

# NOTE

## ENVIRONMENTAL REVIEW OF PERMITTED POLLUTION: *COMMUNITIES FOR A BETTER ENVIRONMENT V. SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT*

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### I. INTRODUCTION

In *Communities for a Better Environment v. South Coast Air Quality Management District* (South Coast Air II),<sup>1</sup> the California Supreme Court addressed whether the South Coast Air Quality Management District (Air District)<sup>2</sup> was required, under the California Environmental Quality Act (CEQA),<sup>3</sup> to prepare an Environmental Impact Report (EIR) for a new project at a Los Angeles area ConocoPhillips refinery.<sup>4</sup> From 2000 to 2001, the Air District,<sup>5</sup> the Environmental Protection Agency,<sup>6</sup> and the California Air Resources Board<sup>7</sup> promulgated or proposed regulations requiring sulfur in diesel fuel be reduced to fifteen parts per million by June 2006. ConocoPhillips submitted a project (the Project) in 2003 to the Air District<sup>8</sup> proposing to meet

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1. *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.*, 226 P.3d 985 (Cal. 2010). The California Supreme Court's decision will be referred to as *South Coast II* and the California Court of Appeals decision as *South Coast I*. *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.*, 71 Cal. Rptr. 3d 7 (Cal. Ct. App. 2007), *aff'd South Coast II*. The Superior Court's opinion is unpublished. *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.*, Case Nos. BS091275 & BS091276 (Cal. Super. Ct. L.A. Cnty. June 29, 2006).

2. The Air District has primary responsibility for meeting, within the Los Angeles area, federal air quality standards promulgated, pursuant to the CAA, by the Environmental Protection Agency, and state air quality standards promulgated, under the California Clean Air Act, by the California Air Resources Board. The Air District has been given authority to promulgate regulatory plans for stationary emissions sources to fulfill this purpose. *Frequently Asked Questions*, SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT (Nov. 2, 2010), <http://www.aqmd.gov/pubinfo/freqask.html>.

3. CAL. PUB. RES. CODE §§ 21000-21178.1 (West 2007). The intent behind CEQA was that agencies should consider "preventing environmental damage" when regulating. CAL. PUB. RES. CODE § 21000(g) (West 2010).

4. *South Coast II*, 226 P.3d at 990; *see also infra* Section I.C.

5. Sulfur Content of Liquid Fuels, Regulation IV, SCAQMD Rules & Regulations, Rule 431.2 (as amended Sept. 15, 2000), *available at* <http://www.aqmd.gov/rules/reg/reg04/r431-2.pdf>.

6. Final Rulemaking, Control of Air Pollution from New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements, 66 Fed. Reg. 5002, 5006 (Jan. 18, 2001) (codified at 40 C.F.R. § 80.520 (2001)).

7. CAL. AIR RES. BD., RISK REDUCTION PLAN TO REDUCE PARTICULATE MATTER EMISSIONS FROM DIESEL-FUELED ENGINES AND VEHICLES 1-2 (Oct. 2000), *available at* <http://www.arb.ca.gov/diesel/documents/trpFinal.pdf>; *see also* CAL. CODE REGS. tit. 13, § 2281 (2004).

8. ConocoPhillips was required to submit the Project to the Air District because it needed a permit to construct the Project. SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT (SCAQMD in footnotes), FINAL

the new low sulfur diesel requirement by operating existing equipment, specifically four boilers and a cogeneration plant, at levels that would generate more nitrogen oxide (NO<sub>x</sub>) emissions than the refinery emitted before implementation of the Project.<sup>9</sup> While overall NO<sub>x</sub> emissions would rise, NO<sub>x</sub> emissions from the four existing boilers would remain below ConocoPhillips' allowable levels under previous permits issued by the Air District. Because ConocoPhillips was already permitted to emit NO<sub>x</sub> from its boilers at the maximum level allowed under its existing boiler permits, the Air District determined that the Project could not have a significant effect on the environment if it increased emissions of the boilers to the maximum level under the existing permits.<sup>10</sup>

In *South Coast II*, the California Supreme Court found that the Air District erred in including the maximum emission levels under the existing boiler permits as part of the environmental baseline from which it determined whether the Project required an EIR.<sup>11</sup> The Court held that environmental effects of projects subject to CEQA environmental review must be measured against the *actual* physical conditions existing at the time of project application, not hypothetical situations under existing permits.<sup>12</sup> The only time that permits will be considered existing physical conditions and part of the baseline from which environmental effects are measured is when the permit has undergone prior CEQA review.<sup>13</sup> If significant adverse environmental effects are found, an EIR must be prepared and mitigation measures suggested.<sup>14</sup>

In Section I, this Note discusses the California Supreme Court's analysis of the proper baseline for determining whether a project will have a significant effect on the environment. Section II investigates whether the Court's ruling can be reconciled with California Court of Appeals' decisions which had previously held that permitted emission levels should be included within an environmental baseline. Additionally, Section II considers ConocoPhillips' argument that it had a vested property right to emit NO<sub>x</sub> at previously permitted levels. Finally, Section III discusses implications of the Court's ruling, specifically its precedential value and possible constitutional attacks on the holding.

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NEGATIVE DECLARATION at 1-8 (June 18, 2004) [hereinafter FINAL NEGATIVE DECLARATION], available at [http://www.aqmd.gov/ceqa/documents/2004/nonaqmd/conoco-w/ND\\_final.doc](http://www.aqmd.gov/ceqa/documents/2004/nonaqmd/conoco-w/ND_final.doc); see also CAL. PUB. RES. CODE § 21065(c) (West 2010).

9. *South Coast II*, 226 P.3d at 990.

10. SCAQMD, FINAL NEGATIVE DECLARATION, *supra* note 8, at app. C at C-35 (finding that no EIR need be prepared for the Project under the CEQA), available at [http://www.aqmd.gov/ceqa/documents/2004/nonaqmd/conoco-w/appC\\_f.doc](http://www.aqmd.gov/ceqa/documents/2004/nonaqmd/conoco-w/appC_f.doc).

