cannot be set aside "on the ground that an opposite conclusion would have been equally or more reasonable." (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512 [internal quotation marks omitted, quoting

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 435 and addressing factual findings supporting an EIR].) " 'Substantial evidence' is defined as 'enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.' (CEQA guidelines, § 15384, subd. (a).) 'The agency is the finder of fact and we must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision.' [Citation omitted.]" (*City of Hayward v. Trustees of California State University* (2015) 242 Cal.App.4th 833, 839-840 [quoting *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117].) (*See also Break Zone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1244 ["reasonable doubts must be resolved in favor of the decision of the agency."].)

Substantial evidence includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (Pub. Res. Code § 21082.2(c).) "Argument, speculation, unsubstantiated opinion or narrative" do not qualify as substantial evidence. (Guidelines § 15384(a); Pub. Res. Code § 21082.2(c).)

The burden is on Petitioners to demonstrate that no substantial evidence in the record supports Respondents' decisions. (*Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 113 ["It is *Citizens*' burden to demonstrate that there is not sufficient evidence in the record to justify the City's action. [Citation omitted; italics in original.] To do so, an appellant must set forth in its brief all the material evidence on the point, not merely its own evidence. [Citation omitted.] A failure to do so is deemed a concession that the evidence supports the findings. [Citation omitted.]"]; *Citizens Against Airport Pollution v. City of San Jose, supra,* 227 Cal.App.4th at 798 [" 'The burden is on the appellant to show there is no substantial evidence

to support the findings of the agency. [Citation.]' [Citation omitted.]," quoting *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1070].)

III. ANALYSIS

A. Proper Baseline

An Environmental Impact Report must establish the existing background against which effects on the environment will be measured. This choice matters a lot in this case, because in many areas the project would have less serious environmental impacts than the old petroleum refinery. But it would have greater impacts than having no operating refinery at all. Accordingly, for a number of matters, the discussion is greatly affected by the choice of baseline.

The CEQA Guidelines address the issue, in section 15125(a)(1); "environmental setting":

> Generally, the lead agency should describe physical environmental conditions as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. Where existing conditions change or fluctuate over time, and where necessary to provide the most accurate picture practically possible of the project's impacts, a lead agency may define existing conditions by referencing historic conditions, or conditions expected when the project becomes operational, or both, that are supported with substantial evidence. In addition, a lead agency may also use baselines consisting of both existing conditions and projected future conditions that are supported by reliable projections based on substantial evidence in the record.

Notably, the Guidelines allow use of "historic conditions," but only where "necessary to provide the most accurate picture practically possible[.]" As one case has noted, "[a]n agency's determination of the proper baseline for a project can be difficult and controversial, particularly when the physical conditions in the vicinity of the project are subject to fluctuations[.]" (*Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 337.) In *Cherry Valley*, the court approved a baseline of water usage based on the amount permitted by a previous judgment in litigation and actually used in the past, even though the actual current water usage on the project site was far lower. In *North County Advocates v. City of Carlsbad* (2015) 241 Cal.App.4th 94, 105-106, the court allowed a project to renovate a shopping center to estimate the baseline of traffic based on full occupancy of the pre-existing shopping center, even though it was not fully occupied at the time and had not been for six years, because it had been fully occupied for much of the previous thirty years. It found that the baseline "was not merely hypothetical because it was not based *solely* on Westfield's entitlement to reoccupy the … building 'at any time without discretionary action' but was also based on the actual historical operation of the space at full occupancy" (*Id.* [emphasis in original].)

In *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, the Supreme Court addressed the baseline issue in the context of modifications to a refinery. The issue was whether the proper baseline was the existing operational level, or maximum allowable under permits. The court stated, "[w]e conclude the District's choice of a baseline for NOx emissions was inconsistent with CEQA and the CEQA guidelines; the District should have looked to the existing physical conditions, rather than to the maximum permitted operation of the boilers." (*Id.*, at 319.) As the court explained, "the impacts of a proposed project are ordinarily to be compared to the actual environmental conditions existing at

the time of CEQA analysis, rather than to allowable conditions defined by a plan or regulatory framework." (*Id.*, at 321.) There was no evidence that the facility ever operated at the maximum capacity.

In *Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.* (2013) 57 Cal.4th 439, 447, the agency used *future* conditions as the baseline, but the court found that the EIR must use current conditions, unless special circumstances exist that would make it misleading. The agency had used predicted 2030 traffic conditions, rather than present conditions. The court also indicated, however, that an agency could consider the future projection, but could not use it as the baseline.

