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,

PHILLIPS 66, a Texas Corporation, and DOES 21 – 40, inclusive,

Real Party in Interest.

Case No. N22-1080

STATEMENT OF DECISION FROM 7/12/23 SUBMISSION

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

The Court heard oral argument in this case on June 28, 2023, and advised the parties that the Court would determine whether further briefing was necessary no later than July 12, 2023. On that date, the Court advised the parties that no further briefing was necessary and the matter was

deemed submitted as of that date. After considering all documents filed in this case, along with oral argument, the Court rules as follows:[1]

I. BACKGROUND

The Rodeo Refinery has operated in Rodeo for 125 years, most recently by Real Party in Interest Phillips 66 Company. In August of 2020, Phillips applied to change the facility to make fuel products from renewable fuels, i.e., 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 an Environmental Impact Report pursuant to CEQA. 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.

First, Petitioners contend that the EIR unlawfully "piecemealed" the project, by excluding the First Phase of the refinery modification into a separate project, which did not undergo environmental review. Second, they contend that the EIR did not disclose the "feedstock mix" that will be used at the refinery. Third, they contend that the EIR failed to consider "Indirect Land Use Changes" (ILUC) caused by the project. Fourth, they contend that the EIR does not address cumulative impacts. Fifth, they claim the County improperly deferred determining how to mitigate odor impacts.

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

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 BreakZone 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. Piecemealing

What Petitioners call the first phase of the project (and which Respondents call the "Unit 250 Renewable Diesel Project") consisted of converting a diesel hydrotreater (Unit 250) to process renewable feedstocks instead of petroleum. This included adding 2,300 feet of pipeline. What petitioners call the second phase is the Rodeo Renewed Project, which converts the entire refinery from processing petroleum to processing renewable feedstocks. It modified the "hydrotreater," rebuilt pumps and other equipment to treat renewable feedstocks. Unit 250's capacity represents

18% of the Rodeo Renewed Project's total. Initially Phillips sought building permits for parts of the project, but sought none for other activities, which led to the Bay Area Air Quality Management District citing Phillips for failing to have required permits. By this time, however, the "first phase" of the project was already operating.

In August of 2020, Phillips applied to the County for approval of the "Second Phase" of the project, the "Rodeo Renewed Project." This phase significantly expanded the ability to process renewable feedstocks, and expand the variety of feedstocks used from soybean oil to include used cooking oil, fats, oil and greases; tallow; and inedible corn oil. The combined effect would make the Rodeo Refinery the largest refiner of renewable feedstocks in the world.

The definition of the "project" is a key part of CEQA. (*Stopthemillenniumhollywood.com v. City of Los Angeles* (2019) 39 Cal.App.5th 1, 16.) Piecemealing or segmenting one project into separate pieces is prohibited because it "avoids the responsibility of considering the environmental impacts of the project as a whole." (*Orinda Ass'n v. Bd. Of Supervisors* (1985) 182 Cal.App.3d 1145, 1156, 1171.) This assures that " 'environmental considerations do not become submerged by chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences.' [Citation.]" (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396.) A "project" is defined broadly to ensure that "CEQA's requirements are not avoided by chopping a proposed activity into bite-sized pieces which, when taken individually, may have no significant adverse effect on the environment. [Citation.]" (*POET, LLC v. State Air Resources Bd.* (2017) 12 Cal.App.5th 52, 73.)

The county contended in response to comments on the Draft EIR that the projects were independent projects. The county said at AR 000931, AR 002302 that Unit 250 was not

"operationally related" to the Rodeo Renewed Project. But it also stated that "from time to time, treated renewable feedstocks from the proposed PTU [Feed Pre-treatment Unit] may be used as an alternative source of feedstock for Unit 250." (AR 2303.) In addition, naphtha produced by Unit 250 will be fed to other referring units converted under the Rodeo Renewed Project for further processing. (AR 053737.) Both are located within the existing boundaries of the refinery.

