

EXHIBIT A

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OCT 19 1994

LOS ANGELES
SUPERIOR COURTSUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

RALPH ATTWOOD, JR., ROBERT W.
JOHNSTON, and UNITED ASSOCIATION
OF JOURNEYMEN AND APPRENTICES OF
THE PLUMBING AND PIPE FITTING
INDUSTRY OF THE UNITED STATES AND
CANADA, LOCAL UNION NO. 250,

Petitioners and Plaintiffs,

vs.

SOUTH COAST AIR QUALITY MANAGEMENT
DISTRICT,

Respondent and Defendant,

CHEVRON U.S.A. PRODUCTS COMPANY,

Real Party in Interest.

Case No. BC093076

[REDACTED] ORDER

This matter came on regularly for hearing before the
Court, the Honorable Diane Wayne, Presiding, on August 2,
1994. Thomas R. Adams and Ann Broadwell appeared as
attorneys for Petitioners. William B. Wong and Frances L.

1 Keeler appeared as attorneys for Respondent, the South Coast
2 Air Quality Management District. Ronald E. Van Buskirk and
3 Betsy G. Stauffer appeared as attorneys for Real Party in
4 Interest, Chevron U.S.A. Products Company. Gail Feuer and
5 Everett DeLano appeared as attorneys for amici curiae
6 Natural Resources Defense Council and Citizens for a Better
7 Environment.

8 The Court, having issued its written Tentative Ruling,
9 copy attached hereto, and having reviewed and considered the
10 record, the evidence and arguments set forth in the papers
11 submitted by counsel, and having heard and considered the
12 oral argument of counsel at the hearing, enters the
13 following order:

14 1. For the reasons given in the Tentative Ruling, the
15 matter is remanded to Respondent to set aside its certifica-
16 tion of the Environmental Impact Report (EIR) and for
17 further proceedings in accordance with CEQA and the Court's
18 Ruling to clarify who is to certify the EIR, and who (or
19 what entity) is to review and consider the EIR, as well as
20 who is to adopt the findings, statement of overriding
21 considerations and the mitigation monitoring plan for the
22 Chevron project.

23 2. Respondent shall serve and file a return
24 evidencing its compliance with this Order by October 11,
25 1994.

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1 3. Ongoing project construction and operations under
2 permits previously issued by Respondent are permitted to
3 continue pending Respondent's return to this Court.

4 IT IS SO ORDERED.

5 Dated: _____.

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The Honorable Diane Wayne
Judge of the Superior Court

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Approved as to form:

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PILLSBURY MADISON & SUTRO

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Ronald E. Van Buskirk

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Betsy G. Stauffer

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By _____

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Attorneys for
Real Party in Interest

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SOUTH COAST AIR QUALITY

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MANAGEMENT DISTRICT

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William B. Wong

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Frances L. Keeler

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By _____

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Attorneys for Respondent

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ADAMS & BROADWELL

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Thomas R. Adams

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Ann Broadwell

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By _____

Attorneys for Petitioners

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Dated: _____

The Honorable Diane Wayne
Judge of the Superior Court

Approved as to form:

PILLSBURY MADISON & SUTRO
Ronald E. Van Buskirk
Betsy G. Stauffer

12

Attorneys for
Real Party in Interest

**SOUTH COAST AIR QUALITY
MANAGEMENT DISTRICT**
William B. Wong
Frances L. Keeler

By

Attorneys for Respondent

ADAMS & BROADWELL
Thomas R. Adams
Ann Broadwell

By

Attorneys for Petitioners

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The Honorable Diane Wayne
Judge of the Superior Court

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FILLSBURY MADISON & SUTRO

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Ronald E. Van Buskirk

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Betsy G. Stauffer

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By _____

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Attorneys for
Real Party in Interest

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SOUTH COAST AIR QUALITY
MANAGEMENT DISTRICT

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William B. Wong

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Frances L. Keeler

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By *James R. Kuhn*

20

Attorneys for Respondent

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22

ADAMS & BROADWELL

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Thomas R. Adams

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Ann Broadwell

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By _____

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Attorneys for Petitioners

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5 Dated: OCT 19 1994

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10 Approved as to form:

11 HILLSBURY MADISON & SUTRO
12 Ronald E. Van Buskirk
13 Nancy G. Stauffer

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19 SOUTH COAST AIR QUALITY
20 MANAGEMENT DISTRICT
21 William H. Wong
22 Frances L. Zeiler

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27 ADAMS & BROADWELL
28 Thomas R. Adams
29 Ann Broadwell

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chevron

Tentative Ruling

ATTWOOD V. SCAQMD

Petition for Writ of Mandate: Grant

The petition for writ of mandate is granted pursuant to Public Resources Code § 21168.5 and under the substantial evidence standard of review as set forth in Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 392. ("Laurel Heights I").