11. *South Coast II*, 226 P.3d at 997.

12. *Id.* at 992.

13. *Id.* at 993.

14. *Id.* at 994-995.

## II. THE CASE

A. *Statement of Facts*

The Air District was required to complete an EIR for the Project if it found the Project might “have a significant effect on the environment.”<sup>15</sup> To determine whether a project has a significant effect, the Air District must compare the existing environmental conditions (the Baseline)<sup>16</sup> with the environmental conditions that would exist if the Air District approved the Project.<sup>17</sup> The Air District had an established significance threshold<sup>18</sup> creating a presumption that a project would have a significant effect if it would increase NO<sub>x</sub> emissions by fifty-five or more pounds per day over the baseline.<sup>19</sup> The threshold was set by calculating the amount of NO<sub>x</sub> that could be released into the Air District and that would remain below “the most stringent [state or federal ambient air quality standards]” when added to the NO<sub>x</sub> already in the atmosphere.<sup>20</sup>

The Air District found the Project would increase NO<sub>x</sub> emissions within a range of 237 and 456 pounds per day.<sup>21</sup> However, because the prior boiler permits cumulatively allowed for emissions at that level, the Air District found “existing equipment operation, as well as increased utilization . . . could . . . occur even if [the Project] did not commence.”<sup>22</sup> Upon this basis, the Air District included the sum of the maximum NO<sub>x</sub> emissions allowed under the separate boiler permits as part of the Baseline.<sup>23</sup> Consequently, the Air District did not view the increased emissions as part of the Project.<sup>24</sup> Because the increased emissions of the boilers were included as part of the Baseline rather than as part of the Project, the Project could not possibly increase emissions above the fifty-five pounds per day threshold. Concluding that the CEQA did not require the preparation of an EIR, the Air District issued a draft negative

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15. CAL. PUB. RES. CODE § 21151(a) (West 2010); *see also* CAL. CODE REGS. tit. 14 § 15064(a)(1) (2010). A ‘significant effect’ is “a substantial . . . adverse change in the environment.” CAL. PUB. RES. CODE § 21068 (West 2010). “‘Environment’ means the physical conditions which exist [in] the area . . . affected by a proposed project.” CAL. PUB. RES. CODE § 21060.5 (West 2010).

16. Throughout this note, ‘Baseline’ will be capitalized when referring to the particular Baseline at issue in *South Coast II*. ‘baseline’ will be lowercased when referring to a generic baseline or a baseline from another case.

17. CAL. CODE REGS. tit. 14 § 15125(a) (2010).

18. CEQA encourages adoption of significance thresholds, “an identifiable, quantitative . . . level of a particular . . . effect, non-compliance with which means the effect will normally be determined to be significant.” CAL. CODE REGS. tit. 14 § 15064.7 (2010).

19. SCAQMD, FINAL LOCALIZED SIGNIFICANCE THRESHOLD METHODOLOGY (July, 2008) [hereinafter SIGNIFICANCE THRESHOLD], available at [http://www.aqmd.gov/ceqa/handbook/lst/Method\\_final.pdf](http://www.aqmd.gov/ceqa/handbook/lst/Method_final.pdf).

20. *Id.* at 1-4 to 1-6.

21. FINAL NEGATIVE DECLARATION, *supra* note 8, at app. C, C-50; *see also South Coast II*, 226 P.3d at 990-991 (discussing findings made in the Air District’s negative declarations).

22. FINAL NEGATIVE DECLARATION, *supra* note 8, at app. C, C-35.

23. *South Coast II*, 226 P.3d at 992-993 (discussing the findings made by the Air District).

24. *Id.*

declaration,<sup>25</sup> stating the Air District intended to approve the Project because it found the Project would have no significant effect on the environment.<sup>26</sup>

Communities for a Better Environment<sup>27</sup> (Plaintiffs) proffered comments against the draft negative declaration<sup>28</sup> asserting a fair argument could be made that the Project would cause significant effects to the environment.<sup>29</sup> Plaintiffs argued the Baseline should not include the previously permitted levels but rather the actual emission levels at the time of application for the Project.<sup>30</sup> Despite these comments, the Air District issued a final negative declaration approving the Project in June 2004.<sup>31</sup>

### B. Procedural Posture

Plaintiffs filed petitions for writ of mandamus against the Air District on July 16, 2004, alleging the Air District should have prepared an EIR and that it selected an illegal Baseline for the determination of whether to issue an EIR.<sup>32</sup> The Superior Court<sup>33</sup> denied Plaintiffs relief, ruling that the Air District had properly calculated the Baseline, and, because the significance threshold was not surpassed, the Air District properly issued a negative declaration.<sup>34</sup> Holding the proper Baseline should have included “realized physical conditions on the ground” rather than “merely hypothetical conditions,”<sup>35</sup> the Court of Appeals reversed the judgment of the Superior Court, holding that the “increased use of existing equipment should have been evaluated as part of the [Project]” and, had it been, there was sufficient evidence of a significant environmental impact requiring the preparation of an EIR.<sup>36</sup> ConocoPhillips and the Air District were granted certiorari by the California Supreme Court to determine whether the Air District had appropriately determined the Baseline for the Project.<sup>37</sup>

25. When an agency decides to issue a negative declaration, it must provide a draft negative declaration “sufficiently prior to adoption . . . of the negative declaration . . . to allow the public and agencies” a sufficient period for review. CAL. CODE REGS. tit. 14 § 15072 (2010).

26. SCAQMD, FINAL SUBSEQUENT NEGATIVE DECLARATION at 1-3 (October 2005), available at [http://www.aqmd.gov/ceqa/documents/2005/nonaqmd/CP/SND\\_final.doc](http://www.aqmd.gov/ceqa/documents/2005/nonaqmd/CP/SND_final.doc). A negative declaration is “[a statement] describing the reasons . . . a . . . project will not have a significant effect on the environment and does not require . . . an [EIR].” CAL. PUB. RES. CODE § 21064 (2010).