In *Tuolumne County. Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214 , the issue was whether a road realignment was separate from the development of a home improvement center because they could be implemented independently of each other." (155 Cal.App.4th at 1229.) The court found that "theoretical independence does not defeat a piecemealing claim, what matters is "what is actually happening." (*Id.*, at 1230; See also *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1223, n. 7 [when "implementation would be sufficiently interdependent in practice even if theoretically separable … a piecemealing challenge would be well founded."].) The Court provided different ways of looking at whether two projects were sufficiently related such that they should be considered together for CEQA purposes. The court explained that "[o]ne way is to examine how closely related the acts are to the overall objective of the project. The relationship between the particular act and the remainder of the project is sufficiently close when the proposed physical act is among the 'various steps which taken together obtain an objective.' [Citation.]" (*Id.* at 1226.) The court also considered whether the two projects were "related in (1) time, (2) physical location and (3) the entity undertaking the action." (*Id.* at 1227; see also *POET, LLC, supra,* 12 Cal.App.5th at 74-75.)

In *Tuolumne County* the road alignment was a condition of the approval of the construction of the home improvement center. The County contended, however, that the road realignment had been contemplated for years, and was needed due to regional traffic concerns, not just the home

improvement center. The court stated, however, that "[w]e reject the position that a CEQA project excludes an activity *that actually will be undertaken* if the need for that activity was not fully attributable to the project as originally proposed." (*Tuolumne County, supra,* 155 Cal.App.4th., at 1228 [emphasis in original].) "The idea that all integral activities are part of the came CEQA project does not establish that *only* integral activities are part of the same CEQA project." (*Id.*, at 1229 [emphasis in original].) The court also relied heavily on the fact that the road alignment was made a condition of approval of the home improvement center: "At that point in time, the independent existence of the two actions ceased for purposes of CEQA[.]" (*Id.*, at 1231.)

In *Orinda Ass'n*, the project consisted of a retail and office development, but the project required the demolition of a theatre and bank building, which was not included as part of the project in the CEQA analysis. (*Orinda Ass'n., supra*, 182 Cal.App.3d at 1170.) The demolition clearly was part of the project. (*Id.*, at 1171.) *Orinda Ass'n.* is a relatively clear case—the remaining part of the project could not be implemented without demolition of the theatre and bank. And there was no reason to demolish the theatre and bank other than to allow the other part of the project to proceed.

Other cases take the same approach. *County of Ventura v. City of Moorpark* (2018) 24 Cal.App.5th 377, at 285, cites *Tuolumne*: "It is only 'where the second activity is independent of, and not a contemplated future part of, the first activity, [that] the two activities may be reviewed separately.'" In that case, the court found that a beach restoration project involving adding sand to a beach could not be separated from the City's approval of permits to allow trucks to haul sand from a quarry to the beach. The court also cited to *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 382 for point that it is a question of independent review.

"Whether an activity is a project is an issue of law that can be decided on undisputed data in the record on appeal."

Make UC A Good Neighbor v. Regents of University of California (2023) 88 Cal.App.5th 656 explained that "[t]he projects must be linked in a way that logically makes them one project, not two. A classic example is *Laurel Heights*, where a university described the project only as its initial plan to occupy part of a building, omitting its future plan to occupy the entire building. (*Laurel Heights, supra*, 47 Cal.3d at p. 396.) … But two projects may be kept separate when, although the projects are related in some ways, they serve different purposes or can be implemented independently. (See *Banning Ranch, supra*, 211 Cal.App.4th at pp. 1223–1224 [summarizing the case law]." (*Make UC A Good Neighbor, supra,* 88 Cal.App.5th at 683-684.)

In essence, the result of the case law is that the two phases are one project if they are interdependent in the sense that one would not be done without the other or if they serve different purposes. Would the Unit 250 project be built without the subsequent Rodeo Renewed Project? Would the Rodeo Renewed Project be built without the Unit 250 project? The issue is not whether they could have, but whether they would have. The Court is also concerned with whether the two projects serve the same purposes.

Respondents argue that Petitioners failed to exhaust their remedies by raising their concerns about Unit 250 when approvals for that project were being considered. Respondents also argue that the statute of limitations for challenging Unit 250's approval has long expired. These arguments assume that Petitioners are challenging Unit 250 directly. Rather, Petitioners are challenging the approval of this Project and the failure to fully consider Unit 250 in the context of this Project. Thus, the Court's consideration here is whether Petitioners raised their concerns regarding Unit 250

in the context of the environmental review for this Project. The Court finds that Petitioners sufficiently raised the issue. (AR 2302-04.)

Unit 250 switched from processing petroleum feedstocks to renewable feedstocks in April 2021. (AR 2302.) Phillips 66 obtained various permits from the County related to the changes to Unit 250 in December 2020. (Respondents' RJN C, D and E.) Apparently Phillips 66 did not obtain the necessary permits from the Air District and received a notice of violation in April 2022. (Petitioners' RJN B.)

