

Association of Irrigated Residents v. Kern County Bd. of Supervisors

Court of Appeal of California, Fifth Appellate District

November 21, 2017, Opinion Filed

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Reporter

17 Cal. App. 5th 708 *; 2017 Cal. App. LEXIS 1037 **; 225 Cal. Rptr. 3d 463; 47 ELR 20152; 2017 WL 5590096

ASSOCIATION OF IRRITATED RESIDENTS et al., Plaintiffs and Appellants, v. KERN COUNTY BOARD OF SUPERVISORS et al., Defendants and Respondents; ALON USA ENERGY, INC., et al., Real Parties in Interest and Respondents.

Notice: CERTIFIED FOR PARTIAL PUBLICATION*

Prior History: [**1] APPEAL from a judgment of the Superior Court of Kern County, No. S-1500-CV-283166, Eric Bradshaw, Judge.

Counsel: Earthjustice, Elizabeth B. Forsyth, Angela Johnson Meszaros and Oscar Espino-Padron for Plaintiffs and Appellants.

Mark L. Nations, Interim County Counsel, and Charles F. Collins, Deputy County Counsel, for Defendants and Respondents.

Alston & Bird, Jocelyn Thompson, Roger A. Cerda and Maya L. Grasse for Real Parties in Interest and Respondents.

Judges: Opinion by Franson, J., with Gomes, Acting P. J., and Peña, J., concurring.

Opinion by: Franson, J.

Opinion

FRANSON, J.—Plaintiffs challenge the County of Kern's certification of an environmental impact report (EIR) and approval of a project to modify an oil refinery in Bakersfield so it can unload two unit trains (104 cars) of crude oil per day, equating to 150,000 barrels. The refinery is authorized to process 70,000 barrels of crude oil per day and the balance of unloaded crude (80,000 barrels per day) would be sent to other refineries by pipeline. A controversial aspect of the proposed project is the transportation of crude oil from the [*718] Bakken formation in North Dakota. Compared to heavier crudes, Bakken crude may be more volatile and likely to explode in the event [**2] of a rail accident.

Plaintiffs contend the *California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.)*¹ was violated because the EIR (1) erroneously used the refinery's operational volume from 2007 as the baseline instead of the conditions existing in 2013 when the notice of preparation of the EIR was published; (2) incorrectly relied upon the refinery's participation in California's cap-and-trade program to conclude the project's greenhouse gas emissions would be less than significant; and (3) underestimated and failed to fully describe the project's rail transport impacts, including the risk of a rail accident causing a release of hazardous materials and the environmental impacts of offsite

* Pursuant to *California Rules of Court, rules 8.1105(b)* and *8.1110*, this opinion is certified for publication with the exception of parts I., IV., and VI. of the Discussion.

¹ All unlabeled statutory references are to the Public Resources Code.

rail activity.

First, we conclude the EIR's choice of 2007 as the measure of an existing conditions baseline for an operating refinery (1) was supported by substantial evidence; (2) appropriately deviated from the normal baseline identified in [the guidelines of California Code of Regulations, section 15125.2 subdivision \(a\)](#) because of the refinery's history of fluctuating operations; and (3) conformed to the principles set forth by the California Supreme Court in *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310 [106 Cal. Rptr. 3d 502, 226 P.3d 985] (*Communities for a Better Environment*), a case that addressed the appropriate baseline for an oil refinery. Thus, [**3] the baseline complies with [CEQA](#).

Second, we interpret the reference in [Guidelines section 15064.4, subdivision \(b\)\(3\)](#) to “regulations ... adopted to implement a statewide ... plan for the reduction or mitigation of greenhouse gas emissions” to include California's cap-and-trade program. We also interpret [Guidelines section 15064.4](#) as authorizing a lead agency to determine that a project's greenhouse gas emissions will have a less than significant effect on the environment based on the project's compliance with the cap-and-trade program. Accordingly, we conclude the EIR's discussion of greenhouse gas emissions contains no prejudicial error.

Third, the EIR contains factual error in its description of federal railroad safety data. It erroneously used the total number of “accident/incidents” [*719] reported for a 10-year period as the number of “train accidents” (both are terms of art under the federal regulation). This error tainted the EIR's calculations of the risk of a release

of hazardous materials due to a mishap during the rail transportation of crude oil to the refinery. The error caused the EIR to underestimate the risk of a release by fivefold.

Fourth, the EIR erroneously stated federal law preempted *CEQA* review of certain environmental [**4] impacts of offsite rail activities. We conclude federal law did not prevent the EIR from disclosing and analyzing the reasonably foreseeable environmental impacts associated with offsite rail activities. Consequently, the EIR must be corrected to include a disclosure and analysis of those indirect effects of the project.

We therefore reverse the judgment and remand for further proceedings.

FACTS

Parties

Plaintiff Association of Irrigated Residents alleges it is a California nonprofit corporation formed in 1991 and based in Kern County, where some of its members reside. It alleges it was formed to advocate for clean air and environmental justice in San Joaquin Valley communities.

Plaintiff Center for Biological Diversity alleges it is a nonprofit corporation with offices throughout California and the United States. It alleges it is actively involved in environmental protection issues throughout North America and has 50,000 members, some of whom reside in Kern County.

Plaintiff Sierra Club alleges it is a national nonprofit organization of approximately 600,000 members. Sierra Club alleges it has approximately 600 members in Kern County and many more along the railway used to transport crude [**5] oil to the project site in Bakersfield.

Defendant Kern County Planning and Community Development Department is the lead agency that conducted the environmental review of the project.

²“Guidelines” refers to the regulations promulgated to implement CEQA, which are set forth in California Code of Regulations, title 14, section 15000 et seq. (See Pub. Resources Code, § 21083, subs. (a), (f) [“Office of Planning and Research shall prepare and develop proposed guidelines” and “Secretary of the Resources Agency shall certify and adopt guidelines”].)

Defendant Kern County Board of Supervisors is the decisionmaking body that certified the EIR and approved the project. Defendants are referred to collectively as “County.”

Real party in interest Alon USA Energy, Inc., is a Delaware corporation headquartered in Texas. It is an independent refiner and marketer of petroleum products and the parent company of real party in interest Paramount [*720] Petroleum Corporation, a Delaware corporation. Paramount Petroleum Corporation is the applicant for, and the recipient of, the approvals that are the subject of this litigation. Real parties in interest are referred to collectively as “Alon USA.”