27. Communities for a Better Environment is a “social justice organization with a focus on environmental health and justice . . . [and] provide[s] community residents who want to challenge corporate polluters with . . . legal assistance.” *About Us*, COMMUNITIES FOR A BETTER ENVIRONMENT, <http://www.cbecal.org/about/index.html> (last visited Apr. 29, 2011).

28. SCAQMD, FINAL NEGATIVE DECLARATION, *supra* note 8, at app. C, C-68 to C-72, available at [http://www.aqmd.gov/ceqa/documents/2004/nonaqmd/conoco-w/appC\\_f.doc](http://www.aqmd.gov/ceqa/documents/2004/nonaqmd/conoco-w/appC_f.doc).

29. *Id.* at app. C at C-69 to C-70. “[If there is] a fair argument that a project may have a significant effect . . . , the lead agency shall prepare an EIR . . . .” CAL. CODE REGS. tit. 14 § 15064(f)(1) (2010).

30. FINAL NEGATIVE DECLARATION, *supra* note 8, at app. C, C-69 to C-70.

31. *Id.*

32. *South Coast I*, 71 Cal. Rptr. 3d 7, 14 (Cal. Ct. App. 2007).

33. The Superior Court’s judgment is unpublished. See *supra* note 1 and accompanying text.

34. *South Coast I*, 71 Cal. Rptr. 3d at 15.

35. *Id.* at 21 (*citing* San Joaquin Raptor Rescue Ctr. v. County Of Merced, 57 Cal. Rptr. 3d 663 (Cal. Ct. App. 2007)).

36. *Id.* at 21.; see also *South Coast II*, 226 P.3d at 991 (Cal. 2010).

37. *Communities for a Better Env’t v. South Coast Air Quality Mgmt. Dist.*, 182 P.3d 512 (Cal. 2008).

### C. The Baseline Decision

In considering whether the Air District applied the correct Baseline, the Court relied on CEQA guidelines<sup>38</sup> stating “[T]he physical environmental conditions in the vicinity of the project . . . will normally constitute the baseline . . . by which [an] agency determines whether an impact is significant.”<sup>39</sup> Thus, the first key issue before the Court was whether the Air District properly found the permitted levels were part of the physical environmental conditions in the vicinity of the Project and, therefore, part of the Baseline. The second key issue was whether ConocoPhillips’ prior permits created one of the rare situations where the Air District had the discretion to use a baseline other than the physical conditions in the vicinity of a project.<sup>40</sup> The Court answered both questions in the negative.

The Air District found the Project would increase NO<sub>x</sub> emissions between 237 and 456 pounds per day, but it did not consider this to be a significant effect because the boilers would still cumulatively emit less than their permitted levels.<sup>41</sup> The Court found that, at the time of Project application, it was rare for even one of the boilers to be utilized at its maximum capacity.<sup>42</sup> Consequently, including the maximum permitted levels in the Baseline did not adequately represent the situation on the ground but rather described a hypothetical situation.<sup>43</sup> Since the purpose of an EIR is to provide the public with information of potential adverse environmental changes,<sup>44</sup> the Court found the proper Baseline should include not the permitted levels of emissions but the actual levels of emissions at the time ConocoPhillips applied for the Project.<sup>45</sup>

The Court further held the Air District implicitly acknowledged the proper Baseline when it concluded that the Project would increase emissions between 237 and 456 pounds per day.<sup>46</sup> Using the proper Baseline, the increase in emissions was well above the significance threshold of fifty-five pounds per day.<sup>47</sup> Thus, Plaintiffs made a fair argument, based on substantial evidence, that the Project would have a significant impact on the environment.<sup>48</sup>

Relying on previous CEQA cases, the Court found that if the Air District makes a determination based upon “a standard inconsistent with [the] CEQA,” then the Air District “has not proceeded in the manner required by law and . . .

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38. The CEQA guidelines are the implementing regulations of the CEQA. CAL. CODE REGS. tit. 14 §§ 15000-15387. “[W]e accord the guidelines great weight except where they are clearly unauthorized or erroneous.” *South Coast II*, 226 P.3d at 991 n.4.

39. *South Coast II*, 226 P.3d at 992 (Court’s emphasis) (quoting CAL. CODE REGS. tit. 14 § 15125(a)).

40. There are two distinct situations where the Court may include in the baseline permitted levels rather than actual levels of emissions: 1) the permits in question have already undergone CEQA review through the preparation of an EIR or a negative declaration upon its issuance, *see infra* pp. 596-597, or 2) when an agency finds overriding legal consideration make it impossible not to include the permitted levels as part of the baseline, *see infra* p. 598.

41. *South Coast II*, 226 P.3d at 990-991.

42. *Id.* at 992.

43. *Id.* at 993.

44. *Fairview Neighbors v. County of Ventura*, 82 Cal. Rptr. 2d 436, 439 (Cal. Ct. App. 1999).

45. *South Coast II*, 226 P.3d at 997.

46. *Id.* at 998.