At least one case has interpreted *Smart Rail* "as applying only to baselines that use hypothetical future conditions. Consequently, we conclude its principles do not apply to an agency's decision about how to measure existing conditions when the activity creating those conditions has fluctuated." (*Association of Irritated Residents v. Kern County Bd. Of Supervisors* (2017) 17 Cal.App.5th 708, 730.) There, the issue was a refinery with long history, which had "suspended" operations during bankruptcy but had a clear intention to continue refining at the site. The city had used a baseline year of 2007, when the facility was operating, not 2010, when operations were limited and emissions were zero. That case in turn relied on *North County Advocates v. City of Carlsbad, supra,* 241 Cal.App.4th at 97.

Accordingly, much of the dispute here addresses which scenario—the closed refinery or the operating refinery—presents the more accurate picture. According to Petitioners, demand for petroleum is down, and will stay down. Marathon and others have reduced their refining capacity. (While Marathon faults Petitioners' briefing for simply referring to its own comments, the comments themselves include evidence concerning the overall state of the petroleum refining business on the west coast.) (AR 048438.) Petitioners argue that there is essentially no chance that

the refinery would reopen. They rely at least in part on an article from a trade magazine asserting that the closure is "permanent." (AR 147787.) Marathon disputes this, arguing that the reduction in petroleum demand is temporary, and if the proposed project does not proceed, the refinery could reopen when market conditions change. It argues that longer-term trends for petroleum demand suggest an increase. (AR 081693.) It also points out that its permits remain valid, and the extension of some of these permits required significant expenditures. (AR 048841.) Indeed, in the EIR, the County rejected the "no project" alternative saying "refinery operations would resume as described in Section 2.4 of the Draft EIR." Marathon's public statements have been more circumspect, e.g., "At this time, the duration of the idle period is unknown; however, it is our intent to return to normal operations once demand levels support doing so." (AR 018697.) Nor is accelerated depreciation of assets (or "exit costs related to the Martinez and Gallup refineries") probative to the issue, especially given that it occurred in February of 2021. (AR 075235.)

The standard of review is important here. The issue is not reviewed de novo, but for whether substantial evidence supports Respondents' conclusion that the previous operating level more accurately reflects the likely conditions that would exist if the project did not go forward. As the court stated in *Cherry Valley*, the decision is "quintessentially a discretionary determination of how the existing physical conditions without the project could most realistically be measured," which is reviewed for substantial evidence. (*Cherry Valley, supra* (190 Cal.App.4th at 337 [citing *CBE, supra* 48 Cal.4th at 328.) The court in *Smart Rail* also addressed the standard of review on this issue, stating that CEQA imposes no " 'uniform, inflexible rule for determination of the existing conditions baseline,' instead leaving to a sound exercise of agency discretion the exact method of measuring the existing environmental conditions upon which the project will operate." (*Smart Rail, supra,* 57 Cal.4th at 452-453.) This issue was also addressed in *Save Our Peninsula*

Committee v. Monterey County Bd. Of Supervisors (2001) 87 Cal.App.4th 99, 120, in which the court stated that "if the determination of a baseline condition requires choosing between conflicting expert opinions or differing methodologies, it is the function of the agency to make those choices based on all of the evidence."

The operating history of the refinery is not disputed. As to the future, there is uncertainty as to whether the refinery would have reopened if the proposed project had not gone forward. In relative terms, the refinery operated for many years and was closed a short time. (In the Draft EIR, the county found that "use of a historical average over a specified period for Refinery crude oil processing operations recognizes such fluctuations and allows for characterization of the overall level of crude oil refining operations without singling out a specific moment in time when the Refinery throughput volumes may have been unusually high or unusually low.") (AR 000142.) But it did not address the issue of complete closure. In the Final EIR, the "Master Response" to comments on the Draft EIR addressed the issue in detail. (AR48838.) After defending the use of the five-year average (AR 0488840-41) it then addressed the issue of "currently suspended" operations. It noted that Marathon had the option of restarting operations, because it had the necessary permits, which had cost $9 million in 2021. It further determined that "a conclusion that Marathon would not re-start petroleum processing at this specific site is speculative." The Master Response cited California Energy Commission and U.S. Energy Information Administration data that "support a contrasting scenario to re-start petroleum processing at the Refinery." (AR 048842.) Data showed increasing demand for liquid fuel, including diesel and jet fuel. Ultimately, the County stated that "the demand for petroleum-based products appears to support the continued operation of the Refinery should the Project not be implemented. Furthermore, Marathon has continued to comply with all regulatory requirements and maintaining all permits necessary for

crude oil refining, providing a path for continued operations if the project is not implemented." (AR 048846.) The data cited in the Response to comments concerning petroleum demand and the information concerning the maintenance of permits provide substantial evidence in support of this determination. Accordingly, substantial evidence supports Respondents' determination to use a baseline reflecting operation of the petroleum refinery, and Respondents did not abuse their discretion in so choosing.