In August 2020, Phillips 66 started the Rodeo Renewed Project by applying to the County. A Draft EIR was completed in October 2021 and a Final EIR was completed in March 2022 and was certified in May 2022. (AR 1, 806-09, 2230, 53631.)

Most of the changes to Unit 250 itself appear to be separate from the Rodeo Renewed Project. However, part of the changes to Unit 250 included changes that support the Project. The Court is particularly concerned with changes to the NuStar rail terminal and the 2,300 feet of pipeline running from the terminal to the Rodeo facility.

In conjunction with the changes to Unit 250, the NuStar terminal requested changes. (AR 103086-87; 103096.) The changes to the NuStar facility would allow it to receive soybean oil and other renewable feedstocks. (AR 103086.) While the capacity at NuStar would not change, NuStar sought the ability to receive approximately 45,000 barrels per day of renewable feedstocks. (AR 103086; 103096.) At the same time, the Unit 250 project would produce 9,000 barrels per day of renewable feedstocks. (AR 103087; 103096.) The capacity for Unit 250 was later changed to 12,000 bpd. (AR 54218.) It seems that the changes to the NuStar facility would allow for it to receive additional renewable feedstock beyond the amounts that can be processed by Unit 250;

possibly up to 33,000 barrels per day that would not be used by Unit 250. It is not clear where the other 33,000 barrels will be used, but the Project discusses obtaining feedstocks from several sources, including rail transport. The DEIR also noted that rail traffic at the Rodeo facility would increase from 4.7 railcars per day to 16 railcars per day. (AR 53805; see also AR 7998 [comment discussing rail traffic].) It is unclear from the record whether any of this increase in rail traffic would go through the NuStar facility.

Respondents argue that the NuStar facility is only handling pretreated feedstocks and that only Unit 250 will be processing pretreated feedstocks. The record partially supports this argument as the record shows that Unit 250 will process pretreated feedstocks. (AR 103087.) But the record also shows that the Project is designed to process "a comprehensive range of renewable feedstocks, including treated and untreated feedstocks". (AR 53730, 53733.) Thus, the fact that NuStar will only handle pretreated feedstocks does not mean that the Project is not designed to process feedstocks from NuStar.

Given this evidence, the Court finds that the changes to the NuStar terminal increased its renewable feedstock capacity well beyond that which was required for Unit 250. Given the proximity in time and location between the NuStar and Unit 250 projects and the Rodeo Renewed Project, the Court finds that the failure to consider the changes to the NuStar facility in the EIR at issue here was improper piecemealing. The Court notes that the record regarding NuStar is limited and with more information it may be possible to show that NuStar's changes can be considered a separate project but on the current record the Court cannot make this finding.

Petitioners also argue that the 2,300 feet of pipe that was included in the Unit 250 changes constituted improper piecemealing. As part of the Unit 250 project, Phillips 66 had 2,300 feet of pipe (sometimes referred to as 2,500 feet of pipe) installed. The pipe runs from the NuStar facility

to the Rodeo facility and is entirely on Phillips 66 property. (AR 103087-88.) The pipe is used to receive pretreated renewable feedstocks from the adjacent NuStar Terminal. (AR 103087.) The pipe is described as a 12" pipe. (AR 103084, 103088.) Petitioners argue that the pipe has capacity of 45,000 barrels per day, but the Court's review of the record citations does not support this point. (AR 2304, 103096.)

Petitioners have not shown that the 2,300 feet of pipeline would not have been installed but for the Rodeo project. There is also no showing that the size of the pipe was increased beyond what would be reasonable to transport feedstocks to Unit 250. The Court finds that the 2,300 feet of pipeline is not improper piecemealing because it was necessary for the Unit 250 project and would have been installed for that project regardless of the Rodeo Renewable Project.

As to the remainder of the Unit 250 Project, the Court is not convinced that excluding Unit 250 from the EIR was improper piecemealing. The record shows that the conversions at Unit 250 were mostly separate from the Project here. Furthermore, the purposes of the Unit 250 Project and the Rodeo Renewed Projects are different. Unit 250 is designed to process a relatively small amount of pretreated renewable feedstocks, while the Rodeo Renewed Project is designed to change the entire Rodeo facility from a petroleum facility to one that only processes renewable feedstocks. The Court also finds that Unit 250 and this Project would have happened independently from each other and thus, there was not improper piecemealing for most of the changes to Unit 250.