47. SIGNIFICANCE THRESHOLD, *supra* note 19.

48. *South Coast II*, 226 P.3d at 997-98.

abused its discretion.”<sup>49</sup> Specifically, the Air District was required to make its determination that the Project would have no significant environmental impacts based upon “substantial evidence, in light of the whole record.”<sup>50</sup> Because the Air District used the emissions allowed under previous permits as part of the Baseline rather than as part of the Project, the Court concluded that the Air District erred in finding the Project would not have significant effects and that it did not proceed in the manner required by law.<sup>51</sup> The Court affirmed the Court of Appeals’ decision and remanded to the Air District to prepare an EIR for the Project.<sup>52</sup>

### III. ARGUMENTS AND ANALYSIS

ConocoPhillips and the Air District made two distinct arguments attempting to persuade the Court that the Air District properly included the permitted levels in the Baseline. First, they argued that previous Court of Appeals decisions authorized the inclusion of permitted levels in the Baseline.<sup>53</sup> Second, they argued the permits gave ConocoPhillips a vested right to use the boilers at their permitted levels regardless of whether the Air District approved the Project.<sup>54</sup>

#### A. Court of Appeals Cases

The Court relied on Court of Appeals decisions,<sup>55</sup> finding that they collectively held “impacts of a proposed project” should normally be determined from a baseline composed of “the actual environmental conditions existing at the time of CEQA analysis, rather than to allowable conditions defined by a plant or regulatory framework.”<sup>56</sup> ConocoPhillips and the Air District attempted to distinguish the facts in their case from those in the appellate cases relied on by

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49. *South Coast II*, 226 P.3d at 992 (citing CAL. PUB. RES. CODE § 21168.5; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 150 P.3d 709 (2007); *No Oil, Inc. v. City of Los Angeles*, 529 P.2d 66 (Cal. 1974)).

50. CAL. PUB. RES. CODE § 21080(c)(1) (West 2009).

51. *South Coast II*, 226 P.3d at 997.

52. *Id.* at 992.

53. Real Party in Interest ConocoPhillips Company’s Opening Brief on the Merits at 17-31, *South Coast II*, 226 P.3d 985 (Cal. 2010); and Opening Brief on the Merits at 39-48, *South Coast II*, 226 P.3d 985 (Cal. 2010); see also *South Coast II*, 226 P.3d at 994.

54. ConocoPhillips’ Opening Brief on the Merits at 19-27, *South Coast II*, 226 P.3d 985 (Cal. 2010); and Opening Brief on the Merits at 32-35, *South Coast II*, 226 P.3d 985 (Cal. 2010); see also *South Coast II*, 226 P.3d at 994-995.

55. *Environmental Planning & Info. Council v. County of El Dorado*, 182 Cal. Rptr. 317 (Cal. Ct. App. 1982) (amendment to county general development plan required EIR using baseline set by the existing environment not by previous plan which had not come to fruition); *City of Carmel-by-the-Sea v. Board of Supervisors*, 227 Cal. Rptr. 899 (Cal. Ct. App. 1986) (baseline must be existing environment not a permitted use, which has never occurred, under a land use plan); *County of Amador v. El Dorado Cnty. Water Agency*, 91 Cal. Rptr. 2d 66 (Cal. Ct. App. 1999) (unadopted general plan should not be baseline for project to increase water use); *Save Our Peninsula Comm. v. Monterey Cnty. Bd. of Supervisors*, 104 Cal. Rptr. 2d 326 (Cal. Ct. App. 2001) (baseline for water project was actual conditions not what applicant was entitled to use); *Woodward Park Homeowners Ass’n, Inc. v. City of Fresno*, 59 Cal. Rptr. 3d 102 (Cal. Ct. App. 2007) (possible zoning does not set baseline, rather actual physical conditions do); see also *South Coast II*, 226 P.3d at 993 n.6.

56. *South Coast II*, 226 P.3d at 992-993.

the Court.<sup>57</sup> They argued those cases applied only to projects involving unrealized land use and zoning plans as opposed to the actually existing equipment at the refinery which was previously operated at the maximum level permitted by their permits.<sup>58</sup> “The . . . plan cases . . . are often described as holding . . . the baseline must be real, not hypothetical . . . . [T]here is nothing hypothetical about the utility equipment at ConocoPhillips refinery . . . . [It] existed at the time environmental review commenced.”<sup>59</sup>

ConocoPhillips’ argument is consistent with *San Joaquin Raptor Rescue Center v. County of Merced*.<sup>60</sup> The *San Joaquin* court held that while “hypothetical conditions . . . under existing plans” cannot be considered part of the baseline, “established levels of a particular use” can.<sup>61</sup> However, the Court implicitly rejected this argument. While the decision is not entirely clear on this point, the Court’s reasoning that the four boilers rarely operated at maximum capacity unless one of the other boilers was undergoing repair implies the Court reasoned that maximum usage of the boilers was not an established use.<sup>62</sup> Rather, like land use plans in the plan cases, maximum simultaneous usage of the boilers was hypothetical, having never been established, and, therefore, not part of the existing environment at the Project site.<sup>63</sup>

Additionally, ConocoPhillips and the Air District argued the facts in this case were analogous to Court of Appeals’ cases where the “maximum operational levels allowed under a permit, rather than existing physical conditions” were used as the baseline for CEQA review.<sup>64</sup> The Court was not persuaded, finding permitted levels were allowed in those cases because the permit included in the baseline had already undergone CEQA review.<sup>65</sup> The Court found the Project never underwent CEQA review.<sup>66</sup> Therefore, CEQA review was required, and the permitted levels could not be included in the Baseline.

While the cases upon which ConocoPhillips and the Air District relied all included prior CEQA review of permits,<sup>67</sup> the Court did not address the Air

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57. Real Party in Interest ConocoPhillips Company’s Opening Brief on the Merits at 29, *South Coast II*, 226 P.3d 985 (Cal. 2010).

58. *Id.*

59. *Id.*

60. *San Joaquin Raptor Rescue Ctr. v. County of Merced*, 57 Cal. Rptr. 3d 663 (Cal. Ct. App. 2007).

61. *Id.* at 674.

62. *South Coast II*, 226 P.3d at 993; *see also id.* at 997-998 (Emission levels may vary over time based on usage. In such a case, an average of emissions over time may be included as part of existing conditions. However, the average will rarely be maximum usage and was not here.).

63. *Id.*

64. *Id.* at 996. The term ‘CEQA review’ refers to the agency’s evaluation of the environmental impacts of a project and either the issuance of an EIR or the proper issuance of a negative declaration under the procedure and definitions proscribed by the CEQA and its implementing regulations.

