

# LAND USE & NATURAL RESOURCES

CLIENT ALERT

APRIL 27, 2010

## CALIFORNIA'S FIRST PUBLISHED COURT DECISION ON CEQA AND GREENHOUSE GAS EMISSIONS SETS ASIDE "CURSORILY DESCRIBED" MITIGATION MEASURES

On Monday, April 26, the First District Court of Appeal in San Francisco published the first decision on greenhouse gas emissions and the California Environmental Quality Act. In *Communities for a Better Environment v City of Richmond*, the court set aside the EIR for Chevron's Richmond refinery upgrade, in part on the basis that the EIR did not adequately describe mitigation measures for greenhouse gas emissions. The court also ruled that the EIR's project description was inconsistent in describing the type of crude oil to be processed at the upgraded refinery, and rejected a claim that a pipeline to transport excess hydrogen from the refinery was required to be evaluated in the EIRs part of the refinery upgrade project.

### *The EIR Impermissibly Deferred Formulation of GHG Mitigation Measures*

The court's ruling on greenhouse gas mitigation measures has obvious significance as the first ruling on the topic. It is also significant in that the court applied existing CEQA rules on mitigation measures in determining that the mitigation was inadequate. In brief, the EIR proposed a "no net increase" plan that was ambitious in setting an objective of no net increase, but the court found that the mitigation plan was insufficiently defined.

The Draft EIR concluded that the project could result in a net increase in CO<sub>2</sub> emissions of approximately 898,000 metric tons per year, and initially declined to determine whether those emissions constituted a significant environmental impact. The City later revised that conclusion and determined that project's greenhouse gas emissions were significant, thus triggering the obligation to consider and adopt feasible measures to reduce the identified impact. The mitigation plan that was adopted required Chevron to hire an expert to prepare an inventory of greenhouse gas emissions and to identify emissions reduction opportunities. Chevron was required to consider various measures that were specified in the EIR, and to submit to the City a proposed plan to achieve a complete reduction of the increased greenhouse gas emissions from the project.

Citing the well known *Sundstrom* decision and other case law, the court held that this mitigation scheme impermissibly deferred the required formulation of mitigation measures. The court characterized the EIR as relying on a tentative plan for future mitigation after completion of the CEQA process. The court indicated that the final EIR proposed only a generalized goal of "no net increase" and set out a "handful of cursorily described mitigation measures for future consideration" with no effort to calculate the reductions that might result from the vaguely described mitigation measures. The court further described the measures as "non exclusive, undefined, untested and of unknown efficacy."

The court rejected Chevron's arguments that the City had proceeded appropriately by setting a performance standard and setting forth a menu of potential mitigation measures. Even though several cases have allowed such an

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approach, the court said that the city here delayed making a significance finding until late in the CEQA process, divulged little or no information about how it quantified the project's emissions, offered no assurance that the plan was feasible and efficacious, and created no objective criteria for determining the success of the measures.

#### *The Project Description Was Inconsistent*

With respect to the project description, the court found that the EIR's project description was inadequate as a matter of law because it inconsistently and inaccurately described the project. The EIR at times stated that the project was designed to allow more flexibility in processing streams of crude oil, and at other times stated that the project would not allow processing of heavier crude oil (which results in greater emissions of pollutants). The court particularly noted that Chevron had stated in a filing with Securities and Exchange Commission that the purpose of the project was to allow the processing of heavier crude. By giving such inconsistent descriptions, the court found the EIR project description was fundamentally inadequate and misleading.

Chevron argued that expert information before the city confirmed the adequacy of the project description, The court rejected this argument, in part because the information was prepared after the EIR, and in part because the expert information confirming the project description was based on confidential information about crude oil used at the refinery, and that information was not shared with anyone else. The court held that such reliance on confidential information not shared with the public or with decisionmakers was inconsistent with CEQA's information disclosure goals.

#### *The EIR Properly Treated A Pipeline as a Separate Project*

Finally, the court ruled a hydrogen pipeline to supply excess hydrogen from the refinery to hydrogen consumers was not a part of the refinery project. The court characterized the pipeline as an independent project, proposed by different proponent, and properly considered in a separate EIR. The court rejected an argument that this constituted improper "piecemealing" or "project-chopping" under CEQA.

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As an interesting historical note, when the First District heard oral argument on this case on February 23, it was actually considering two CEQA greenhouse gas emissions cases on the same day. In the other case, *Jones v. Regents*, the court upheld an EIR against challenges based on alternatives and greenhouse gas emissions. The greenhouse gas claim was rejected on procedural grounds (petitioners failed to exhaust remedies by raising the issue during the EIR process) and that part of the *Jones* decision is unpublished. Mike Zischke observed the oral argument in *CBE v. Richmond*, and represented the Regents in the *Jones* case.

*If you have any questions regarding this alert, please contact:*

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