Petitioners also argue that the decision not to use the one-year average in 2019-2020 was an error. (AR 143-145.) The EIR explained that the 2019-2020 average was not representative because it included a half year of zero production. (AR 145.) Instead, the EIR chose a five-year average for the baseline. (AR 145.) The EIR sufficiently explained why it did not use a one-year average during 2019-2020. The numbers here are another way of highlighting Petitioners' main point, which is that the refinery closed in 2020. As discussed above, there is substantial evidence to support Respondent's determination to use a baseline reflecting operation of the petroleum refinery.

B. Estimating Mix of Feedstocks

An EIR must have a proper description of the project. "[W]hether the EIR's project description complied with CEQA's requirements, the standard of review is de novo. [Citations.]" (*stopthemillenniumhollywood.com v. City of Los Angeles* (2019) 39 Cal.App.5th 1, 15.)

As part of the description of the Project, the EIR describes that the modified facility would use a variety of different substances as inputs: "rendered fats, soybean and corn oil, and potentially other cooking and vegetable oils, but excluding palm oil." (AR 000100.) It also noted that in the future, "other biological fuel sources such as used cooking oils, and plant and animal processing

by-products, may also be used as feedstock using substantially the same equipment and processes as those proposed under the proposed Project." (AR 000135.)

Petitioners contend that which of these inputs are used, in what proportions, significantly changes the environmental impacts of the project, specifically carbon emissions and hydrogen usage (which leads to other GHG emissions). The record contains evidence that indicates that the different feedstocks could lead to different emissions, and quantifies the difference between the different types of feedstock as a general matter. (AR 048864-048868.)

In comments to the Draft EIR, Petitioners argued that "processing emissions of GHGs should have been estimated in the Draft EIR for each potential project feedstock and product slate, or range of product slates, proposed to be manufactured from it, including a reasonable worst-case scenario." (AR 048467.) It does not, however, make any estimate of the likely mix of feedstocks and the combined effect of the various mixtures. In response to comments, Respondents stated only that "CEQA does not require speculation about future fuel sources that might materialize." (*Id.*)

The EIR should consider the relative mix of these inputs, to the extent it can be estimated, but not if it would be speculative. The record, however, does not appear to contain substantial evidence concerning the likely mixtures of feedstocks that would be used.

Petitioners contend that even if the actual mix cannot be predicted, a worst-case scenario could be used. Use of worst-case scenarios has been discussed in a number of cases.

stopthemillenniumhollywood.com, supra, 39 Cal.App.5th 1 rejected using worst-case scenario where project description included different conceptual scenarios for development instead of including the size, mass, or appearance of proposed buildings on the site. The court explained that it was not enough that "the worst-case-scenario environmental effects have been assumed,

analyzed, and mitigated" and development does not exceed those mitigation measures. "CEQA's purposes go beyond an evaluation of theoretical environmental impacts. 'If an EIR fails to include relevant information and precludes informed decision making and public participation, the goals of CEQA are thwarted and a prejudicial abuse of discretion has occurred.' [Citation.]" (*stopthemillenniumhollywood.com v. City of Los Angeles, supra*, 39 Cal.App.5th at 18.)

In *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036 a worst-case type analysis was approved. There, the EIR included different potential building development options, but with more detail than in *stopthemillenniumhollywood.com*. The court in *Treasure Island* approved of "the EIR's focus on the maximum impacts expected to occur at full buildout [because it] promoted informed decision making, and evidences a good faith effort at forecasting what is expected to occur if the Project is approved." (*Id.* at 1053, fn. 7.)

Respondents argue that this case is more like *South of Market Community Action Network v. City and County of San Francisco* (2019) 33 Cal.App.5th 321 ("*South of Market Community Action*"). There the EIR described a mixed-use development with two options for different allocations of residential and office space. The court rejected the argument that the project description was insufficient. The court found that the project description "carefully articulated two possible variations and fully disclosed the maximum possible scope of the project. The project description here enhanced, rather than obscured, the information available to the public." (*Id.* at 333-334.)

" ' "CEQA requires that an EIR make 'a good faith effort at full disclosure.' [Citation.] 'An EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences.' " '(*Save the El Dorado Canal v. El Dorado Irrigation Dist.* (2022) 75 Cal.App.5th 239, 264 (*El Dorado*).) An EIR 'is required to study only reasonably foreseeable consequences of' a project. (*High Sierra Rural Alliance v. County of Plumas* (2018) 29 Cal.App.5th 102, 125.) 'CEQA does not require an agency to assume an unlikely worst-case scenario in its environmental analysis.' (*Id.* at p. 126.)" (*East Oakland Stadium Alliance v. City of Oakland* (2023) 89 Cal.App.5th 1226, 1252.)

" '[A]n EIR is not required to engage in speculation in order to analyze a "worst case scenario." ' (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 373, citing *Towards Responsibility in Planning v. City Council* (1988) 200 Cal.App.3d 671.)" (*High Sierra Rural Alliance v. County of Plumas* (2018) 29 Cal.App.5th 102, 122.)

