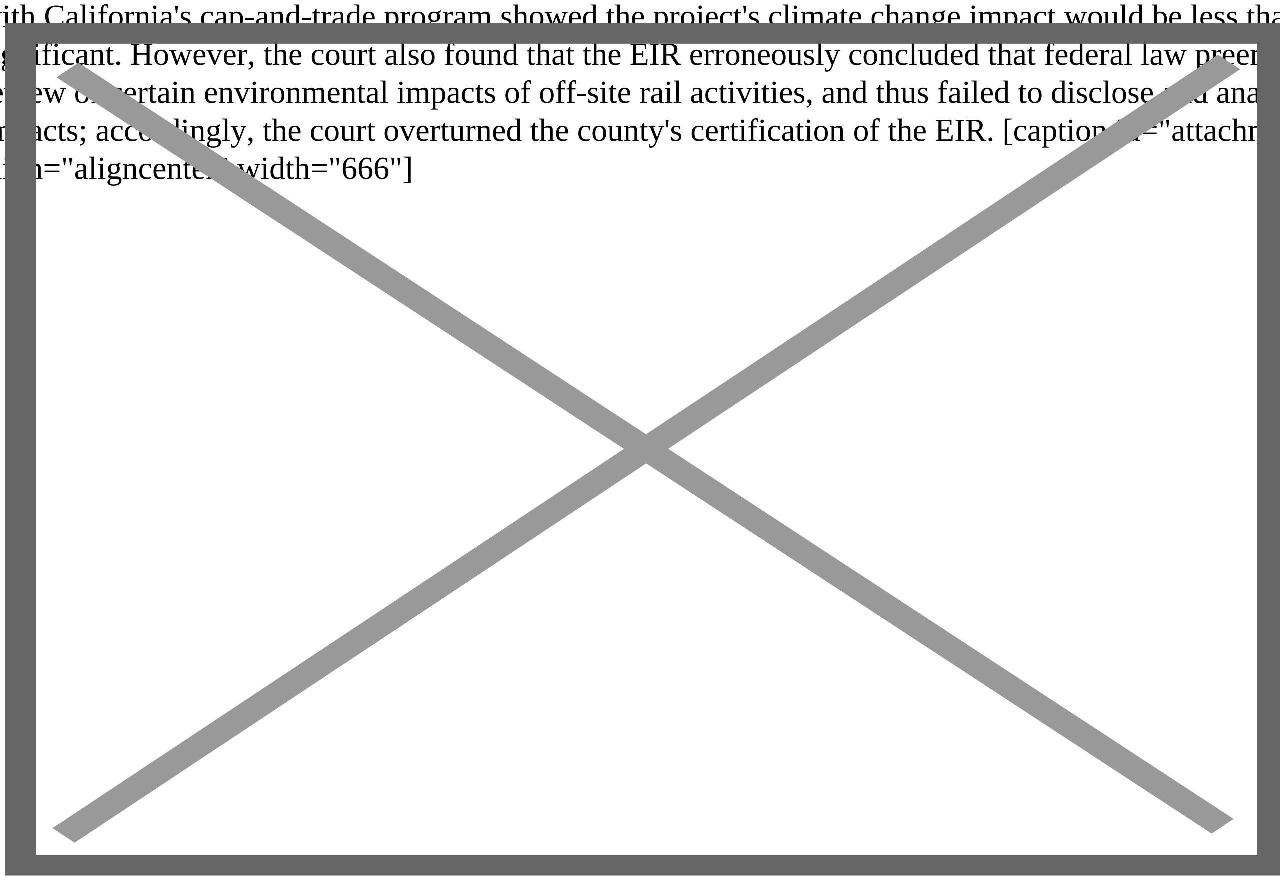
[Blogs](#)
December 29, 2017
California Land Use & Development Law Report

Court Upholds Refinery EIR's 2007 Baseline and Reliance on Cap-And-Trade for Climate Change Analysis

In a precedent-setting decision, the Fifth District Court of Appeal has upheld two key aspects of the 2014 environmental impact report for a refinery expansion project. *Association of Irritated Residents v. Kern County Board of Supervisors* No. F073892 (5th Dist., Nov. 21, 2017). First, the court approved the use of 2007 operating data for the refinery as part of the baseline environmental condition, even though the EIR's notice of preparation was not issued until 2013. Second, the court held, on a matter of first impression, that compliance with California's cap-and-trade program showed the project's climate change impact would be less than significant. However, the court also found that the EIR erroneously concluded that federal law preempted CEQA review of certain environmental impacts of off-site rail activities, and thus failed to disclose and analyze these impacts; accordingly, the court overturned the county's certification of the EIR. [caption id="attachment_5249" align="aligncenter" width="666"]