The Refinery

Alon USA named its proposal the “Alon Bakersfield Refinery Crude Flexibility Project” and its purpose is to allow greater flexibility for the existing refinery to process a variety of crude oils onsite. The refinery is located at 6451 Rosedale Highway, northwest of the City of Bakersfield. The site has been the location of a petroleum refinery since 1932. The [*6] refinery is capable of producing gas oil, gasoline, diesel fuel and petroleum coke. The existing refinery includes units for crude distillation, delayed cooking, hydrocracking, catalytic reforming, and ancillary and support facilities. Those facilities include steam boilers, process heaters, cooling towers, storage tanks, interconnecting pipelines, and a terminal with truck and rail loading facilities.

The refinery has current environmental permits, including permits to operate from the San Joaquin Valley Air Pollution Control District (Air District). The refinery has a maximum rated crude processing capacity of 70,000 barrels per day. The proposed project would not increase that capacity.

Various companies have owned and operated the refinery since 1932. In the 1980's Texaco acquired the refinery and two neighboring facilities, integrated them into a single plant, and brought the

refining capacity up to 70,000 barrels per day. In 2000, Shell Oil became the sole owner of the refinery. In November 2003, Shell Oil announced it planned to close the refinery. In March 2005, Shell Oil sold the plant to Flying J Inc., which operated the refinery through a subsidiary. As a result of financial [**7] issues unrelated to the refinery, Flying J Inc. and its subsidiary declared bankruptcy on December 21, 2008, and, a week later, the refinery was shut down.

In June 2010, Alon USA purchased the refinery through the bankruptcy. Twelve months later, Alon USA resumed some refining operations, processing gas oil transported via rail and truck from its refinery located in Paramount, California. When the Paramount refinery suspended production, the refinery in Bakersfield stopped its refining operations, but continued other operations and activities. Those continuing activities included managing inventory, blending and marketing fuels, and functioning as a terminal for crude oil and finished petroleum products. The foregoing history is relevant to the issue of the project's baseline and what level of refining operations, if any, may be included in the baseline used to analyze the project's environmental effects.

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The Project

The project involves: (1) the expansion of existing rail, transfer and storage facilities; (2) the construction of process unit upgrades and modifications; (3) repurposing existing storage tanks; and (4) the relocation and modernization of an existing liquid propane gas truck [**8] rack and upgrades to a sales rack. The expansion includes construction of a double rail loop from a new onsite spur connected to the BNSF Railway and the addition of up to three new boilers. The EIR estimates the construction phase of the project would last approximately 10 months.

The new unloading facilities would allow offloading of crude oil from railcars. The new

facilities would receive and unload two unit trains (104 cars) within a 24-hour period under normal operating conditions. Based on the maximum capacity for tank cars, the modified facility would be able to offload an average of 150,000 barrels per day. The crude oil delivered by unit train would be transferred into the refinery for processing (up to 70,000 barrels per day) or into the existing pipeline network for transfer to other refineries.

The expanded train facilities would increase the plant's potential to receive crude oil from the Bakken formation in northwestern North Dakota. Bakken crude oil generally is more volatile than other crude oils. The draft EIR described the safety concerns raised by transporting Bakken crude by rail and listed five major train accidents and derailments in the year preceding the release [**9] of the draft EIR.³ The most notable accident involving Bakken crude oil occurred in Lac-Megantic, Quebec, in July 2013, when 60 tank cars exploded and killed 47 people.

CEQA Review

On September 19, 2013, County published a notice of preparation of a draft EIR, which triggered a “scoping” process that involved soliciting the views of various public agencies about the scope and content of the environmental information relevant to each agency's statutory responsibilities. The notice also announced the date and location of a scoping meeting for responsible agencies and the public. County used the comments received during the review period in preparing the draft EIR. Normally, the physical environmental conditions existing when the notice is published constitute the project's baseline. (Guidelines, § 15125, subd. (a).) [**722]

³ Exhibit Q to plaintiffs' counsel's July 7, 2014, comment letter was an 18-page document titled “Oil by Rail Safety in California, Preliminary Findings and Recommendations,” which was prepared by the State of California's Interagency Rail Safety Working Group and dated June 10, 2014. The document identified the Tehachapi Pass to Bakersfield as a high-hazard area for derailment.

County prepared a draft EIR and circulated it for public review from May 22 to July 7, 2014. In a letter dated July 7, 2014, counsel for plaintiffs submitted written comments on the draft EIR. The letter was accompanied by 37 exhibits designated A through KK, which contained over 4,000 pages. After the comment period expired, County prepared written responses to the comments received from the public [**10] and responsible agencies. The written responses constitute chapter 7 of the final EIR and were made available to County's board of supervisors in late August 2014.

On September 9, 2014, County's board of supervisors held a public hearing in connection with its consideration of the project and the EIR. The board of supervisors allocated 30 minutes for attendees who wished to speak in favor of the proposal and 30 minutes for those who wished to speak against it. At the end of the public hearing the board of supervisors unanimously passed a resolution approving the requested zoning modifications, adopting findings pursuant to CEQA and the Guidelines, and determining the EIR complied with CEQA and was complete and adequate in scope.

The day after the public hearing, County filed a notice of determination with the county clerk. The notice stated County had approved the project and certified the EIR. The filing of the notice and its posting by the county clerk commenced the running of a 30-day statute of limitations for filing a CEQA lawsuit. (Pub. Resources Code, § 21167, subd. (e); Guidelines, § 15094, subd. (g).)

PROCEEDINGS

In October 2014, plaintiffs filed a verified petition for writ of mandate against County that alleged CEQA violations involving [**11] (1) the use of an improper baseline reflecting conditions in 2007, (2) an inaccurate project description, (3) a failure to adequately disclose the project's significant environmental effects, (4) a failure to provide

information upon which conclusions were based, and (5) a failure to discuss and adopt mitigation measures. About a week later, plaintiffs filed a first amended petition for writ of mandate, which alleged the same five [CEQA](#) violations and which is the operative pleading in this appeal. The amended pleading referred to “Alon USA Energy, Inc.,” instead of “Alon U.S.A.”

On December 18, 2015, and February 5, 2016, the trial court held hearings on the petition. On April 1, 2016, the court issued a minute order and ruling denying plaintiffs' petition. Later that month, a final judgment denying writ of mandate was entered. In June 2016, plaintiffs filed a notice of appeal.