Respondents point out CEQA permits a worst-case analysis in some situations. The cases relied on by Respondents are both water supply cases and did not deal with an adequate project description. (*Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 345; *Western Placer Citizens for an Agricultural and Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890, 908.)

It is possible that a worst-case analysis of the feedstocks would comply with CEQA, however, such a worst-case analysis is not required. Instead, Respondents are required to make good faith effort to include a description of the likely or reasonably foreseeable mixtures of feedstock. Here the question is whether a description of the likely types of feedstocks constitutes a

good faith effort at describing the feedstocks in the Project Description. Or whether Respondents needed to do more by including various estimates of the likely amounts of feedstock. The Court finds that including estimates on the likely amounts of feedstocks is unduly speculative given the shifting nature of the renewable feedstock market.

Furthermore, Petitioners have not shown that the failure to include more information on the likely amounts of feedstocks negatively affected the analysis of the environmental impact from the Project. The EIR's analysis of the greenhouse gas (GHG) emissions assumed the maximum operating capacity of the hydrogen plant. (AR 115-116.) Thus, the specific amounts of feedstock will not change the GHG emissions analysis. As discussed below, the Court finds that additional discussion on how this Project will impact indirect land use changes would be too speculative. Thus, a better estimate of the different types of feedstocks used at this facility will not change the indirect land use analysis as more information on what this facility is likely to use will not change the speculative nature of that analysis.

Finally, the Court must consider whether the odor mitigation analysis could be better with an estimate as to the likely amounts of various feedstocks. It is worth noting here that certain feedstocks, such as animal fats, are known to create more objectionable odors than plant-based feedstocks. Yet, the EIR concluded that there would be potentially significant odor impacts from the Project that could be reduced to less than significant with mitigation. More specific information on the amounts of feedstocks would not change the analysis of the potential odor impacts. While the Court finds that the EIR improperly deferred mitigation of the odor impacts, it is not convinced that more information on the amounts of feedstocks is necessary for a properly drafted odor mitigation measure.

Therefore, the Court finds that the Project Description is sufficient and that the EIR is not required to include additional information on the likely amounts of feedstocks.

C. Discussion of Greenhouse Gas Emissions

Projects that emit significant amounts of greenhouse gases, such as CO2, must identify the emissions in the EIR. Petitioners assert that the EIR fails in two significant respects. First, while the EIR estimates that GHG emissions will be 104,085.68 metric tons, in fact the amount of emissions "is highly variable and depends on the feedstock's chemical composition." This, of course, harkens back to Petitioners' earlier argument that the nature of the feedstock is not sufficiently described. Likewise, Respondents and Marathon contend that the issue is too speculative to warrant further study. It also relates to the "baseline" discussion, because Marathon and Respondents contend that the emission estimates were calculated based on the previously operating petroleum refinery, which included hydrogen plants operating at full capacity. Because some portions of the facility will be shut down, those sources of GHG emissions are eliminated. Other parts of the facility will emit more GHGs. The net result is that the conversion will reduce GHG emissions by over a million metric tons per year. (AR 000540.)

Respondents offer the following explanation: To process the feedstocks into fuel, one of the steps requires the use of substantial amounts of hydrogen. Using hydrogen in the process requires the combustion of natural gas, which results in emissions of GHGs. Some feedstocks need more hydrogen than others, thus, they could result in more GHG emissions. The needed hydrogen is obtained through two hydrogen plants that are part of the refinery. According to Marathon, however, the GHG estimates were made assuming that the hydrogen plants operate at maximum capacity (because the availability of hydrogen limits the otherwise possible amount of production).

Thus, if a mix of feedstocks that require more hydrogen were used, it would not increase the use of hydrogen, it would reduce the processing capacity of the refinery.

Accordingly, Marathon contends that by assuming that the hydrogen plants are operating at maximum capacity, it is effectively using a worst-case scenario, and therefore need not further address how the mix of feedstocks will affect GHG emissions.

Petitioners' response to this argument is that Respondents never disclosed it in the EIR, but only in the briefing, and therefore it cannot be considered at this point. (While this argument bears some similarity to a "failure to exhaust administrative remedies" argument, it is different because Respondents are not contesting the administrative decision.) There is authority, however, that if an EIR fails to discuss an issue adequately, the problem cannot be "fixed" through discussion in briefs (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 443; ["That a party's briefs to the court may explain or supplement matters that are obscure or incomplete in the EIR, for example, is irrelevant, because the public and decision makers did not have the briefs available at the time the project was reviewed and approved. The question is therefore not whether the project's significant environmental effects *can* be clearly explained, but whether they *were*."] [emphasis in original].) The entire record, including appendices, not just the text of the EIR, is available for this purpose, however. (*A Local & Regional Monitor v. City of Los Angeles* (1993) 12 Cal.App.4th 1773, 1793; *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd of Directors* (2013) 216 Cal.App.4th 614, 638.)