65. *Id.*

66. *Id.*

67. *See, e.g.*, *San Joaquin Raptor Rescue Ctr. v. County of Merced*, 57 Cal. Rptr. 3d 663 (Cal. Ct. App. 2007); *Lighthouse Field Beach Rescue v. City of Santa Cruz*, 31 Cal. Rptr. 3d 901 (Cal. Ct. App. 2005); *Fat v. County of Sacramento*, 119 Cal. Rptr. 2d 402 (Cal. Ct. App. 2002); *Save Our Peninsula Comm. v. Monterey Cnty. Bd. of Supervisors*, 104 Cal. Rptr. 2d 326 (Cal. Ct. App. 2001); *Fairview Neighbors v. County of Ventura*, 82 Cal. Rptr. 2d 436 (Cal. Ct. App. 1999); *Bloom v. McGurk*, 31 Cal. Rptr. 2d 914 (Cal. Ct. App.

District's argument that, in at least some of the permit cases, the existence of a prior permit and the fact of prior CEQA review were independent bases for concluding the permit should be included in the baseline.<sup>68</sup> For instance, *Fairview Neighbors v. County of Ventura* involved an applicant proposing to expand mine use.<sup>69</sup> At the time of application, the mine was permitted to have 810 truck trips to and from the mine per day.<sup>70</sup> The agency<sup>71</sup> in *Fairview* issued an EIR, but the petitioners argued the agency erred in finding the maximum permitted traffic flow was part of the baseline and that, consequently, the increased traffic flow from the new use was not significant.<sup>72</sup> The Court of Appeals in *Fairview* held the agency was not in error.<sup>73</sup> If the agency had not included the permitted levels in the baseline, the information provided to the public in the EIR would be "misleading and illusory."<sup>74</sup> Conversely, the *South Coast II* court reached the opposite conclusion, finding that inclusion of the permitted levels in the Baseline would result in an "illusory comparison" between the Project's impacts and hypothetical conditions.<sup>75</sup>

In *Fairview*, the permit at issue had already undergone an EIR, but that EIR only looked at the impacts on the environment of 120 trips to and from the mine every day whereas the mine was permitted for 810 trips per day.<sup>76</sup> ConocoPhillips argued that because the permitted levels were much higher than those considered in the original EIR, it was the existence of the permit and not the EIR that was determinative in *Fairview*.<sup>77</sup> If that was the case, ConocoPhillips' permits should have been included in the Baseline for the Project. Given the Court's ruling in *South Coast II*, however, permitted levels will no longer be allowed to be included in a baseline if the permits have not undergone prior CEQA review.<sup>78</sup>

Although the holdings in *Fairview* and *South Coast II* appear to be in conflict, they are reconcilable. While the EIR for the prior permit in *Fairview* only looked at the effect on the environment of 120 truck trips when the permit actually allowed for 810 truck trips per day, that EIR was prepared in 1976.<sup>79</sup> The CEQA has a very short thirty day statute of limitations for challenging an

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1994), *Benton v. Board of Supervisors of Napa Cnty.*, 277 Cal. Rptr. 481 (Cal. Ct. App. 1991); *Committee for a Progressive Gilroy v. State Water Res. Control Bd.*, 237 Cal. Rptr. 723 (Cal. Ct. App. 1987).

68. Opening Brief on the Merits at 19-23, 39-46, *South Coast II*, 226 P.3d 985 (Cal. 2010).

69. *Fairview Neighbors v. County of Ventura*, 82 Cal. Rptr. 2d 436 (Cal. Ct. App. 1999).

70. *Id.* at 440.

71. In *Fairview*, the Ventura County Board of Supervisors was the administrative body charged with approving the mine's new conditional use permit. *Id.* at 438.

72. *Id.* at 439.

73. *Id.*

74. *Id.* at 440.

75. *South Coast II*, 226 P.3d 985, 994 (Cal. 2010).

76. *Fairview Neighbors*, 82 Cal. Rptr. 2d at 438. Therefore, in *Fairview*, the EIR actually considered, as part of the baseline, the hypothetical condition of 810 truck trips per day. Under the *South Coast II* analysis, this was a flawed baseline.

77. Real Party in Interest ConocoPhillips Company's Opening Brief on the Merits at 22, *South Coast II*, 224 P.3d 985 (Cal. 2010).

78. *South Coast II*, 226 P.3d at 993.

79. *Fairview Neighbors*, 82 Cal. Rptr. 2d at 438.

EIR.<sup>80</sup> If the California Supreme Court was to reexamine *Fairview* in light of *South Coast II*, it seems likely that it would hold that the permitted levels were properly included in the baseline in *Fairview* because the permit there underwent prior, albeit flawed, CEQA review. Even though the original EIR was flawed, an EIR had been completed and could no longer be challenged in court.

### B. Vested Rights

In addition to arguing that prior cases allowed for inclusion of permitted emission levels in the baseline, ConocoPhillips and the Air District argued ConocoPhillips had a vested right to emit at maximum permitted levels, and, therefore, emissions up to those levels should be included in the Baseline.<sup>81</sup> In California, the doctrine of vested rights requires three elements be met: 1) a property owner relies in good faith on 2) a government permit 3) while incurring substantial liability.<sup>82</sup> When a property owner establishes these elements, the owner has a vested right to complete construction.<sup>83</sup> Here, it is undisputed that ConocoPhillips had a government permit. The Court, however, implies that ConocoPhillips did not rely on that permit in good faith.<sup>84</sup>

The Court held “the boiler permits give ConocoPhillips no vested right to pollute the air at any particular level.”<sup>85</sup> By applying the facts to the rule, the Court’s ruling is understandable. Despite the permits, both ConocoPhillips and the Air District acknowledged that the Air District could at any time require ConocoPhillips to modify the boilers to reduce pollution.<sup>86</sup> The Air District would be able to do this regardless of whether the permits had been subject to previous CEQA review or not. Given this fact, ConocoPhillips could not rely in good faith on an Air District permit which was subject to modification at any time and which the Air District had previously modified.<sup>87</sup>

Beyond failing to establish that it relied in good faith on the permits, ConocoPhillips did not incur substantial liability by relying on the permits. In the current instance, ConocoPhillips was applying for permits to construct and operate a new Project.<sup>88</sup> Therefore, the costs of construction and operation had not yet been incurred. ConocoPhillips likely did not incur substantial costs as a result of reliance on the prior permits for the new Project, but, even if it did, ConocoPhillips could not rely on the permits in good faith. Thus, ConocoPhillips did not have a vested right to emit up to the levels of the permit,

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80. CAL. PUB. RES. CODE § 21167(c) (West 1010).