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DISCUSSION

I. *Standard of Review** [NOT CERTIFIED FOR PUBLICATION]

II. *Baseline For Project's Air Pollution Impacts*

A. *Contentions of the Parties*

Plaintiffs contend County failed to proceed in the manner required by law when it chose 2007 as the baseline for the refinery's air pollution emissions instead of the conditions [**12] that existed in 2013 when County published the notice of preparation.⁴ Plaintiffs rely on [Guidelines section 15125, subdivision \(a\)](#) and argue the physical conditions existing when the notice of preparation is published normally constitute the baseline and that norm should have been used in this case. Plaintiffs argue County's use of a 2007 baseline for

air pollution emissions was gamesmanship designed to conceal or understate the project's air pollution emissions and did not improve the informational value of the EIR to decision makers and the public.

County contends its choice of the 2007 baseline is supported by substantial evidence and relevant case law. County argues it had to resolve the question of what the existing refinery contributed to the project's baseline. County asserts the 2007 baseline brings the project's impacts into focus and avoids confusing (1) the impacts resulting from the changes caused by the project with (2) impacts resulting from operating the existing refinery—operations that already are approved. In simplified terms, County contends: (1) the existing conditions include a refinery with a history of actual operations pursuant to governmental authorizations entitling it to process up to [**13] 70,000 barrels of crude oil per day; (2) the history of actual operations should be reflected in the baseline; and (3) the actual operations from 2007 provide a reasonable measurement of the refinery's historical operations. We agree with these contentions and conclude the baseline chosen did not violate [CEQA](#).

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B. *Legal Principles*

1. *General Principles Relating to Baseline Selection*

(1) The purpose of an EIR is to identify the project's *significant* effects on the environment and indicate the manner in which those significant effects can be mitigated or avoided. ([§ 21002.1, subd. \(a\)](#).) [CEQA](#) considers this information to be part of the public disclosure intended to be “meaningful and useful to decisionmakers and to the public.” ([§ 21003, subd. \(b\)](#); see [§ 21002.1, subd. \(e\)](#).)

(2) “To decide whether a given project's environmental effects are likely to be *significant*, the agency must use some measure of the environment's state absent the project, a measure

* See footnote, *ante*, page 708.

⁴ A notice of preparation is a brief notice sent by the lead agency to (1) notify responsible agencies that the lead agency plans to prepare an EIR for the project and (2) solicit guidance from those agencies as to the scope and content of environmental information included in the EIR. ([Guidelines, § 15375](#); see [Guidelines, § 15103](#) [response to notice of preparation].) The contents of a notice of preparation are described in [Guidelines section 15082](#) and a sample notice is provided in appendix I of the Guidelines.

sometimes referred to as the ‘baseline’ for environmental analysis.” (*Communities for a Better Environment, supra*, 48 Cal.4th at p. 315, italics added.) The baseline used in an EIR “delineate[s] environmental conditions prevailing absent the project” and it is these conditions “against which predicted effects can be described and quantified.” (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 447 [160 Cal. Rptr. 3d 1, 304 P.3d 499] (*Neighbors for Smart Rail*)). More [**14] specifically, the potential physical changes to the environment generally are “identified by comparing existing physical conditions [(i.e., the baseline)] with the physical conditions that are predicted to exist at a later point in time, after the proposed activity has been implemented. [Citation.] The difference between these two sets of physical conditions is the relevant physical change” to the environment, part of which may be allocated to the project and part of which may be allocated to other causes. (*Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, 289 [41 Cal. Rptr. 3d 420], fn. omitted.) After the project's predicted environmental effects have been quantified, the agency then determines whether those environmental effects are “significant” for purposes of [CEQA](#). Thus, the baseline is a fundamental component of the analysis used to determine whether a proposed project may cause environmental effects and, if so, whether those effects are significant.

2. Specific Text of the Statute and Guidelines

(3) [CEQA](#) does not use or define the term “baseline.” Nevertheless, the idea of a baseline is embedded in [CEQA](#)'s definition of the environment. “‘Environment’ means the *physical conditions which exist within the area which will be affected by a proposed project ...* .” ([Pub. Resources Code, § 21060.5](#), italics added; [**15] see [Guidelines, § 15360](#) [regulatory definition of “environment”].) The importance of existing physical conditions is repeated in [CEQA](#) provisions addressing the preparation of an EIR by state and local [*725]

agencies. For instance, when such agencies prepare an EIR, “any significant effect on the environment shall be limited to substantial, or potentially substantial, adverse changes in *physical conditions which exist within the area.*” ([§ 21100, subd. \(d\)](#), italics added; see [§ 21151, subd. \(b\)](#).) These references to physical conditions that exist provide the statutory foundation for the Guidelines provision that uses the term “baseline.” [Guidelines section 15125, subdivision \(a\)](#) provides in part: “An EIR must include a description of the *physical environmental conditions* in the vicinity of the project, as they *exist* at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will *normally* constitute the *baseline* physical conditions by which a lead agency determines whether an impact is significant.” (Italics added.)

(4) In sum, the text of [CEQA](#) and the Guidelines identify *existing* conditions as the starting point (i.e., [**16] baseline) for determining and quantifying the proposed project's changes to the environment. Furthermore, the Guidelines amplify the statutory text by specifying the point in time normally used to identify existing physical conditions.⁵

3. Baseline for a Petroleum Refinery

The application of the provisions from [CEQA](#) and the Guidelines relating to baselines is relatively simple in this case because the California Supreme

⁵ The regulatory term “normally” and the point-in-time references are repeated in [Guidelines section 15126.2, subdivision \(a\)](#), which states: “In assessing the impact of a proposed project on the environment, the lead agency should *normally* limit its examination to changes in the existing *physical conditions* in the affected area as they *exist* at the time the notice of preparation is published, or where no notice of preparation is published, at the time environmental analysis is commenced.” (Italics added.) This regulatory text takes the mandatory phrase “shall be limited” used in [Public Resources Code sections 21100, subdivision \(d\)](#) and [21151, subdivision \(b\)](#) and changes it to “should normally limit” and adds point-in-time references that do not appear in CEQA. (See [Guidelines, § 15005, subd. \(b\)](#) [definition of “[s]hould”].)