Was the "maximum emissions" contention disclosed in the record? Real Parties cite to numerous places in the administrative record describing the sources of the GHG emissions and estimating their amounts. (Rsp., at 34.) It does state that "due to limitations in the production of the on-site hydrogen plant, the Refinery would have capacity to receive and process up to 48,000

bpd of fresh renewable feedstock." (AR 000115-000116.) It does not offer the more lucid narrative explanation offered by Respondents in the briefing, but it does establish that the GHG estimates were made based on the maximum operating capacity of the hydrogen plant.

Respondents assert that Petitioners failed to exhaust administrative remedies on this issue. Marathon argues that the "mix of feedstocks" issue was not raised with respect to the GHG analysis. (It clearly was raised with respect to the "project description" issue.) Respondents claim that in the administrative process, petitioners claimed only that "emissions should be calculated for each type of feedstock," but never claimed that the EIR should calculate the *actual mix* of feedstocks that would be used. (Rsp., at 33.)

The Comments of CBE, et al. on the draft EIR (beginning at AR 080894) show that the issue was raised at several points: (AR 080910: "the County was obligated to use available information to estimate the likelihood of any given feedstock or combination of feedstocks will be used."; "The DEIR should have developed scenarios (including a reasonable worst-case scenario…) for likely feedstock mixes." AR 080944: "[T]he choice among project feedstocks itself could result in significant emission impacts. Therefore, emissions from each potential feedstock should be estimated in the EIR." AR 080955: "[T]he analysis fails to take into account the widely differing air emissions impact associated with both different feedstocks and different product slates. Those differences should have been factored into the reasonable worst-case scenario analysis to address uncertainty as to the feedstocks what will be used[.]" Thus, Petitioners clearly indicated that they sought either "the likelihood of any given feedstock or combination of feedstocks will be used," likely "scenarios," or a worst-case scenario. This was sufficient to exhaust administrative remedies.

D. Discussion of Indirect Land Use changes

CEQA requires that agencies consider the indirect changes in land use caused by projects, but not if they are speculative. Indirect land use changes are cognizable under CEQA as a basis for a finding that the project will significantly affect the environment, *if* a sufficient showing is made. (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 383.) Petitioners argue that the project will result in the conversion of existing lands that either lie fallow or are used to grow other crops and instead will be used for growing crops that are used as feedstock for the project. Some of these changes, particularly production of soybeans, involve adoption of more intensive agricultural practices that consume more water and otherwise affect the environment.

Accordingly, the CEQA Guidelines address the issue, requiring analysis of indirect land use changes if they are "reasonably foreseeable." (CEQA Guidelines §§ 15064(d), 15358(a)(2).)

While many cases discuss this issue, typically the issue is raised in the context of displaced physical development. As the Supreme Court stated, "a government agency may reasonably anticipate that its placing a ban on development in an area of a jurisdiction may have the consequence, notwithstanding existing zoning or land use planning, of displacing development to other areas of the jurisdiction." (*Id.*, at 383.) Nor does the fact that subsequent developments will require further approvals automatically negate the requirement, although it is a factor that may be considered. (*Id.*, at 383 and 388.) As the court noted in *Muzzy Ranch*, "nothing inherent in the notion of displaced development places such development, *when it can reasonably be anticipated*, categorically outside the concern of CEQA." (*Id.*, [emphasis added].)

The line between the two appears to be very fact-specific. In *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 158, the court considered whether construction of a golf course could lead to residential development. The fact that those effects (development of housing) would go through their own environmental review process did not avoid the issue. There were no pending applications at the time. The county had stated that past experience had shown that golf courses were "a catalyst which triggers requests for residential development." (*Id.*, at 16, 158.) As the court stated, "The record here clearly contains substantial evidence supporting a fair argument the proposed country club may induce housing development in the surrounding area. The fact that the exact extent and location of such growth cannot now be determined does not excuse the County from preparation of an EIR." (*Id.*) The court went on to note that the petition is not required to prove that the project "*will* have a growth-inducing effect or to present evidence demonstrating it had already spurred growth in the surrounding area. To the contrary, appellant is required only to demonstrate that the record contains substantial evidence sufficient to support a *fair argument* that the project *may* have a significant growth inducing effect." (*Id.*, at 152-153 [emphasis in original].)