In the alternative, Petitioners argue that the failure to discuss Unit 250 in the cumulative impact section was an error. The changes to Unit 250 were not discussed in the cumulative impact section in the DEIR. (AR 54245-47.) Respondents dismiss this issue by pointing out that Unit 250 was discussed in the baseline analysis. The baseline for renewable feedstocks in the DEIR is listed

as zero. (AR 53654.) However, it was also noted that Unit 250 had a capacity to produce 12,000 bpd of renewable fuels, but that it was not producing those fuels during the 2019 baseline period. (AR 53654.) In addition, in the summary of alternatives to the Project, it is noted that Unit 250 has a capacity to produce 12,000 bpd in renewable fuels. (AR 54218-219.) The DEIR notes that Unit 250 has the capacity of producing 12,000 bpd of renewable fuels while the Project would produce 55,000 bpd of renewable fuels. (AR 53654.) The capacity at Unit 250 amounts is over 15% of the renewable fuel capacity at the Rodeo facility when the Project is fully operational. A couple of footnotes regarding Unit 250's renewable fuels processing does not sufficiently explain the cumulative impact of Unit 250 along with the Project. The Court finds that the EIR violated CEQA by failing to include Unit 250 in the cumulative impact analysis.

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, supra,* 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, including "but not be limited to" used cooking oil, fats, oils, and grease, tallow (animal fat), inedible corn oil, canola oil, soybean oil, "other vegetable-based oils, and/or emerging and other next-generation feedstocks." (AR 053735.)

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), indirect land use impacts and odor issues. The record does contain evidence that indicates that the different feedstocks could lead to different emissions,

and quantifies the difference between the different types of feedstock. "Switching to new and different feedstock has known potential to increase refinery emissions and to create new and different process hazards and feedstock acquisition impacts.... However, the DEIR does not describe the chemistries, processing characteristics, or types and locations of feed extraction sufficiently to evaluate potential impacts of the proposed feedstock switch." (AR 471; see also AR 25354.) A comment letter also described feedstocks involving fats, oils and grease as "highly malodorous". (AR 2625.)

In comments to the Draft EIR, Petitioners argued that "the County should have evaluated a 'reasonable worst-case scenario' for feedstock consumption and its impacts" and that "the County was required to evaluate a reasonable array of scenarios, including but not necessarily limited to the worst-case scenario, in order to provide full disclosure." (AR 278; 2281.) "Comments also contend that appropriate Draft EIR impact analysis should reflect historic, current, and projected feedstock availability that will influence the proportional selection of feedstocks as demand for feedstocks increases." (AR 2281.) Petitioners also argue that, based on the information available, a large portion of the feedstocks would come from food crop oils. (AR 279; see also, 2282.)

The FEIR 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 explained that they are not required to conduct a worst case analysis and that CEQA only "requires analysis of reasonably foreseeable impacts 'in terms of what is reasonably feasible.' " (AR 2282.) The FEIR also explained that the DEIR provided information on potential feedstocks, but where there is no reliable forecasting, "CEQA requires only that the County use its best efforts to find out and disclose all it reasonably can..." (AR 2282.) Petitioners also argued that the County erred when it claimed the Project would not use meaningful amounts of soybean oil. The FEIR stated that

"comment[s] that feedstocks will utilize food crops and oils, particularly soybean, are not consistent with available data." The FEIR explained that the credits provided for soy oil are much lower than those provided for cooking oil. (AR 2279.) Petitioners argue that the NuStar facility will unload 45,000 bpd of soybean oil and that only a portion of that soybean oil would be used by Unit 250. The record does not support Petitioners' assumption. While a County employee stated that NuStar would receive 45,000 bpd of soybean oil, the accompanying permits and project description state that NuStar would receive 45,000 bpd of "soybean oil and other renewable feedstocks". (AR 103083-86, 103096.) Petitioners also point to Phillips 66's applications to CARB that include soybean oil, but those were for Unit 250 and do not mean that the rest of the facility will use significant amounts of soybean oil. (AR 26059-60.)

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. In the absence of any information indicating past history or even a forward-looking, but factually informed, basis for an estimate, following Petitioners' suggestions and making projections based on all of the different possibilities, including a worst-case scenario, would be an exercise in the hypothetical, and not based on reliable information concerning their likelihood. In other words, it would be speculative.