Under the substantial evidence test, the court's analysis is limited to ". . . whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." Public Resources Code § 21168.5. The court "must resolve reasonable doubts in favor of the administrative findings and decision." Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 514.

The court finds that respondent ("District") did not proceed in the matter required by law. The District violated CEQA by approving the project prior to the certification of the EIR and by failing to properly consider and adopt the EIR.

A writ of mandate shall issue (1) ordering the District to set aside its certification of the EIR; and (2) remanding the matter to the District for further proceedings in accordance with CEQA and this court's ruling. However, this court specifically finds that equitable factors support the continuation of existing operations, and will as such permit such activity to continue, pending compliance with CEQA. Laurel Heights I, supra, 47 Cal.3d at 423; Public Resources Code § 21168.9. Specifically, existing operations are required for Chevron to comply "clean fuel" mandates. 1 AR 40-41.

In light of this ruling, the court does not address the

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sufficiency of the EIR itself. This ruling is not intended to validate the EIR or to prohibit any further environmental review by the District.

I. Approval of project prior to certification of the EIR.

Phase I of the project was "approved" prior to the certification of the EIR and issuance of the permits on 10/25/93.

In reviewing actions undertaken by an agency, the court "does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document." Laurel Heights I, supra, 47 Cal.3d at 392 (quoting County of Inyo v. City of Los Angeles (1977) 71 Cal.App.3d 185, 189). The court should not demand perfection but only a demonstration of an objective, good faith effort to comply. Mount Sutro Defense Committee v. Regents of Univ. of California (1978) 77 Cal.App.3d 20, 37.

The purpose of an EIR is "to identify the significant effects of a project on the environment, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided." Public Resources Code sec. 21102.1(a). The purpose of an EIR is to inform the public and governmental agencies of the environmental of a proposed project. No Oil, Inc. v. City of Los Angeles 13 Cal.3d 68, 86. The EIR must contain a meaningful discussion of both mitigation measures and project alternatives. Laurel Heights, 47 Cal.3d at 401-403.

While the EIR must indicate a good faith effort at full disclosure, it need not be perfect nor must it contain an exhaustive analysis of all issues. CEQA Guidelines section 15151; Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692. "A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." Kings County, 221 Cal.App.3d at 712 (citing Laurel Heights, 42 Cal. 3d at 403-405).

And, "Public participation is an essential part of the CEQA process." (Guide. § 15201). That process is invalidated if the project begins before comment is available. Sutter Sensible Planning v. Board 122 Cal.App.3d 813.

Reformulated gasoline projects, such as the project in the instant case, are required to comply with CEQA. Public Resources Code § 21178.1. Pursuant to CEQA, an agency must consider the final EIR prior to approval or disapproval of the project. Public Resources Code § 21061; CEQA Guidelines §§ 15004, 15089; Laurel Heights I, supra, 47 Cal.3d at 394; No Oil Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 79.

As applicable to the instant case, a "project" is "the whole

of an action, which has a potential for resulting in a physical change in the environment, directly or ultimately, and is [an] activity involving the issuance to a person of a . . . permit . . . or other entitlement for use by one or more public agencies." CEQA Guidelines § 15378(a)(3); Public Resources Code § 21065(c).

Pursuant to Public Resources Code § 21080(a), CEQA applies only to approvals of "discretionary projects," i.e., those projects which "[require] the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity," as opposed to "ministerial projects" in which the agency merely determines "whether there has been conformity with applicable statutes, ordinances, or regulations." CEQA Guidelines §§ 15357, 15268.

"Approval" is defined as a decision "which commits the agency to a definite course of action in regard to a project intended to be carried out by any person." CEQA Guidelines § 15352(a); Public Resources Code § 21151. Approval of a private project "occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary . . . permit . . . or other entitlement for use of the project." CEQA Guidelines § 15352(b). However, the precise date of approval is to be determined by the agency pursuant to its own rules and regulations. CEQA Guidelines § 15352(a).

A. Approval under District Rule 201.

District Rule 201, which governs the issuance of a Permit to Construct, provides that:

"A person shall not build, erect, install, alter or replace any equipment, the use of which may cause the issuance of air contaminants without first obtaining written authorization for such construction from the Executive Officer. A permit to construct shall remain in effect until the permit to operate the equipment for which the application was filed is granted or denied, or the application is cancelled."

According to the stipulated facts in this case, Chevron began the subject field activities in 2/93. In 7/93, Chevron sent a letter to Dr. Lentz, the District's Executive Officer, in order to confirm that certain field activities would be in compliance with Rule 201. Dr. Lentz's 7/7/93 letter confirmed that Chevron could place certain equipment in their final locations, but that Chevron could not make process or utility connections prior to issuance of a permit to construct. The Lentz letter advised that such work would be at Chevron's risk. The construction began prior to the completion of the EIR. Stip. pp. 4-9.