In *Aptos Council v. County of Santa Cruz* (2017) 10 Cal. App.5th 266, 293, the court noted the same standards, but reached a different result based on the facts in the record. The ordinance in question changed standards for construction of hotels in a manner that was intended to encourage more development. The court stated that "when evaluating the potential environmental impact of a project that has growth-inducing effects, an agency is not excused from environmental review simply because it is unclear what future developments may take place. It must evaluate and consider the environmental effects of the 'most probable development patterns.'" (*Id.*, at 292-293, quoting *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1337.) Ultimately, however,

the court concluded that while the ordinance reflected the County's "hope" that it would result in more hotels, the record did not show that it was "reasonably foreseeable, rather than an 'optimistic gleam in [the County's] eye.'" (*Id.*, at 294.) Thus, it found that no Environmental Impact Report was required.

In some instances, the foreseeability of the impact affects not simply whether the issue must be discussed, but the level of detail required. (*Muzzy Ranch Co., supra*, 41 Cal.4th at 388.)

The issue has been reviewed in other contexts, i.e., the California Air Resources Board's "Low Carbon Fuels Standard Program, in which it analyzed the indirect effects of requiring development of "biofuels." To be clear, that analysis does not substitute for any analysis required in the consideration of this project. It does, however, provide some useful information in determining the feasibility of ILUC analysis for this project. In response to comments to the Draft EIR, the County recounted much of the Air Resources Board's efforts to analyze the problem. Its solution was to give certain biofuels a "carbon intensity" score based on the extent to which the particular feedstock generated carbon, including through "worldwide model for estimating land use change impacts.[…] As a consequence, fuels produced from feedstock that results in greater land use change are assigned a higher CI score, which acts as an economic disincentive to produce such fuels as a substitute for petroleum-based fuels." (AR 048865.) As a result, the EIR addressed this issue, but in a broad-brush way, highlighting the existing uncertainty, and ultimately concluding that "the project would not have significant irretrievable impacts on land, forest, or agricultural resources." (AR 048866.)

Petitioners argue that the Project will cause significant and unavoidable land use impacts. Petitioners cite to three articles discussing potential land use changes caused by an increased demand in bio feedstock. (AR 145865-145904; 1542427-152478; 68565-68564.) These articles

explain that an increased demand for certain feedstocks may result in deforestation, which can have a number of negative impacts including negative impacts on biodiversity and threatening food and water security. (AR 68584.) Two of the articles note a particular problem with palm oil, however, palm oil will not be used at the Marathon facility. (AR 145874, 152430.) One of the articles explained that the International Panel on Climate Change rated certain feedstocks as having a high risk of indirect land use changes. Based on that system, palm oil was identified as high risk while soy was not. (AR 145874.)

In addition to these articles, Petitioners' point to the 2018 FEIR for proposed Amendments to low carbon fuel standards and the alternative diesel fuels regulation, providing in this FEIR as appendix D. (AR 46931-47334.) The 2018 FEIR explained that biofuel crop production may cause more fuel-based agricultural and thus cause indirect land use where the loss of food-based agriculture results in conversion of rangeland, grassland, forests, and other land uses to agriculture. (AR 46998-46999.) The 2018 FEIR concluded there was a potentially significant impact on indirect land use, but it could not be mitigated by the California Air Resources Board because CARB had no authority over land use regulation. (AR 46999; 47026-27.)

Petitioners show that in general there may be some impacts on land use from an increase in biofuels on a large scale. But Petitioners' evidence does not show that this Project will have a significant impact on land use changes. In addition, much of Petitioners' cited evidence focuses on the harmful effects of palm oil, which, as noted above, will not be used at this facility.

Petitioners also argue that Respondents failed to consider the cumulative impact of similar projects on indirect land use changes.

"The EIR must discuss cumulative impacts. (Guidelines, § 15130.) That is, the EIR must discuss the impacts of the project over time in conjunction with past, present and reasonably foreseeable future projects. (§ 21083; Guidelines, § 15130.) Guidelines section 15130, subdivision (b) provides that '[t]he discussion of cumulative impacts shall reflect the severity of the impacts and their likelihood of occurrence, but the discussion need not provide as great detail as is provided of the effects attributable to the project alone. …' Thus, an EIR which completely ignores cumulative impacts of the project is inadequate. [Citation.] But a good faith and reasonable disclosure of such impacts is sufficient. [Citation.]" (*Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238, 245.)

"An agency's selection of the geographic area impacted by a proposed development, however, falls within the lead agency's discretion, based on its expertise. (Guidelines, § 15130, subd. (b)(3); *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 907.) Moreover, discussion of cumulative impacts in an EIR ' "should be guided by the standards of practicality and reasonableness." '[Citation.] Absent a showing of arbitrary action, a reviewing court must assume the agency has exercised its discretion appropriately. [Citation.]" (*South of Market Community Action Network v. City and County of San Francisco* (2019) 33 Cal.App.5th 321, 338.)

In *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692 the court held that the cumulative air quality impact analysis was insufficient because it only considered a portion of the San Joaquin Valley. Initially, respondents had agreed to include the entire air basin in the FEIR, but ultimately decided to keep the smaller area for the cumulative impact analysis without providing an explanation. The court found that the FEIR was inadequate under CEQA because the cumulative impacts did not include similar projects in the entire air basin. In reaching this

conclusion, the court noted that information on the excluded projects was available through several sources. (*Id.* at 722-724.)