81. Opening Brief on the Merits at 32-35, *South Coast II*, 226 P.3d 985 (Cal. 2010); Real Party in Interest ConocoPhillips Company’s Opening Brief on the Merits at 19-21, *South Coast II*, 226 P.3d 985 (Cal. 2010).

82. *Russ Bldg. P’ship v. County of San Francisco*, 750 P.2d 324, 327 (Cal. 1988) (“The rule is grounded on the constitutional principle that property may not be taken without due process of law”).

83. *South Coast II*, 226 P.3d at 994.

84. *Id.* at 995 (“[T]he [Air] District and ConocoPhillips acknowledge . . . the [Air] District may . . . require ConocoPhillips to modify its boilers to reduce their pollution, as it has . . . done in the past.”).

85. *Id.* (Court’s emphasis).

86. *Id.*

87. *Id.*

88. FINAL NEGATIVE DECLARATION, *supra* note 8, at 1-8 (June 18, 2004), available at [http://www.aqmd.gov/ceqa/documents/2004/nonaqmd/conoco-w/ND\\_final.doc](http://www.aqmd.gov/ceqa/documents/2004/nonaqmd/conoco-w/ND_final.doc).

and, thus, the Air District erred in including the permitted levels in the Baseline.<sup>89</sup>

In the alternative, the Court found that even if ConocoPhillips had vested rights to pollute under the permits, requiring an EIR would not deprive ConocoPhillips of those rights.<sup>90</sup> The purpose of an EIR is to provide the public with information about the possible harmful environmental effects of projects.<sup>91</sup>

While preparation of an EIR is mandatory when previously obtained permits have not undergone prior CEQA review, the Court confirmed the Air District's statutory discretion to decide how to deal with the negative effects identified in the EIR.<sup>92</sup> Under the CEQA, the Air District has three options upon finding the Project would cause significant impact to the environment: 1) it may approve the Project upon the condition that emissions caused by the Project be brought below the threshold level; 2) it could find the significant effects are immitigable and not approve the Project; or 3) it could find immitigable effects but approve the Project based on overriding considerations.<sup>93</sup> Therefore, upon remand, the Air District must prepare an EIR.<sup>94</sup> If the EIR shows significant environmental impacts, the Air District must consider whether the environmental impacts of the Project can be lessened through mitigation or whether they are immitigable; if so, the Project may still be approved if the Air District finds overriding legal considerations.

#### IV. IMPLICATIONS

In this case, ConocoPhillips and the Air District sought swift approval of the Project so that ConocoPhillips could meet the 2006 deadline for producing low sulfur diesel, which would positively affect the environment.<sup>95</sup> After *South Coast II*, California agencies, such as the Air District, still have the discretion to approve projects like ConocoPhillips' low sulfur diesel Project, but they must first complete an EIR.<sup>96</sup> *South Coast II* sets the precedent that existing permits must have undergone prior CEQA review to be included in the baseline.<sup>97</sup> Therefore, an agency must now prepare an EIR if the environmental effects of a project, as compared to a facility's actual emissions at the time of project application, exceed the agency's published significance thresholds.<sup>98</sup>

An agency may approve a project even though it has significant environmental effects if it finds both that "[s]pecific economic, legal, social, technological, or other considerations" make mitigation infeasible and that the

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89. *South Coast II*, 226 P.3d at 995.

90. *Id.* at 995 n.9.

91. *Fairview Neighbors v. County Of Ventura*, 82 Cal. Rptr. 2d 436, 439 (Cal. Ct. App. 1999).

92. *South Coast II*, 226 P.3d at 994-995.

93. *Id.*; see also CAL. PUB. RES. CODE § 21081 (West 2010).

94. *South Coast II*, 226 P.3d at 992 ("If no EIR has been prepared . . . , but substantial evidence in the record supports a fair arguments that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR.")

95. Answer Brief on the Merits at 7, *South Coast II*, 226 P.3d 985 (Cal. 2010).

96. See *supra* pp. 593-94.

97. *South Coast II*, 226 P.3d at 993.

98. *Id.* at 998.

“benefits of the project outweigh the significant effects on the environment.”<sup>99</sup> If mitigation measures are infeasible where the project applicant claims to have some sort of property right to pollute from prior permits, an agency could exercise its discretion and approve the project finding overriding legal considerations.<sup>100</sup>

In this case, the Air District could fairly argue for at least two overriding considerations. First, the Air District might balance the effects of the availability of low sulfur diesel with the effects of increased emissions from ConocoPhillips’ refinery and find that the cumulative effects actually reduce the harmful emissions in California.<sup>101</sup> A court will probably not find this to be a compelling overriding interest, however, because the purpose of the CEQA is to maintain a quality environment for all the people of the state.<sup>102</sup> Allowing the environmental degradation of the physical environment surrounding one project for the sake of decreasing emissions state-wide could result in a patchwork of environmental disaster areas in small portions of the state for the benefit of the greater whole.<sup>103</sup> “[R]egardless of whether the overall effect of the project is adverse or beneficial,” the CEQA’s purpose is to provide the public in the area of the project with information of the project’s effects on the local environment.<sup>104</sup>

Second, another overriding consideration could be that the Air District cannot prevent a project applicant from emitting at permitted levels, even if the project never existed, because of property rights the applicant has in its previous permits. Despite the *South Coast II* Court holding that no vested right to pollute exists, companies rely on permits in their daily operations, and they should be able to rely upon them in planning future operations.<sup>105</sup> Even given the possibility of the permits being changed by the agency at any time, companies should still be able to rely on the permitted levels unless the agency gives the company some notice of the intent to change the permit and an opportunity to object.<sup>106</sup> This policy, favoring notifying companies before changing permits, raises significant constitutional issues concerning the Fourteenth Amendment.<sup>107</sup>

The Fourteenth Amendment provides that states may not deprive an individual “of life, liberty, or property without due process of law.”<sup>108</sup> The

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99. CAL. PUB. RES. CODE § 21081(a)(3) (West 2010).

