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Vested Rights Under Prior Permits Do Not Establish CEQA Baseline

By Claudia Gutierrez

Communities for a Better Environment v. South Coast Air Quality Management District et al. ___Cal.__) (March 15, 2010; Case No. S161190)

In this case, the Supreme Court of California held that neither the statute of limitations, the principles of vested rights, nor the CEQA case law on which ConocoPhillips relied, justified employing the maximum capacity allowed under prior equipment permits as an analytical baseline for a new project, rather than the physical conditions actually existing at the time of the analysis. The court therefore concluded that the South Coast Air Quality Management District (District) abused its discretion in determining ConocoPhillips' proposed project would have no significant environmental effects compared to a baseline of maximum permitted capacity.

ConocoPhillips operates a petroleum refinery in the City of Los Angeles. In order to comply with certain requirements to reduce sulfur content in motor vehicle diesel fuel, ConocoPhillips developed plans for an ultra low sulfur diesel fuel project (Project). ConocoPhillips applied to the District for a permit to construct the Project. After completing an initial study, the District prepared a negative declaration, concluding that the Project did not create any adverse environmental impacts. Multiple community-based organizations, including Communities for Better Environment (CBE) joined forces to file suit.

CBE submitted comments on the draft negative declaration arguing the Project would have significant adverse impacts on the environment and that an environmental impact report (EIR) should be prepared. The District determined that, while increased operation of existing steam generation equipment would cause additional NOx emissions, it did not consider such increases to be part of the Project because they did not exceed the maximum rate of heat production and related NOx emissions allowed under existing permits. In other words, the District treated the additional NOx emissions as part of the baseline for measurement of the physical impacts of the Project, rather than as part of the proposed Project.

Section 15125, subdivision (a) of the CEQA Guidelines provides in part: “An EIR must include a description of the physical environmental conditions in the vicinity… This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.” The California Supreme Court determined that by defining the baseline as the simultaneous operation of the boilers within the limits of their individual permits, the District ensured that emissions from increased boiler operation would not be considered an environmental impact so long as no single boiler operated beyond its permitted capacity. The court held that simultaneous maximum operation did not represent a realistic replication of existing operating conditions, and therefore the District had failed to establish an appropriate baseline.

ConocoPhillips also presented a vested rights argument. However, the court determined that using the actual pre-project emissions as a baseline for analyzing the Project's impacts did not impinge on ConocoPhillips' vested right to operate the boilers at permitted levels. The issue before the court was whether proper environmental review was used in connection with the Project — ConocoPhillips' right to operate existing equipment at any particular level was not itself at issue. The court noted that ConocoPhillips could not, and did not, argue its boiler permits "gave it a vested right to use the boilers for the *Diesel Project*." (Emphasis in original.) Further, regardless of how the CEQA analysis was performed, there would be no impact on ConocoPhillips' right to use any boiler, and it would not be required to use such equipment below any previously permitted level. As such, the court's decision had no impact on ConocoPhillips' vested rights with regard to use of the existing equipment for previously authorized purposes.

The court concluded further, however, that there was an even more fundamental reason the District's and ConocoPhillips' contentions failed. Even if environmental review were to indicate that the Project's adverse effects could be mitigated only by a condition requiring ConocoPhillips to reduce or limit its use of an individual boiler below the previously permitted level, but ConocoPhillips's vested rights precluded imposition of that condition, CEQA would still demand an analysis of the project's true effects. Citing Section 21081(b) of CEQA, the court stated that even though a particular mitigation measure may be infeasible or precluded, as by the applicant's vested rights, that is not a justification for not performing environmental review; it does not excuse the agency from following the dictates of CEQA and realistically analyzing the project's effects. After proper analysis, the agency might decide to disapprove the project because of its immitigable adverse effects or to approve it with a finding of overriding considerations. In short, an applicant's vested rights might constitute a valid reason to forgo particular mitigation measures, but were not an excuse to avoid "realistic" CEQA analysis.

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