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.)

" ' "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.)

Petitioners also argue that *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70 (*CBE v. Richmond*) applies here and shows that Respondents need to do more in describing the likely feedstock mix for the Project. In *CBE v. Richmond* the issue was whether the EIR failed to properly discuss whether a reasonably foreseeable consequence of the project would include the processing for lower quality, heavier crude. (*Id.* at 83.) The EIR stated in conclusory terms that it would not increase capacity to process heavier crude, but the court noted that the record showed conflicting evidence on that issue. (*Ibid.*) The court found that the EIR failed as an informational document because the project description was inconsistent and obscure as to whether the project would enable the refinery to process heavier crude. (*Id.* at 89.)

Unlike *CBE v. Richmond*, the description of feedstocks for this Project is not obscure or inconsistent with the evidence. Petitioners argue that in this case the EIR failed to disclose that Unit 250 would use soybean oil and that the NuStar terminal would provide up to 45,000 bpd of soybean oil. As discussed above, the Court finds that Unit 250 should have been included as cumulative impact, but was not required to be analyzed as part of the Project. The Court's review of the record shows that NuStar terminal would provide capacity for 45,000 bpd of renewable feedstocks, but the record does not support that such feedstocks would be soybean oil.

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 a 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. 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 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 currently forested) are used to grow other 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." (*Muzzy Ranch Co., supra,* 41 Cal.4th 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.)

In response to comments, the FEIR stated that it would be too speculative to analyze indirect land use impacts because the mix of feedstocks, as well as their sources, cannot reasonably be predicted. (AR 2284.) The response also explained that based on California Air Resources Board's Low Carbon Fuels Standard Program the majority of feedstocks so far have been waste-oil and tallow. (AR 2284.)

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 feedstocks. (AR 21903, 23905, 59292.) 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 21903.) Two of the articles note a particular problem with palm oil, however, palm oil will not be used at the Phillips 66 facility. (AR 23905, 59292.) 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 23911.)

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. (AR 19426.) 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 19493.) 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 19494.)

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. 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.

D. Cumulative ILUC impacts

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 Rodeo facility as well as projects near the Santa Maria site. (AR 54245-47.) The cumulative impact section included a discussion of the Martinez Refinery project, which involves transforming that refinery into a

facility that processes renewable feedstocks, similar to the Project here. (AR 54246.) The FEIR explained that the cumulative impacts related to renewable feedstocks are too speculative and unable to be quantified. (AR 2274-75.)

Petitioners argue that the EIR should have considered the nearly 20 other renewable fuel conversion projects in California and throughout the nation. (AR 727; see also AR 10493-95.)

Here, the EIR considered the Martinez 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 the Martinez facility and consider other biodiesel facilities in California or perhaps the entire nation. (Whether the EIR needed to consider the changes to Unit 250 as a cumulative impact is discussed above.)

The Court is concerned that on a statewide or nationwide scale, there may be some indirect land use effects. (Such effects were discussed in CARB's 2018 FEIR. (AR 19493-94.)) 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 the failure to include more analysis on the cumulative indirect land use impacts did not violate CEQA.

E. Deferral of Odor Mitigation

The DEIR stated that during refinery operations the impacts from odor would have less than significant with mitigation. (AR 53809, 53828.) The odor concerns include that "renewable feedstocks can create odors similar to an animal and/or food processing facility unless properly managed through good engineering practices during project development combined with an Odor Management Plan after Project completion." (AR 53827.) The DEIR goes on to note that these principals are currently used at the facility and will continue to be used after the completion of the Project. (*Ibid.*)

In order to lessen the impacts from odor, the EIR includes mitigation measure AQ-4. (AR 2322, 53829.) In the DEIR, AQ-4 states that during the construction phase of the Project an Odor Management Plan (OMP) would be development and implemented. (AR 53829.) The FEIR provided additional guidance on AQ-4, including: (1) the OMP will be developed and reviewed by the County and the Air District, (2) the OMP will be an "evergreen" document that will be updated overtime, (3) the OMP will include guidance for proactive identification and documentation of odors and (4) every odor complaint will be investigated with a goal of identifying if the odor originated from the facility and if so, to determine the cause of the odor and remediate the odor. (AR 2322; see also AR 776-777.)