Court has discussed the appropriate baseline for a project involving modification to a petroleum refinery. In *Communities for a Better Environment, supra*, 48 Cal.4th 310, ConocoPhillips proposed modifying the refinery to enable it to produce ultralow sulfur diesel fuel. (*Id. at p. 316.*) The plans “involved replacing or modifying hydrotreater reactors, a cooling tower, storage tank, and compressor; installing new pipelines and pumps; and substantially increasing operation of the existing cogeneration plant and four boilers, which provide steam for refinery operations.” (*Id. at p. 317.*) ConocoPhillips had permits to operate the cogeneration plant and boiler and those permits specified the maximum rate of heat production for each piece of equipment. (*Id. at pp. 317–318.*)

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ConocoPhillips applied to the regional air quality management district for [*17] a permit to construct the proposed modifications to its refinery. (*Communities for a Better Environment, supra*, 48 Cal.4th at p. 317.) The district approved the permits after concluding in a negative declaration that (1) the proposed project would cause increased operation of the steam generating equipment; (2) the increased steam generation and other new activities would create additional nitrogen oxide (NOx) emissions; and (3) the proposed project could not have a significant effect on the environment because the increase in NOx emissions from the increased operation of the existing steam generation equipment were not attributable to the project because those operations did not exceed the maximum rate of heat production allowed under the existing permit. (*Id. at p. 318.*) Restated using the concept of a baseline, “the District treated any additional NOx emissions stemming from increased plant operations within previously permitted levels as part of the baseline measurement for environmental review, rather than as part of the proposed Diesel Project.” (*Ibid.*)

(5) The district's choice of the existing maximum permitted operations as the baseline was rejected by the Supreme Court. (*Communities for a Better*

Environment, supra, 48 Cal.4th at p. 316 [district abused its discretion by comparing project's effects “to a baseline of maximum permitted capacity”].) [*18] The court relied on [Guidelines section 15125](#) and [CEQA](#) case law for the principle that the baseline for an agency's primary environmental analysis under [CEQA](#) must ordinarily be the *actually* existing physical conditions rather than *hypothetical* conditions that could have existed under applicable permits or regulations. (*Communities for a Better Environment, supra*, at pp. 320–322.) Applying this principle, the court determined the air pollution effects of the proposal to modify the petroleum refinery's operations were to be measured against the existing emission levels, rather than against the levels that would have existed had all the refinery's boilers operated simultaneously at their maximum permitted capacities. (*Id. at pp. 322–327.*) Thus, the Supreme Court concluded the district used an erroneous baseline.

(6) The Supreme Court did not take the further step of identifying the baseline that was required to be used. Instead, the court stated: “We leave for the District on remand, however, to resolve exactly how the existing physical conditions—assertedly subject to operational variation over time—should be measured.” (*Communities for a Better Environment, supra*, 48 Cal.4th at p. 316.) The court reiterated that it would “not attempt here to answer any technical questions as to how existing refinery operations should be measured for baseline purposes [*19] in this case or how similar baseline conditions should be measured in future cases.” (*Id. at p. 327.*) Nevertheless, the court addressed the problem of defining an existing conditions baseline in circumstances where the existing conditions themselves change or fluctuate over time, as ConocoPhillip's refinery operations and emissions had. ([*727] *Id. at pp. 327–328.*) “A temporary lull or spike in operations that happens to occur at the time environmental review for a new project begins should not depress or elevate the baseline” (*Id. at p. 328.*) The court concluded that despite the Guidelines' reference to “the time

the notice of preparation is published, or if no notice of preparation is published, ... the time environmental analysis is commenced” (*Guidelines, § 15125, subd. (a)*), “[n]either *CEQA* nor the *CEQA* Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all *CEQA* factual determinations, for support by substantial evidence” (*Communities for a Better Environment, supra, at p. 328*).

The foregoing sentence sets forth the legal principle applicable to the parties' [**20] dispute about how the existing physical conditions should be measured. Consequently, we consider whether substantial evidence supports County's finding that existing physical conditions are realistically measured by the volume the refinery processed in 2007.

4. *EIR's Discussion of the Choice of Baseline*

Section 3.3.2 of the EIR is labeled “Baseline/Existing Environmental Setting.” That section provides a history of the refinery and its operations from 1932 to the present and then states: “Here, the refinery was established over 80 years ago, and environmental review has been conducted for numerous upgrades and modifications since the adoption of *CEQA*. The refinery has temporarily suspended most refining operations, but the new owner has consistently stated its intention to continue refining at the site. To bring the project impacts into clearest focus and avoid confusing the impacts of project changes with the operation of the existing refinery, the baseline for purposes of environmental review is considered to be the physical environmental conditions as of 2013, adjusted where necessary to include refinery operations and related activities in 2007.”

The EIR reiterates that it “generally uses a baseline consisting [**21] of the physical environmental conditions as of September 19, 2013, the date the

Notice of Preparation (NOP) was issued for the project, adjusted to the extent necessary to reflect an operating refinery.” The operating refinery is represented in the EIR by data from 2007 (where available), which was the last full year of operations.

The draft EIR supports the choice of 2007 as representing the existing refinery operations by providing data for the refinery's throughput for 12 years (2001 to 2012, inclusive) in table 3-3. Average barrels per calendar day were:

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 [Go to table 1](#)

These figures combine crude oil and other hydrocarbons. In 2011 and 2012, there was no crude oil refined at the existing refinery. The figures for those years reflect the further refining of gas oil received from the Paramount refinery.

The EIR states the refinery is capable of processing 70,000 barrels per day and asserts a baseline of the 60,389 average barrels per day from 2007 is conservative. The EIR also states it was reasonable to include the operating refinery in the baseline [**22] because many aspects of the refinery and its operations were reviewed in prior *CEQA* documents. Those *CEQA* documents were summarized in table 3-4 of the EIR.

5. *Substantial Evidence Supports the Choice of Baseline*

Our analysis of County's treatment of the baseline question breaks the County's approach into two factual components. The first inquiry considers the basic question of whether County has a sufficient evidentiary basis for finding existing conditions included an *operating* refinery. If that finding is upheld, the second inquiry addresses whether substantial evidence supports County's choice of 2007 as a *realistic measure* of the baseline physical conditions created by the refinery's operations.

We conclude substantial evidence supports County's finding that existing physical conditions

included an operating refinery, despite the fact the operations were shut down shortly after Flying J and its subsidiary filed bankruptcy in December 2008. First, the evidence establishes that refinery operations of up to 70,000 barrels per day have been approved by the issuance of permits or other entitlements that are still in effect. Second, information in the EIR, including table 3-3, shows the [**23] refinery actually processed crude oil and other hydrocarbons until the bankruptcy filing of [*729] Flying J and its subsidiary in December 2008, and the processing of other hydrocarbons (i.e., gas oil) resumed in 2011 and continued in 2012. Third, as demonstrated by table 3-4 in the EIR, the refinery operations have been subject to prior environmental reviews under CEQA. Fourth, the processing of crude oil at the refinery could begin again without the approval of the project currently being proposed by Alon USA. These facts provide sufficient support for finding that existing conditions included an operating refinery and, therefore, an operating refinery was properly included in the project's baseline.