Kern County Refinery[/caption] **The Proposed Refinery Expansion** Kern County approved a project to modify an oil refinery in Bakersfield. The refinery began operation in 1932 and was operating under air district permits that allowed processing of 70,000 barrels per day of crude oil and other hydrocarbons. In 2013, the new owner of the refinery proposed modifications to enable the refinery to process a greater variety of crude oils, including Bakken crude oil from North Dakota. The project did not propose an increase in the refinery's 70,000 barrels per day capacity, but in addition to the refinery modifications, it proposed expanding existing rail transfer and storage facilities to allow offloading an average of 150,000 barrels per day from two unit trains; the balance of unloaded crude would be sent to other refineries. The project was controversial because it would increase transport of Bakken crude, which is generally more volatile than other crude oils. The EIR described safety concerns with transporting crude by rail, including reference to several high-profile train accidents in recent years. Project opponents sued, alleging the EIR violated CEQA in numerous respects. The published portion of the court of appeal's opinion addresses three of these challenges. **Substantial Evidence Supported the EIR's Use of the Last Year of Full Refinery Operations for the Project Baseline** The court first addressed the county's approach to establishing a baseline for review of the proposed project's environmental impacts. The EIR generally used a baseline of environmental conditions as of 2013, when the Notice of Preparation was issued for the project's EIR. However, to describe the baseline for refinery operations, the EIR adjusted the existing environmental conditions "to the extent necessary to reflect an operating refinery" and presented throughput data for 2007, which was the refinery's last full year of operation prior to a bankruptcy, refinery shutdown, and subsequent reduced operations that did not include crude oil processing. Petitioners challenged this deviation from CEQA's "normal" approach to establishing a project baseline. The court first upheld the county's finding that existing physical conditions included an operating refinery. Substantial evidence established that refinery operations of up to 70,000 barrels a day had been approved by permits and entitlements still in effect, and that these operations had been the subject of prior CEQA reviews. Furthermore, the refinery was entitled to begin processing crude oil again regardless of the project proposal under consideration. Second, the court addressed the county's choice of 2007 as the realistic measure of the baseline physical conditions created by the refinery's operations. It noted that the refinery's maximum permitted operation (70,000 barrels per day under existing permits) would have been an inappropriate baseline since that maximum was rarely, if ever, achieved in practice. Instead, 2007 data (60,389 barrels per day) reasonably represented actual refinery operations and was adequately presented by the county as a conservative estimate, given that the average throughput between 2001 and 2008 (when the refinery was fully operational and crude oil was being refined) was slightly higher than the 2007 number. **Cap-and-Trade Compliance Shows Project Would Not Cause Significant Climate Change Impact** Addressing a question not previously decided by any published decision, the court next addressed the EIR's conclusion that the refinery's compliance with California's cap-and-trade program demonstrated that the project would not cause a significant climate change impact. Petitioners argued that cap-and-trade allowances are merely authorizations to emit GHGs, not reductions in GHG emissions for the purpose of a CEQA significance determination. The court relied on section 15064.4(b)(3) of the CEQA Guidelines, which provides: "A lead agency should consider the following factors, among others, when assessing the significance of impacts from greenhouse gas emissions on the environment: …(3) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions…." The court then ruled that the cap-and-trade program constituted such a regulation, noting: "The idea underlying the cap-and-trade program is not that capped facilities relying on allowances will decrease their greenhouse gas emissions and help the state achieve its target, but that the limited allocation and use of allowances means they are not available for use elsewhere, which affects California's refining industry as a whole. Specifically, the use or expenditure of allowances will diminish the supply of allowances, which will cause their price to rise and incentivize investment in technologies and equipment that reduce greenhouse gas emissions." The court concluded: "Based on this industry-wide perspective, we conclude it is appropriate for a lead agency to conclude a project['s] compliance with the cap-and-trade program provides a sufficient basis for determining the impact of the project's greenhouse gas emissions will be less than significant." . **An EIR Must Disclose and Analyze the Environmental Impacts of Off-Site Rail Activities Arising from a Refinery Project, Even Though Federal Regulation Might Preempt Mitigation Measures** Finally, the court held that the EIR failed to comply with CEQA by erroneously stating that federal law preempted CEQA review of certain environmental impacts of off-site rail activities. Petitioners successfully argued that the Interstate Commerce Commission Termination Act of 1995 (ICCTA), which established the federal Surface Transportation Board in order to administer a regulatory scheme for rail carriers, does not preempt CEQA analysis of the environmental impacts of rail operations that would be caused by a refinery project. Because the disclosure and analysis of environmental impacts stemming from the project's off-site rail activities would not have burdened or interfered with these activities, the court concluded the impacts needed to have been addressed in Kern County's EIR. Petitioners acknowledged that the ICCTA might preempt Kern County's ability to impose certain mitigation measures, but argued that it would not preempt an agreement requiring the refinery owner to mitigate pollution resulting from off-site rail operations. The court directed that, on remand, Kern County should determine whether the imposition of this or other potential mitigation measures on the refinery owner (a rail carrier's customer) would indirectly impose an unreasonable burden on or interfere with rail transportation.

****

The court of appeal's opinion addresses three important issues under CEQA. First, it continues and extends the deference that courts have paid to lead agency's determinations regarding project baseline where modifications to an existing facility are proposed. Here, the court explicitly approved use of a six-year-old baseline year where that year represented the last full year of full facility operations and was consistent with average full facility operations. Second, the decision states that the EIR for a refinery, and presumably for any other facility that is subject to the cap-and-trade program, can rely on compliance with that program to conclude that the project's climate change impacts are less than significant. Third, the decision provides a useful reminder that an EIR must analyze all potentially significant direct and indirect impacts of a proposed project, even if mitigation of those impacts may be legally infeasible for reasons such as federal preemption.

Authors

Julie Jones

Partner
JJones@perkinscoie.com 415.344.7108


Christian Termyn

Counsel
CTermyn@perkinscoie.com 415.344.7018
Blog series

California Land Use & Development Law Report

California Land Use & Development Law Report offers insights into legal issues relating to development and use of land and federal, state and local permitting and approval processes. View posts by topic. Subscribe ?

View the blog