Dr. Lentz's letter was based upon the District's 11/17/89 written interpretation of Rule 201, whereby field activities require prior approval when equipment which could emit or control air contaminants is

"a) Beginning to be fabricated on-site or,

"b) In the case of equipment that is delivered fully fabricated, positioned in its final intended location and power and process connections to be made."

Respondent's interpretations of the statutes of which it must enforce and the corresponding rules and regulations are entitled to great weight. Dept. of Health Services v. Superior Court (1991) 232 Cal.App.3d 776; Ralph's Grocery Co. v. Reimel (1968) 69 Cal.2d 172. An agency's interpretation of its own regulations is controlling unless clearly erroneous or inconsistent with the regulation. United States v. Larionoff (1977) 431 U.S. 864; Carmona v. Div. of Industrial Safety (1975) 13 Cal.3d 303.

The court finds that the interpretation of Rule 201 is not unreasonable nor is it inconsistent with the rule. So long as the equipment at issue is pre-fabricated when positioned in its intended final location and is not connected or otherwise operative, the equipment may reasonably be considered as not under construction.

However, the stipulated facts indicate that the equipment was not all pre-fabricated and merely installed at their intended final locations, i.e., that actual construction was taking place. During the period of 8/93 to 9/93, Chevron began to erect a 170-foot reactor/regenerator structure and a 130-foot dehexanizer column, and to make modifications to the existing electrical substation. As of 10/23/93 (prior to the certification of the EIR), the estimated percentage completion for work on the project included the following: furnace work, 11 % complete; reactor/regenerator structure, 65 % complete; hydrogen net gas compressor, 14 % complete; dehexanizer column, 40 % complete; new electrical substations, 60 % complete; and modifications to existing electrical substation, 20 % complete.

Thus, the District, under its own rules, should not have permitted activity without the issuance of a Permit to Construct.

B. Approval within the meaning of CEQA.

Accordingly, this court finds that the District's action constituted an "approval" within the meaning of CEQA.

Notwithstanding Dr. Lentz's warning that Chevron would undertake field activities at its own risk, the District by its conduct committed itself to "a definite course of action." CEQA Guidelines § 15352(a); Public Resources Code § 21151. Pursuant to its own Rule 201, the District should have issued a permit in order to allow Chevron's activities to proceed.

Moreover, permission to undertake the subject project activities prior to the consideration and approval of a final EIR

is not permitted under CEQA.

"A fundamental purpose of an EIR is to provide decision makers with information they can use in deciding whether to approve a proposed project, not to inform them of the environmental effects of projects that they have already approved. If post approval environmental review were allowed, EIR's would likely become nothing more than post hoc rationalizations to support action already taken. We have expressly condemned this use of EIR's." (Emphasis original.)

Laurel Heights I, supra, 47 Cal.3d at 394 (citing No Oil, supra, 13 Cal.3d at 79).

Thus, the EIR should be prepared "as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment." CEQA Guidelines § 15004(b); Laurel Heights I, supra, 47 Cal.3d at 395. "With private projects, the Lead Agency shall encourage the project proponent to incorporate environmental considerations into project conceptualization, design and planning at the earliest feasible time." CEQA Guidelines § 15004(b)(1). The purpose for this requirement is to consider environmental problems at a time "where genuine flexibility remains". Sundstrom v. County 208 Cal.App.3d 296.

Timing of the preparation of the EIR is to be determined by the agency in accordance with the objectives of CEQA. Mount Sutro, supra, 77 Cal.App.3d at 36. Thus, in Mount Sutro, the Regents fulfilled the requirements by CEQA by coordinating at an early stage the exchange and evaluation of information between project planners and environmental consultants and eliciting and considering public comments during "this formative stage of planning and review," thereby facilitating the early identification and assessment of significant impacts to "meaningfully influence and effect changes in the proposed projects. . . ." 77 Cal.App.3d at 39.

In contrast, the project activities began well before the environmental review process was completed.¹

The District began the environmental review process in 10/92 and held a public scoping session held in 11/92. The draft EIR was not circulated until 7/31/93, and a hearing on public comment was not held until 8/23/93. 2 AR 4-48; 6 AR 37; 1 AR 3, 4. The public

¹ Cf. Stand Tall on Principles v. Shasta Union High School District (1991) 235 Cal.App.3d 772, 781. The court found that selection, as opposed to acquisition, of a project site is not an approval under CEQA because there is no commitment to a definite course of action. The site was also one of the alternative sites discussed in the EIR. Id.

comment period ended on 9/14/93 and, on 10/25/93, the EIR was certified and the permits were issued. 6 AR 111; 5 AR 1.