Our second factual inquiry considers whether County's choice of the figure from 2007 as the baseline is supported by substantial evidence. We conclude substantial evidence supports that choice. First, the 2007 figure reflects operations of the refinery that actually occurred. The figure is not hypothetical and it is not the maximum authorized by existing permits. Use of the maximum of 70,000 barrels per day would have been inappropriate because that level was not achieved in any of the years [**24] from 2001 through 2012 and *Communities for a Better Environment* rejected using the maximum permitted amounts in a baseline where that maximum was rarely, if ever, reached. Second, the evidence shows the 2007 figure was a reasonable representation of the operations actually performed at the refinery. Although the EIR does not calculate the average barrels per day for the period from 2001 through 2008 when crude oil was being refined, we calculate that average as 60,994 barrels per day, which is 605 barrels per day *more* than the 2007

figure. The comparison of this overall average to the 2007 figure leads us to conclude the 2007 figure was a reasonable estimate of the operations that actually existed. Furthermore, the EIR did not misrepresent the facts or mislead the public by stating its use of the 2007 figure was conservative because the 2007 figure is slightly less than the overall average.

The foregoing analysis and conclusions are compatible with *North County Advocates v. City of Carlsbad* (2015) 241 Cal.App.4th 94 [193 Cal. Rptr. 3d 360], a case addressing the appropriate baseline for the traffic analysis performed in connection with proposed renovations of a shopping center. (*Id. at p. 97.*) The project's EIR adopted a traffic baseline that treated a large retail store as being fully [**25] occupied, even though it was vacated in 2006 and had been only periodically occupied since. (*Ibid.*) The appellate court upheld the lead agency's determination of the traffic baseline, concluding substantial evidence supported the determination because “it was based on recent historical use and was consistent with [project applicant's] right to fully occupy the [retail] space without further discretionary approvals.” (*Ibid.*)

In summary, County did not abuse its discretion when it chose the operating volume from 2007 to measure for the existing physical conditions created by the operation of the refinery.

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6. Test for a Future Conditions Baseline Does Not Apply

Plaintiffs contend all deviations from CEQA's normal baseline—that is, existing conditions at the time the notice of preparation is published—must be supported by a demonstration in the EIR that analyzing project impacts under the normal baseline would be “misleading or without informational value.” (*Neighbors for Smart Rail, supra, 57 Cal.4th at p. 457.*) Plaintiffs acknowledge that *Neighbors for Smart Rail* involved an agency's selection of environmental conditions *projected to*

occur in the future and argue “the rationale and holding of the case are phrased broadly, and thus apply to [**26] all agency decisions to deviate from CEQA's normal existing conditions baseline.” We disagree with plaintiffs' broad interpretation of *Neighbors for Smart Rail*. We interpret that case as applying only to baselines that use hypothetical future conditions. Consequently, we conclude its principles do not apply to an agency's decision about *how to measure existing conditions* when the activity creating those conditions has fluctuated.

(7) In our view, the use of an existing conditions baseline is fundamentally different from the use of a hypothetical set of physical conditions that might exist in the future. Existing physical conditions are referred to in [CEQA's](#) statutory text. (§§ [21060.5](#), [21100](#), *subd. (d)*, [21151](#), *subd. (b)*.) In contrast, a comparison based on hypothetical future conditions is not mentioned in [CEQA](#). Similarly, the Guidelines state existing physical conditions at the time the notice of preparation is published are the normal baseline and make no reference to the use of hypothetical future conditions. In light of the statutory and regulatory text, it made sense for the Supreme Court to adopt a strict test for determining the propriety of deviating from an existing conditions baseline in favor of a baseline that uses [**27] hypothetical future conditions.

(8) Furthermore, the court adopted language in *Neighbors for Smart Rail* that acknowledges this distinction: “Projected future conditions may be used as the sole baseline for impacts analysis if their use in place of measured existing conditions—a departure from the norm stated in [Guidelines section 15125\(a\)](#)—is justified by unusual aspects of the project or the surrounding conditions. That the future conditions analysis would be informative is insufficient, but an agency does have discretion to completely omit an analysis of impacts on existing conditions when inclusion of such an analysis would detract from an EIR's effectiveness as an informational document, either because an analysis based on existing conditions would be uninformative or because it would be misleading to

decision makers and the public.” (*Neighbors for Smart Rail*, *supra*, 57 Cal.4th at pp. 451–452.)

This quoted language clearly shows the court intended a *future conditions* baseline to be subject to a more rigorous judicial scrutiny than the scrutiny [**31] applied to the choice of measurement for an *existing conditions* baseline, a choice that is a factual finding reviewed under the substantial evidence standard. (*Communities for a Better Environment*, *supra*, 48 Cal.4th at p. 328.)

(9) We note that there are two basic ways to deviate from the [**28] existing conditions baseline normally used. First, a future conditions baseline could be used. In that case, the standards set forth in *Neighbors for Smart Rail* must be satisfied. Second, an existing conditions baseline could deviate from the norm identified in [Guidelines section 15125, subdivision \(a\)](#) by measuring existing physical conditions *at a time other than when the notice of preparation is published*. This second deviation is easily distinguished from the first type because it still measures conditions that actually existed and does not utilize hypothetical conditions. In short, the stricter principles applied to future (i.e., hypothetical) conditions baselines are not needed when a baseline using actual conditions *at a time other than the publication of the notice of preparation* is used to address “the problem of defining an existing conditions baseline in circumstances where the existing conditions themselves change or fluctuate over time.” (*Neighbors for Smart Rail*, *supra*, 57 Cal.4th at p. 449.) In the latter situation, the principles set forth in *Communities for a Better Environment* establish the substantial evidence standard as the applicable standard of judicial review. If the Supreme Court had intended to change that aspect of its decision in *Communities* [**29] *for a Better Environment*, it would have stated it was modifying its earlier decision. Therefore, we reject plaintiffs' argument that the principles adopted in *Neighbors for Smart Rail* for future conditions baselines apply to County's choice of the 2007 figure to measure the refinery's existing conditions baseline.