In *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859 the court found the EIR for a water diversion project was inadequate because it did not consider the cumulative impacts of another pending governmental action that could significantly affect water supply.

The DEIR considered several other projects in the vicinity of the Project site (most within 2 miles). (AR 452-456.) The cumulative impact section included a discussion of the Phillips 66 Rodeo project, which involves transforming the Rodeo refinery into a facility that processes renewable feedstocks, similar to the Project here. (AR 456.) The FEIR explained that it was difficult to predict the cumulative indirect impacts raised in the comments (including land use). It also explained that a discussion with more generality was appropriate when considering the upstream impacts from the Project and similar projects, each with their own blend of feedstocks. (AR 48870.)

Petitioners argue that the EIR should have considered the nearly 20 other renewable fuel conversion projects in California and throughout the nation. (AR 82721-26; 152451.) Petitioners' evidence shows several biofuel and biodiesel facilities in operation and planned. Approximately six of these facilities are located in California, five in Southern California and one in Northern California near Nevada. There are five facilities planned or under construction in California. The only two in the Bay Area are the Marathon and Phillips 66 facilities. (AR 82725.) Here, the EIR considered the Phillips 66 facility, which was arguably necessary for a proper cumulative impact analysis. Given the similarity of the two projects, the relatively close proximity of the two projects

(approximately 10 miles) and the fact that the two projects (if they become operational) will be two of the largest biodiesel facilities in California. The question here is whether Respondents were required to go beyond Phillips 66 and consider other biodiesel facilities in California or perhaps the entire nation.

The Court is concerned that on a statewide or nationwide scale, there may be some indirect land use effects. Such effects were discussed in the 2018 FEIR. (AR 46998-46999.) The problem here is where should the line be drawn? In most of the cases cited by the parties, there was a clear geographical boundary, which is near the Project site. Using a statewide boundary when considering a change to a state law or regulation makes sense, but the Court is not convinced that the same logic for requiring a statewide boundary applies to this Project.

Assuming that the Court is convinced that the EIR should have considered more biodiesel or renewable fuel facilities in California, the Court is still concerned that the indirect land use changes are too speculative. It does not appear practical for Respondents to estimate what the likely mix of feedstocks will be at each facility. The Court finds that providing more analysis on the indirect land use impacts would be too speculative and thus, the failure to include additional analysis did not violate CEQA.

E. Deferral of Odor Mitigation

Respondents argued that no odor mitigation was required because the Project is expected to reduce odor impacts. The primary odor sources from petroleum refining were sour gas streams, the sulfur recovery unit, the sulfuric acid plant, storage of crude oil and the wastewater treatment plant. (AR 206.) Stopping oil refining will results in the eliminated of the sulfur-based facilities and the storage of crude oil, which will eliminate those odors. (AR 206, 548.) The wastewater treatment

plant will be upgraded to reduce odors from that plant. (AR 206.) Despite these improvements, the EIR recognized that there is still a potential for odor impacts, including odors from the storage of renewable feedstocks. (AR 206.) Ultimately, the DEIR found that the impact of odors is potentially significant, but that with mitigation the impact would be reduced to less than significant. (AR 73, 206.) Since the DEIR concluded that the environmental impact from odors required mitigation to be less than significant, the Court must consider whether the mitigation measures for odor are sufficient.

Where an EIR identifies significant impacts from the project, it must also include feasible mitigation measures for those impacts. (Pub. Res. Code § 21081.6(b), CEQA Guidelines S 15126.4(a)(2).) Here, the EIR identified "objectionable odors" as "potentially significant." It then identified a mitigation measure consisting of "the operational Odor Management Plan," which "shall be developed and implemented upon commissioning of the renewable fuels processes, intended to become an integrated part of daily operation of the facilities. While the EIR contains other language referring to the OMP preventing objectionable odors, and that it "shall outline equipment that is in place and procedures that facility personnel shall use to address odor issues," it identifies no actual mechanism or whether it would reduce or eliminate the odors in question.

Mitigation measures may be deferred where they "specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way." (CEQA Guidelines § 15126.4(a)(1)(B).) This is permissible where the agency "commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan. [Citation.]" (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.) As that court stated in more detail:

" ' "[F]or [the] kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process (e.g., at the general plan amendment or rezone stage), the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated. [Citations.]" ' [Citation.]" (*Id.* at 1275-76.) "On the other hand, an agency goes too far when it simply requires a project applicant to obtain a biological report and then comply with any recommendations that may be made in the report. [Citation.]" (*Id.* at 1275.)