Field work began in 2/93 and Chevron received permission to proceed with further field work in 7/93 - prior to the circulation of the draft EIR. By 10/23/93, about 37 % of the field work had been completed and that of 135 pieces of equipment, 69 had been installed on their foundations or in steel structures. A significant portion of the project had been completed even though the EIR had not yet been certified nor were the requisite permits issued. This is clearly more than the beginning of fabrication.

The EIR is intended to analyze the direct and indirect consequences of the project. Public Resources Code § 21083(c); CEQA Guidelines §§ 15064, 15126. For example, the EIR proposed certain mitigation measures regarding traffic impacts of the project, which were rendered somewhat ineffectual by the premature approval of the project and the initiation of construction prior to the certification of the EIR. See 1 AR 160-161, 237-238.

Failure to complete environmental review of the project prior to approval deprives the process of "genuine flexibility." Sundstrom, supra, 202 Cal.App.3d at 307. Timing of the project completion itself indicates that the EIR is a "post hoc rationalization of the agency action." Id. Field activities were begun in 2/93 (8 months before certification of the EIR). As of 10/23/93, the project was 37 % complete. By 2/28/94 (3 months after certification) the project was substantially completed by 2/28/94. Decl. of Brown. The project commenced operation as of 3/9/94 (4 months after certification). Id.

III. Consideration and certification of the EIR.

It is unclear whether or not the EIR was reviewed and considered by the appropriate decision maker.

"[T]he decision-making body or administrative official having final approval authority over a project involving a substantial effect upon the environment [must] review and consider an EIR before taking action to approve or disapprove the project." Kleist v. City of Glendale (1976) 56 Cal.App.3d 770, 778 (citing former CEQA Guidelines § 15085(g), now § 15090). ". . . The requirement exists in part because 'only by this process will the public be able to determine the environmental and economic values of their elected and appointed officials'". Id. at 778 (citations omitted.)

Section 15090 provides that the lead agency is responsible for certifying that the final EIR is completed in compliance with CEQA, and that the decision-making body of the lead agency reviewed and considered the information prior to approving the project.

Section 15090 does not mention delegation of certification duties. Rather, the section gives the lead agency leeway to determine such responsibility. See Comment to CEQA Guidelines § 15090. Nonetheless, the agency may not delegate the review and consideration of a final EIR. CEQA Guidelines § 15025. Such action must be taken by the decision-making body. CEQA Guidelines § 15090.

The "decision-making body" is the person permitted by law to approve or disapprove the project. CEQA Guidelines § 15356. By District Rule, this person is Dr. Lentz, the Executive Officer. As such, it would appear that Dr. Lentz would be the person to review and consider the final EIR. However, the EIR was apparently certified by Barry Wallerstein, Deputy Executive Officer. 5 AR 1. Nowhere in his declaration does Wallerstein inform this court of his authority, delegated or actual, to certify the EIR.

Upon remand, the District should clarify who is to certify the EIR, and who (or what entity) is to review and consider the EIR, as well as who is to adopt the findings, statement of overriding considerations, and the mitigation monitoring plan.

IV. Laches and mootness.

Chevron has failed to demonstrate that the petition is barred by the doctrine of laches and is moot.

"The affirmative defense of laches requires unreasonable delay in bringing suit 'plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.'" Miller v. Eisenhower Medical Center (1980) 27 Cal.3d 614, 624 (citing Conti v. Board of Civil Service Commissioners (1969) 1 Cal.3d 351, 359).

"Prejudice is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain his burdens of proof and the production of evidence on the issue. [Citation.]" Id.

"Generally speaking, the existence of laches is a question of fact to be determined by the trial court in light of all of the applicable circumstances, and in the absence of manifest injustice or lack of substantial support in the evidence its determination will be sustained. [Citations.]" Id.

Petitioners could not have filed a CEQA challenge until after the posting of the Notice of Determination on 10/26/93. Chevron has stipulated that by 10/23/93, it had already spent \$ 13.7 million on the project. This action was timely filed and diligently brought on 11/12/93, well within the statute of limitations.

Furthermore, the court is permitting a continuation of existing operations pending the remanding of the EIR for proper attention.

Furthermore, the petition is not rendered moot. The petition specifically seeks to set aside the entire project, not just Phase I. The fact that the project is now fully operating has no effect upon the validity of the permits issued.

V. Proper remedy.

The court need not enjoin the underlying activity upon a finding that CEQA has been violated. Public Resources Code § 21168.9. In making this determination, the court must rely upon traditional equitable principles in deciding whether or not the activity should be enjoined. Laurel Heights I 47 Cal.3d at 423.

An injunction would cause substantial economic harm to Chevron and would adversely affect consumers, as well as the District's obligations under the Clean Air Act. Decl. of Brown.

Note: Thank you to all counsel. All of the briefs were clear, concise and informative.