100. CAL. CODE REGS. tit. 14 § 15093 (2010) (When an “agency approves a project” with significant effects that are unavoidable, “the agency shall state in writing the specific reasons to support its action . . . [t]he statement of overriding considerations shall be supported by substantial evidence in the record.”).

101. Both ConocoPhillips and the District made such arguments before the Court. Answer Brief on the Merits at 46, *South Coast II*, 226 P.3d 985 (Cal. 2010).

102. CAL. PUB. RES. CODE § 21000(a) (West 2010).

103. Such a situation would be opposed to one of the stated purposes of CEQA, to “provide[] a decent home and satisfying living environment for every Californian.” CAL. PUB. RES. CODE § 21000(g) (West 2010).

104. CAL. CODE REGS. tit. 14 § 15063(b)(1) (2010).

105. Real Party in Interest ConocoPhillips Company’s Opening Brief on the Merits at 43-44, *South Coast II*, 226 P.3d 985 (Cal. 2010).

106. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); see also *Russ Bldg. P’ship v. County of San Francisco*, 750 P.2d 324, 327 (Cal. 1988) (“The rule [of vested rights] is grounded on the constitutional principle that property may not be taken without due process of law”).

107. U.S. CONST. amend. XIV, § 1.

108. *Id.*

property protected by the Fourteenth Amendment includes rights granted by states that create entitlements.<sup>109</sup> ConocoPhillips argued, and the Air District accepted, that the boiler permits entitled it to operate each boiler at a certain level.<sup>110</sup> This argument would easily transition into an argument that ConocoPhillips had a property right, an entitlement, granted by the permits to pollute at certain levels of which ConocoPhillips could not be deprived without due process.<sup>111</sup>

If such an entitlement exists, the Air District should not be able to deprive ConocoPhillips of that entitlement without providing notice and an opportunity to be heard.<sup>112</sup> In this case, the Air District, merely performing an environmental review of a separate project, would be unlikely to put ConocoPhillips on notice that the Air District might deprive it of the right to operate its boilers at the levels entitled by the previous permits.<sup>113</sup> If the Air District determines that the Project's effects could only be mitigated through denying ConocoPhillips the right to operate at maximum permitted levels and if that deprivation violated due process by providing inadequate notice, the Air District could, in its discretion, find the constitutional issue to be an overriding legal consideration and approve the Project.<sup>114</sup>

However, the *South Coast II* Court held permits, like those for the boilers, not only do not create a vested right to pollute but also do not *entitle* the permit holder to pollute at any particular level.<sup>115</sup> The Court's statement would not preclude a constitutional challenge, as federal courts, not state courts, are charged with deciding whether entitlements rise to the level of property protected by the Fourteenth Amendment.<sup>116</sup> However, when federal courts have reviewed whether an entitlement to pollute exists, they consider statements such as the Court's, in *South Coast II*, that in California there is no right to pollute.<sup>117</sup> Given the Court's specific ruling that no right to pollute exists, approving the

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109. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); see also Paramount Convalescent Ctr., Inc. v. Department of Health Care Servs., 542 P.2d 1 (Cal. 1975) (recognizing *Roth's* entitlement rule).

110. Real Party in Interest ConocoPhillips Company's Opening Brief on the Merits at 19-20, *South Coast II*, 224 P.3d 985 (Cal. 2010). Opening Brief on the Merits at 4, *South Coast II*, 226 P.3d 985 (Cal. 2010).

111. *Roth*, 408 U.S. at 577.

112. Fuentes v. Shevin, 407 U.S. 67, 80 (1972); but compare Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1316, 1320 (9th Cir. 1989) (holding that due process hearing requirement was met in a case involving an immediate suspension of a permit that allowed a business to pollute where adequate statutory post-deprivation process is available).

113. Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (When process is due, it "must be granted at a meaningful time and in a meaningful manner.").

114. CAL. PUB. RES. CODE § 21081 (West 2010). In the alternative, the California legislature could enact a statutory post-deprivation mechanism which, given California's interest in preventing pollution, might satisfy due process concerns. *Soranno's Gasco, Inc.*, 874 F.2d at 1317-1318; see also Machado v. State Water Res. Control Bd., 109 Cal. Rptr. 2d 116, 120-122 (Cal Ct. App. 2001) (holding post-deprivation mechanism adequate for issuance of non-discharge order by agency, relying on strong state interest in keeping water clean).

115. *South Coast II*, 226 P.3d 985, 995 (Cal. 2010) (the District could alter permits at any time).

116. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978) ("federal constitutional law determines whether [state created entitlements rise] to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause."), *aff'd* Town of Castle Rock v. Gonzales 545 U.S. 748, 756-757 (2005).