III. Greenhouse Gas Emissions

A. General Information About Greenhouse Gases

Greenhouse gases absorb infrared radiation and trap the heat in the Earth's atmosphere, rather than allowing the radiation to escape into space. The most prevalent greenhouse gases are water vapor, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. The capacity of each gas to retain heat varies. To ease comparison, emissions of greenhouse gases are converted into a carbon dioxide equivalent (CO

2e),⁶ which is the amount of carbon dioxide that would have the same global warming potential as the emissions of that particular greenhouse gas.

[*732]

Fossil fuel combustion is the source of the vast majority of the United States' greenhouse gas emissions. In 2011, total greenhouse gas emissions in the United States were 6,702 million metric tons of CO

2e, which is down [**30] from the peak of 7,263 million metric tons in 2007. In 2010, California produced 452 million metric tons of CO

2e. The transportation sector was the largest contributor to California's greenhouse gas emissions, producing 38 percent of the state's total. Electrical generation produced 21 percent.

B. Regulatory Background

1. Supreme Court Decisions

Two recent decisions of the California Supreme Court provide overviews of California's regulatory scheme addressing greenhouse gas emissions for the purpose of slowing climate change. ([Cleveland National Forest Foundation v. San Diego Assn. of](#)

[Governments](#) (2017) 3 Cal.5th 497, 504–507 [220 Cal. Rptr. 3d 294, 397 P.3d 989] (Cleveland) [pt. I.]; [Center for Biological Diversity v. Department of Fish & Wildlife](#) (2015) 62 Cal.4th 204, 215–217 [195 Cal. Rptr. 3d 247, 361 P.3d 342] (Center for Biological Diversity) [pt. II.A.1.]) Among other things, the overviews describe provisions of the California Global Warming Solutions Act of 2006 ([Health & Saf. Code, § 38500 et seq.](#)) and the climate change scoping plan prepared by the State Air Resources Board (CARB). ([Cleveland, supra, at p. 505](#); [Center for Biological Diversity, supra, at pp. 215–216.](#))

(10) In [Center for Biological Diversity](#), the court explained some of the difficulties inherent in determining whether a project's greenhouse gas emissions will have a significant adverse effect on the environment. ([Center for Biological Diversity, supra, 62 Cal.4th at p. 219.](#)) “First, because of the global scale of climate change, any one project's contribution is unlikely to be significant by itself. The challenge for [CEQA](#) purposes is to determine [**31] whether the impact of the project's emissions of greenhouse gases is *cumulatively* considerable, in the sense that ‘the incremental effects of [the] individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.’” (*Ibid.*, quoting [§ 21083, subd. \(b\)\(2\).](#)) “Second, the global scope of climate change and the fact that carbon dioxide and other greenhouse gases, once released into the atmosphere, are not contained in the local area of their emission means that the impacts to be evaluated are also global rather than local.” ([Center for Biological Diversity, supra, at pp. 219–220.](#))

The principal statutory and regulatory provisions governing [CEQA](#) analysis of greenhouse gas emissions are [Public Resources Code section 21083.05](#) and [Guidelines section 15064.4.](#) ([*733] [Center for Biological Diversity, supra, 62 Cal.4th at p. 219.](#)) We take up the description of the regulatory scheme by quoting the text of those

⁶“CO

2e” is defined by regulation to mean “the number of metric tons of [carbon dioxide] emissions with the same global warming potential as one metric ton of another greenhouse gas.” ([Cal. Code Regs., tit. 17, § 95802, subd. \(a\).](#))

provisions and then summarize California's cap-and-trade program.

2. *Section 21083.05*

In 2007, the Legislature amended [CEQA](#) to address greenhouse gas emissions by requiring the preparation, adoption and periodic update of guidelines for mitigation of greenhouse gas impacts. (Stats. 2007, ch. 185, § 1, p. 2330, adding § 21083.05.) The present version of *section 21083.05* provides in full: “The Office of Planning and [**32] Research and the Natural Resources Agency shall periodically update the guidelines for the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions as required by [[CEQA](#)], including, but not limited to, effects associated with transportation or energy consumption, to incorporate new information or criteria established by the State Air Resources Board pursuant to [the California Global Warming Solutions Act of 2006].”

3. [Guidelines Section 15064.4](#)

In 2010, the Natural Resources Agency complied with the legislative directive and promulgated a guideline under CEQA for assessing the significance of greenhouse gas emissions impacts. (*Cleveland, supra, 3 Cal.5th at p. 512.*) [Guidelines section 15064.4, subdivision \(a\)](#) provides:

“The determination of the significance of greenhouse gas emissions calls for a careful judgment by the lead agency consistent with the provisions in [section 15064](#). A lead agency should make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project. A lead agency shall have discretion to determine, in the context of a particular project, whether to:

“(1) Use a model or methodology to quantify greenhouse gas emissions resulting [**33] from a project, and which model or methodology to use. The lead agency has discretion to select the model

or methodology it considers most appropriate provided it supports its decision with substantial evidence. The lead agency should explain the limitations of the particular model or methodology selected for use; and/or

“(2) Rely on a qualitative analysis or performance based standards.”

[Subdivision \(b\) of Guidelines section 15064.4](#) provides a nonexclusive list of factors a lead agency should consider when assessing the environmental [*734] significance of the project's impacts from greenhouse gas emissions: “(1) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting; [¶] (2) Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project[;] [¶] (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 last factor listed is relevant in this case because County's assessment of the significance of the impacts of the project's greenhouse gas [**34] emissions relied on the project's compliance with the cap-and-trade program. We conclude the cap-and-trade program consists of “regulations ... adopted to implement a statewide ... plan for the reduction or mitigation of greenhouse gas emissions” as that phrase is used in [Guidelines section 15064.4, subdivision \(b\)\(3\)](#), and was properly considered by County in its evaluation, preparation, and approval of the EIR. (See [Cal. Code Regs., tit. 17, §§ 95801–96022](#) [cap-and-trade program].)