The DEIR describes some additional odor management controls, which are not included in the mitigation measure. The DEIR provides a two-page discussion on different types of odor management controls. (AR 53827-28.) The DEIR provides includes a discussion on how to control odor from tallow feedstocks. (AR 53827 and 53738.) A staff report addresses the claim that the odor mitigation is an improperly deferred mitigation by claiming that if the OMP is developed too

early, it would not be effective. (AR 922.) Respondents also point to the Air District's Regulation 7 on regarding odors. (Respondents RJN F.)

Finally, the FEIR noted that a draft OMP existed and was being reviewed by the County. (AR 2322.) The draft OMP provides additional information on how odors will be reduced or eliminated. (AR183007-183014.)

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), CQA 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 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), *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 671 and *Save Agoura Cornell Knoll v. City of Agoura Hills* (2020) 46 Cal.App.5th 665, 687-688.)

Rominger v. County of Colusa (2014) 229 Cal.App.4th 690 is distinguishable from the case here. *Rominger* found an odor mitigation measure, similar to the one here, was not an improperly deferred mitigation measure. (*Id.* at 723-724.) In 2014, the relevant CEQA Guideline stated that "Formulation of mitigation measures should not be deferred until some future time. However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way." (CEQA Guideline §15126.4(a)(1)(B) (2014).) The CEQA Guidelines in effect in 2014 have been modified. They now include the "impractical or infeasible" finding and *also* require that "the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and

(3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will be considered, analyzed, and potentially incorporated in the mitigation measure." (CEQA Guideline §15126.4(a)(1)(B) (2022).) The analysis in *Rominger* did not consider the standards in the current CEQA Guidelines and thus, *Rominger* does not apply here.

"Courts have approved deferring the formulation of the details of a mitigation measure where another regulatory agency will issue a permit for the project and is expected to impose mitigation requirements independent of the CEQA process so long as the EIR included performance criteria and the lead agency committed itself to mitigation. [Citation.]" (*Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 237.) *Clover Valley* found a mitigation measure was not improperly deferred where it required the real party to obtain necessary permits from two government agencies that were not the lead agency. (*Id.* at 235, 237.) Similarly, in *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614 the court found a mitigation was not improperly deferred where consultation with NOAA Fisheries was required as part of the federal permitting process under the Clean Water Act and the Endangered Species Act, as well as an express term in the EIR. (*Id.* at 647.)

In addition to case law, the CEQA Guidelines state that "compliance with a regulatory permit or other similar process may be identified as mitigation if compliance would result in implementation of measures that would be reasonably expected, based on substantial evidence in the record, to reduce the significant impact to the specified performance standards." (CEQA Guideline § 15126.4(a)(1)(B).)

Petitioners argue that the odor mitigation measure AQ-4 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 have not shown how this

threshold requirement was met. The County did not make the required finding in the EIR. In addition, a draft Odor Management Plan was available when the EIR was certified, but it is unclear why a final version of the document could not be completed. (AR 183007.) 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.

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. Furthermore, while an operating permit from the Air District might be sufficient in some cases to show a mitigation measure is not improperly deferred, the record here does not support that conclusion. Mitigation measure AQ-4 does not state that the Air District will issue a permit. An Air District permit will be required for construction and operations. (AR 53688, 53792-93.) But, the record does not show that the Air District's permit will sufficiently address the odor concerns raised by Petitioners. 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. Requests for Judicial Notice

Petitioners' request for judicial notice is granted as to B. Requests A, C and D are denied as these documents were not in existence when the EIR was certified.

Respondents' requests for judicial notice are granted as to C, D, E, F and G. Requests A and B are denied as the Court cannot tell whether these documents were in existence when the EIR was certified.

IV. CONCLUSION

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

1. The project description improperly omitted changes to the NuStar terminal, but did not improperly omit Unit 250;
2. Unit 250 was improperly omitted from the cumulative impact section;
3. The project description with respect to the mix of feedstocks 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 NuStar and Unit 250 projects and the odor mitigation measure. Because the piecemealing and cumulative impact issues affect the entire analysis of the project, the Court will order the County to set aside its certification of the EIR. The CEQA violations found here relate to operation of the Project, but not to construction of the Project. Therefore, the Court will not issue an injunction preventing Phillips from continuing its construction activities while the County reconsiders these issues.

The parties shall submit proposed writs and judgments by August 18, 2023.

Dated: July 20, 2023

HON. EDWARD G. WEIL
Judge of the Superior Court