117. Stupak-Thrall v. United States, 89 F.3d 1269, 1287 (6th Cir. 1996) (Boggs, J. dissenting).

Project based upon these considerations would most likely be an abuse of discretion.<sup>118</sup>

Finally, ConocoPhillips also had a permit to emit certain levels of NO<sub>x</sub> refinery-wide under the Air District's Regional Clean Air Initiative Market (RECLAIM) cap and trade system.<sup>119</sup> At the time of the Project application, ConocoPhillips had been allocated RECLAIM trading credits (RTCs) allowing it to emit up to 2,343 pounds of NO<sub>x</sub> per day refinery wide for the whole of 2003, but it "was still allowed to emit up to its [original 1994] allocation of 8,318 [pounds per day] so long as it purchased a corresponding amount of [RTCs] from another facility" that had RTCs to spare.<sup>120</sup> If a facility emits at a level less than the yearly allocation, that facility may sell its excess RTCs to companies, such as ConocoPhillips, which need more than their yearly allocations.<sup>121</sup> The NO<sub>x</sub> emissions under the project would be, at maximum, 2,799 pounds per day, well below the permitted 8,318 pounds per day.<sup>122</sup> Thus, if ConocoPhillips' RECLAIM permit had been included as part of the Baseline, the Project could not possibly increase NO<sub>x</sub> emissions by fifty-five pounds per day over the Baseline.<sup>123</sup>

The RECLAIM permit replaced a number of command and control permits, like the boiler permits, which "[set] specific emissions limits on each piece of equipment,"<sup>124</sup> but it did not replace the boiler permits.<sup>125</sup> The RECLAIM baseline only would apply when considering a project dealing with increased "emissions from new or *modified* RECLAIM equipment."<sup>126</sup> Because the boilers were not RECLAIM equipment and because the Project did not involve constructing new or modifying old RECLAIM equipment, the Air District did not include the RECLAIM permit in the Baseline.<sup>127</sup>

Under the Court's ruling, even if the Air District had decided to use the RECLAIM baseline, the Air District might still have abused its discretion by analyzing the Project's environmental effects against a hypothetical situation, maximum emissions under the RECLAIM permit.<sup>128</sup> Whether the Air District would have abused its discretion in this hypothetical is dependent upon whether

118. The Court was ambiguous on this point. While it stated no right to pollute existed, the Court acknowledged that if a vested property right did exist, then, while an EIR would still be required, the vested rights of ConocoPhillips in using the boiler permits at maximum levels might constitute a sufficient overriding consideration. *South Coast II*, 226 P.3d at 995.

119. *South Coast I*, 71 Cal. Rptr. 3d 7, 12 (Cal. Ct. App. 2007).

120. *Id.*

121. *Alliance of Small Emitters/Metals Indust. v. SCAQMD*, 70 Cal. Rptr. 2d 54, 55-56 (Cal. Ct. App. 1997).

122. *South Coast I*, 71 Cal. Rptr. 3d at 13.

123. *Id.*

124. Opening Brief on the Merits at 53, *South Coast II*, 226 P.3d 985 (Cal. 2010).

125. *Id.* at 58.

126. *Id.*

127. *Id.*

128. The *South Coast II* Court declined to decide whether a RECLAIM baseline was proper under CEQA because the parties conceded it was not used. *South Coast II*, 226 P.3d at 997 n.12. However, on October 11, 2009, the California Legislature amended CEQA to provide an express exemption from the necessity of preparing an EIR for "[t]he selection, credit, and transfer of emission credits" under the RECLAIM project. Act of Oct. 11, 2009, 2009 Cal. Legis. Serv. Ch. 285 (West) (codified at CAL. PUB. RES. CODE § 21080 (West 2009)).

RECLAIM had undergone a prior EIR as a project, which it should have,<sup>129</sup> and whether ConocoPhillips' Project could be construed as a modification of the RECLAIM project.<sup>130</sup> Assuming that RECLAIM underwent CEQA review, it is doubtful that ConocoPhillips' Project could be construed as a modification of the RECLAIM project. Because the Air District initiated the RECLAIM project and controls its details, ConocoPhillips' Project is not the same project, having both a different purpose and a different scope.

## V. CONCLUSION

The purpose of preparing an EIR under the CEQA is to provide the public information about the possible adverse environmental effects of a project subject to state approval. In *South Coast II*, the California Supreme Court set a precedent that environmental effects of projects subject to CEQA environmental review must be measured against the *actual* physical conditions existing at the time of project application. The only time that permits will be considered existing physical conditions and part of the baseline from which environmental effects are measured is when the permit has undergone prior CEQA review. If significant adverse environmental effects are found, an EIR must be prepared and mitigation measures suggested.

However, the Air District and similarly situated state agencies still have the discretion to approve a project causing significant adverse environmental effects if they find overriding considerations make the mitigation measures infeasible. The *South Coast II* Court, while stating no right to pollute exists, did not specifically decide the Fourteenth Amendment issue. Given the federal courts' previous reliance on state court opinions stating that no right to pollute exists, a federal court would likely find ConocoPhillips did not have a property right in either its boiler permits or its RECLAIM permit.<sup>131</sup> On one hand, if no property right exists, it cannot be deprived by the state, and no due process claim can arise. On the other hand, since the Court acknowledged that a vested rights argument might be enough to constitute an overriding consideration, there is room to argue permits create property rights and due process concerns should be viewed as an overriding consideration.<sup>132</sup>

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129. A project is "an activity which may cause direct physical change in the environment" and may be "directly undertaken by any public agency." CAL. PUB. RES. CODE § 21065 (West 2010).

130. *South Coast II*, 226 P.3d at 996.

131. *Stupak-Thrall v. United States*, 89 F.3d 1269, 1287 (6th Cir. 1996) (Boggs, J. dissenting). While the *Stupak* decision's value for this proposition suffers from an equal split of the Third Circuit sitting *en banc*, both *Roth* and *Memphis Light* look to state law first to determine if an entitlement to "new property" exists. A statement by the Supreme Court of California to the effect that no entitlement to pollute exists would weigh heavily in a federal court's consideration of whether a property right is created by permits like the ones at issue in *South Coast II*. However, *Memphis Light* and *Castle Rock* both stand for the proposition that federal courts will look beyond blanket assertions and look at the substance of the permit in determining whether a property right exists.

132. *See supra* note 118 and accompanying text.

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