In order to defer mitigation measures, the lead agency must find that the providing details on a mitigation measure is "impractical or infeasible at the time the EIR was certified." (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281; see also CEQA Guidelines § 15126.4(a)(1)(B) and *Save Agoura Cornell Knoll v. City of Agoura Hills* (2020) 46 Cal.App.5th 665, 687-688.)

Petitioners argue that the odor mitigation measure AQ-2 is an improperly deferred mitigation because the County did not find that it was impractical or infeasible to include details of the mitigation measure when the EIR was certified. Respondents has not shown how this threshold requirement was met. The Court did not find the required finding in the EIR. Thus, as an initial matter, the EIR fails to comply with CEQA because it has not shown that it was impractical or infeasible to include the details odor mitigation measure at the time the EIR was certified.

In addition to the threshold issue, a related question is whether there are feasible measures to mitigate the odor, which are already known to exist, but simply can't be specified until more is known about the odor problem.

Again, the issue here is tied to some degree to the selection of the proper baseline. According to respondents, the odor problem will be less than it was when the refinery was in full operation processing petroleum, because the biofuel feedstocks contain less sulfur and aromatic hydrocarbons than petroleum, which are the main culprits in odor problems. (AR 048893.) They also maintain that odor management practices were defined: installing carbon canisters, nitrogen blanketing of storage tanks and use of the existing vapor recovery system, which would be incorporated into required BAAQMD permits. (AR 000491.) (The record doesn't give any information on how well those techniques work, other than a diagram on AR 048893.)

What is a "significant" odor impact? It is not defined by airborne concentrations of a pollutant, because it has a substantial subjective element. Thus, it is defined by the number of confirmed complaints received, in this instance five complaints per year in the area, averaged over three years.

In the Executive Summary of the Draft EIR the County noted that odors were "potentially significant" and that the "Odor Management Plan shall be developed upon commissioning of the renewable fuels processes intended to become an integrated part of daily operations at the Facility and other sides, so as to prevent any objectionable offsite odors and effect diligent identification and remediation of a potential objectional odors generated by the facility and associated sites." (AR 000073.)

One comment to the Draft EIR requested "examples of successful odor management methods at existing biofuels production facilities and at slaughterhouses where animal fat is rendered." The County responded that:

> "The project will develop an odor control plan during the construction phase of the project. Examples of successful odor control applications for both biofuels production and slaughterhouses will be identified at that time. Odor management controls including, but not limited to, carbon adsorption, incineration, biofilter use, and chemical scrubbing, all in conjunction with a vapor recovery system and nitrogen blanketing of storage tanks are being evaluated to determine the most effective and practicable method to reduce odors from the storage tanks and loading and unloading activities. … Examples of successful odor control applications for biofuels production and slaughterhouses will be identified at that time."

(AR 048971.) The response then went on to provide over three pages of descriptions of various odor mitigation measures, generally describing them, including a chart showing four major types of odor control technologies, and identifying eight of their major characteristics. (AR 048892-95.)

The Court finds that the record does not show that there are feasible mitigation measures, which could not be finished when the EIR was certified due to practical considerations. Therefore, the Court finds that the County violated CEQA by allowing deferred mitigation for the odor impacts without complying with CEQA Guidelines § 15126.4(a)(1)(B).

F. Request for Judicial Notice

Respondents' request for judicial notice is denied. The SEC filing was not part of the proceedings below.

IV. CONCLUSION

Accordingly, the Court's rulings on the issues are:

1. The County's decision to use an operating refinery as the baseline was supported by substantial evidence in the record and was not an abuse of discretion;
2. The project description with respect to the mix of feedstocks was sufficient;
3. The discussion of Greenhouse Gas emissions was sufficient;
4. The discussion of Indirect Land Use Impacts was sufficient;
5. The discussion of cumulative Indirect Land Use Impacts was sufficient;
6. The discussion of Odor Mitigation Measures was insufficient.

This matter will be remanded to the County for reconsideration of the odor mitigation measure. The parties shall submit proposed writs and judgments by August 18, 2023. The parties may also file and serve briefs of no more than ten pages double spaced addressing the issues below by that date. No further hearings are anticipated.

(1) An Odor Management Plan was to be completed before the facility began processing renewable fuels. Has that plan been completed? The parties may submit a copy of it with a request for judicial notice. The parties may also briefly address if the Odor Management Plan is included in the EIR whether there are additional objections to the odor mitigation measure.

(2) The Court is inclined to partially decertify the EIR as to the odor mitigation issue only. The parties may address this issue.

(3) Finally, the Court is not inclined to enjoin operations at the facility while the County reconsiders the odor mitigation measure, but wants to ensure a prompt resolution of this issue. The parties may address whether an injunction is appropriate here and a reasonable timeline for the writ return.

Dated: July 20, 2023

HON. EDWARD G. WEIL
Judge of the Superior Court