Power Plant EIR Defeated By Inadequate Responses to Commenters' Proposed Mitigation Measures

[...]s recommending additional mitigation measures has [...] *[...]asin Unified Air Pollution Control District*, 3d Dist. [...] on 12/23/2019). The court of appeal emphasized that [...]navoidable, it is not commenters' responsibility to [...] mitigation measures are feasible; instead it is the lead [...] the commenter-proposed measures are *not* feasible.

The *Covington* case arose from a labor union

challenge to a geothermal project that would use normal pentane, which is a reactive organic gas (ROG). Although the gas would be in a closed-loop piping system, some of it would leak from the valves, connections, seals, and tubes of the system. The local air district, which was the CEQA lead agency for the project, set a significance threshold of 55 pounds per day of ROG emissions, but concluded that the project would emit up to 410 pounds per day, and set that amount as the project's permit limit. Opponents commented that additional

mitigation measures were available to reduce ROG emissions. In its Final EIR, the air district rejected the commenters' proposed measures and stated that all feasible mitigation measures were already included in the EIR. The air district then approved the geothermal project and issued a statement of overriding considerations stating that the project's greenhouse gas reduction and other benefits outweighed its significant and unavoidable environmental impacts. The court of appeal first found that the EIR did not adequately respond to commenters' arguments for a stronger leak detection and repair program. Commenters claimed that stricter programs, setting a smaller leak rate to trigger repair requirements as well as specific deadlines for repair, were used for petroleum refineries and chemical plants and would be feasible for the geothermal project. Finding that the air district made no attempt to show that such measures would be infeasible for the project, the court held that the district had not met CEQA's requirement to give a good faith, reasoned analysis explaining why it was not adopting the proposed measures. Commenters also submitted evidence that low-leak or leakless technology had been used in refineries and chemical plants, and claimed that such technology would be equally feasible for a geothermal facility. The air district responded that the project included limited leakless technology such as welded connections, but that some connections could not be welded: "For example, valves would need to be flanged in case they would ever need to be replaced and instrumentation would need to be threaded to allow for calibration and/or replacement." The court held that this explanation was inadequate because it addressed only welding as a means of leakless operation and did not address other technologies cited by the commenters, such as graphite-packed control valves, bellows-sealed valves, and hermetically sealed valves and flanges. The court directed the superior court to order the air district "to provide a reasoned analysis supported by factual information in response to the mitigation measures proposed by the petitioners." In other notable sections of the opinion, the court rejected claims that the EIR's maximum fugitive emissions estimate of 410 pounds per day was unsupported and that Mono County rather than the air district was required to act as the CEQA lead agency. The *Covington* case is an important reminder that reviewing courts are willing to dig deep into the record to assess whether a lead agency has truly analyzed all suggested mitigation measures before declaring an impact to be significant and unavoidable and before issuing a statement of overriding considerations.

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