4. *Cap-and-trade Regulations*

As required by the California Global Warming Solutions Act of 2006, CARB pursued a number of strategies for reducing greenhouse gas emissions. One of those strategies was a cap-and-trade program, which CARB implemented by

promulgating regulations in 2011. (*Cal. Code Regs., tit. 17, §§ 95801–96022*; see *Association of Irrigated Residents v. State Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1498, fn. 6 [143 Cal. Rptr. 3d 65] [summary of the cap-and-trade program].) The express regulatory purpose was “to reduce emissions of greenhouse gases associated with entities identified in this article through the establishment, administration, and enforcement of the California Greenhouse Gas Cap-and-Trade Program by applying an aggregate greenhouse gas allowance budget on covered entities and providing a trading mechanism for compliance instruments.” (*Cal. Code Regs., tit. 17, § 95801.*)

“Compliance Instrument” is defined as an “allowance” or [**35] “offset” issued by CARB or by an external trading system to which California's cap-and-trade program has been linked pursuant to the regulations. (*Cal. Code Regs., tit. 17, § 95802, subd. (a).*) “Allowance” is a limited tradable authorization to emit up to one metric ton of CO

2e. (*Cal. Code Regs., tit. 17, § 95802, subd. (a).*) An “Offset Credit” is a tradable compliance instrument issued by CARB that represents a greenhouse gas reduction or greenhouse gas removal enhancement of one metric ton of CO

2e. ([*735] *Cal. Code Regs., tit. 17, § 95802, subd. (a).*) The reduction or removal justifying an offset credit “must be real, additional, quantifiable, permanent, verifiable and, enforceable.” (*Ibid.*)⁷

The EIR described the cap-and-trade program by stating it established “a system of market-based declining annual aggregate emission limits for [greenhouse gas] emission sources, applicable from January 1, 2013 to December 31, 2020. The cap-and-trade program imposes enforceable [greenhouse gas] emission caps for covered facilities (refineries, electric power providers,

cement production facilities, oil and gas production facilities, and other industrial facilities).” Both the refinery and its electrical power provider, Pacific Gas and Electric, are subject to California's cap-and-trade program.

Capped facilities are required to [**36] surrender greenhouse gas emission compliance instruments equal to their emissions at the end of each compliance period (i.e., 2013 to 2014, 2015 to 2017, and 2018 to 2020). Over these periods, greenhouse gas emissions from capped facilities are expected to be 75 million metric tons per year less than baseline conditions, which would represent an 18 percent reduction from the statewide 1990 greenhouse gas emissions. Pursuant to the cap-and-trade program, in January 2013, CARB issued 29.3 million metric tons in free greenhouse gas allowances to California refineries, which represented 93 percent of the reported greenhouse gas emissions from those same facilities during 2011. Similarly, in September 2012, CARB distributed 97.7 million metric tons in free 2013-vintage greenhouse gas allowances to California electrical distribution utilities.

C. EIR's Discussion of Greenhouse Gas Emissions and Cap and Trade

The EIR addressed greenhouse gas emissions in section 4.5, which includes subsections on the regulatory setting⁸ and the project's impacts. The EIR acknowledges that the refinery will produce greenhouse gas emissions and will be subject to the cap-and-trade program. Consequently, the EIR states Alon USA will [**37] be required to (1) reduce greenhouse gas emissions elsewhere in the refinery or (2) surrender greenhouse gas allowances, offset credits, or other compliance instruments to counterbalance those emissions. Similarly, the EIR states Pacific Gas and Electric

⁷The terms “[a]dditional,” “[e]nforceable,” “[p]ermanent,” “[q]uantifiable,” “[r]eal,” and “[v]erifiable” are defined by the cap-and-trade regulation. (*Cal. Code Regs., tit. 17, § 95802, subd. (a).*)

⁸The regulatory setting describes (1) federal legislation and regulations applicable to greenhouse gas emissions, (2) California legislation and a 2005 executive order from Governor Schwarzenegger, (3) guidance documents adopted by Air District, and (4) the Metropolitan Bakersfield General Plan.

will be required to reduce [*736] greenhouse gas emissions at its facilities or to surrender compliance instruments to counterbalance the emission increases associated with increased power usage.

1. *Quantifying Emissions and Reductions/Offsets*

The project's greenhouse gas emissions are categorized and quantified in tables 4.5-2 and 4.5-3 of the EIR. The tables also show the application of compliance instruments to counterbalance the greenhouse gas emissions.

Table 4.5-2 sets forth the estimated greenhouse gas emissions for the project, *excluding* emissions associated with mainline rail activities. The emissions are divided into three categories: (1) construction activity, (2) permitted sources, and (3) nonpermitted sources. Permitted sources are essentially the stationary parts of the refinery's operations. The two permitted source line items with table entries are existing heaters (40,439.3 metric tons per year of CO

2e) and new boilers (29,288.9 [**38] metric tons per year of CO

2e). The nonpermitted sources include mobile sources, such as onsite rail transportation, truck transportation, and onsite vehicles and equipment. Nonpermitted sources also include indirect greenhouse gas emissions from electrical power use (14,129.7 metric tons per year of CO

2e). The total annual greenhouse gas emissions for the project, excluding mainline rail activities, are calculated as being 88,248.9 metric tons per year of CO

2e.

Table 4.5-2 of the EIR also includes four line items under the heading for greenhouse gas emission reductions: (1) offsets of the permitted source greenhouse gas increases through cap and trade, (2) displaced truck trips from refineries in the San Francisco Bay Area to Fresno, (3) greenhouse gas reductions realized by onsite rail by using diesel fuel that complies with the federal biomass-based diesel fuel requirements, and (4) offsets of electric

utility greenhouse gas emissions increases through cap and trade. These four items totaled 88,737.7 metric tons of CO

2e per year, which exceed the project's greenhouse gas emissions by 488.9 metric tons of CO

2e per year. As a result, the EIR concluded the greenhouse gas emissions [**39] after application of emission reductions equal a negative 488.9 metric tons of CO

2e per year and states greenhouse gas emissions are reduced by 100.6 percent.

Table 4.5-3 of the EIR sets forth the estimated greenhouse gas emissions for the project *including* the emissions associated with mainline rail activities, which it lists as 49,638.0 metric tons of CO

2e per year. This addition causes the total greenhouse gas emissions to equal 137,886.9 metric tons of CO

2e per year. The mainline rail activities also changed the total greenhouse gas emission reductions, which rose slightly to 89,358.4 metric tons of CO

2e per year. As a result, the greenhouse gas emissions after application of emission [*737] reductions equal 48,528.5 metric tons of CO

2e per year. The EIR states the emission reductions are 64.8 percent of the project's annual greenhouse gas emissions. The EIR characterizes this reduction as meeting the threshold of significance defined as 29 percent greenhouse gas mitigation compared to business as usual.⁹

2. *Thresholds of Significance*

The EIR stated County had not developed a quantitative threshold of significance for greenhouse gas emissions. It also stated a project is presumed to have [**40] a less-than-significant greenhouse gas emission impact if the project is

⁹ A "business-as-usual" projection "assumes no conservation or regulatory efforts beyond what was in place when the forecast was made." (*Center for Biological Diversity, supra, 62 Cal.4th at p. 216.*)

found (1) to contribute to a net decrease in greenhouse gas emissions and (2) to be consistent with the adopted implementation of CARB's climate change scoping plan.

The EIR stated the Air District adopted guidance documents for assessing and mitigating greenhouse gas emissions impacts on global climate change. Air District did not establish specific numeric thresholds of significance, but utilized performance based standards to assess cumulative impacts on global climate change. Under Air District's May 2012 draft *Guidance for Assessing and Mitigating Air Quality Impacts*, a project is deemed to have a less than significant individual and cumulative impact for greenhouse gas emissions if (1) it complies with a statewide, regional, or local plan for reducing or mitigating greenhouse gas emissions; (2) it implements Air District's best performance standards; or (3) it achieves a 29 percent reduction in greenhouse gas emissions compared to business as usual, which is the target established by CARB for implementation of the California Global Warming Solutions Act of 2006.

The EIR stated the project's greenhouse gas emissions were [**41] anticipated to be less than significant because (1) the project is consistent with CARB's climate change scoping plan and the cap-and-trade program and (2) greenhouse gas emissions reductions achieved under cap and trade, federal renewable fuels standard, and displacement of fuel transport trucks exceed the 29 percent greenhouse gas emissions reductions target recommended in Air District's May 2012 draft *Guidance for Assessing and Mitigating Air Quality Impacts*. The same conclusions regarding significance were reached regardless of whether the main rail line activities were included or excluded from the calculation of the project's greenhouse gas emissions.

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3. [CEQA Findings](#)

The board of supervisors certified the EIR and relied on it to make findings in accordance with

[Guidelines section 15091](#) about the project's environmental effects. As to greenhouse gas emissions, the board of supervisors found the project (1) would not generate emissions, either directly or indirectly, that may have a significant impact on the environment and (2) would not conflict with any applicable plan, policy or regulation adopted for the purpose of reducing the emission of greenhouse gases. It also found the "project's greenhouse [**42] gas emissions are determined to have a less than cumulatively significant impact on global climate change."

D. *Contentions of the Parties*

Plaintiffs contend the EIR made an erroneous legal conclusion regarding the effect of California's cap-and-trade regulation, which resulted in the additional erroneous legal conclusion that compliance with the cap-and-trade regulation would reduce the project's greenhouse gas emissions to zero. In plaintiffs' view, compliance with California's cap-and-trade regulation will not actually reduce greenhouse gas emissions because allowances are authorizations to emit greenhouse gases. Plaintiffs further argue the EIR failed to accurately disclose and analyze greenhouse gas emissions (i.e., is misleading), which violated [CEQA](#) by precluding informed decisionmaking and informed participation by the public.

In response, County argues: "It is true that much of the [greenhouse gas] reductions associated with the Project will come from the Refinery's participation in the Cap-and-Trade program. [Citation.] But [plaintiffs] mischaracterize the Cap-and-Trade program and goals, and fail to understand how the program works to reduce [greenhouse gas] emissions within [**43] California." (Fn. omitted.)

County also argues that plaintiffs have cited no authority that shows the EIR's methodology for analyzing the project's participation in the cap-and-trade program is not valid.

E. *Framing the Issues*

1. *Misleading Disclosure?*

The first issue we consider is whether the EIR's discussion of greenhouse gas emissions is misleading. Plaintiffs have argued the discussion is misleading without citing *Public Resources Code section 21083.05* or *Guidelines section 15064.4*—“the principal statutory and regulatory provisions governing [*739] *CEQA* analysis of greenhouse gas emissions.” (*Center for Biological Diversity, supra, 62 Cal.4th at p. 219.*) Consequently, our analysis of this issue is based on *CEQA* general requirements for EIR's and is separate from our consideration of the related issue about whether the EIR is inaccurate (and thus misleading) because of the erroneous application of the cap-and-trade program.

2. Applying Cap and Trade

The second issue presented by the contentions of the parties can be framed as follows: When determining the significance of a project's greenhouse gas emissions, can the volume of the project's estimated emissions be decreased to reflect the use of compliance instruments (both allowances and offset credits) under the cap-and-trade program? The following three [**44] points provide context for this issue. First, this issue has not been decided in a published opinion and, therefore, presents a question of first impression. Second, the issue is predominantly a question of correct procedure and, therefore, it is a legal question subject to de novo review. (*Center for Biological Diversity, supra, 62 Cal.4th at p. 219.*) Third, the cap-and-trade program is a statewide regulation designed to reduce greenhouse gas emissions and, therefore, whether County properly applied *Guidelines section 15064.4, subdivision (b)(3)* is relevant to whether County committed legal error. (See pt. III.B.3., *ante.*)

F. Greenhouse Gas Analysis in EIR Is Not Misleading

1. Basic Principles

(11) *Guidelines section 15140* requires EIR's to “be written in plain language” and allows them to “use appropriate graphics so that decisionmakers and the

public can rapidly understand the documents.” (12) *Guidelines section 15144* recognizes that drafting an EIR necessarily involves some degree of forecasting and that foreseeing the unforeseeable is not possible. Despite this limitation on forecasting, the section still requires a lead agency to “use its best efforts to find out and disclose all that it reasonably can.” (*Guidelines, § 15144.*)

Guidelines section 15064.4, subdivision (a) states an “agency should make a good-faith effort, based to the extent possible on scientific [**45] and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project.” The reference to a “good-faith effort” also appears in *Guidelines sections 15003* and *15151*. For instance, “*CEQA* does not require technical perfection in an EIR, but rather adequacy, completeness, and a good-faith effort at full disclosure.” (*Guidelines, § 15003, subd. (i).*)

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2. The Disclosure Was Adequate

Applying the foregoing principles to the EIR's description of the project's greenhouse gas emissions, we conclude the EIR's disclosure was not misleading or deceptive, but adequately describes the method, data and conclusions reached about greenhouse gas emissions and the impact on global climate warming.

We recognize that the EIR refers to “emission reductions” and “offsets” through cap and trade in a way that could be read as suggesting the project's compliance with the cap-and-trade program actually would cause the number of greenhouse gas molecules emitted *by the project* to be reduced. For example, tables 4.5-2 and 4.5-3 each contain headings referring to greenhouse gas “Emission Reductions” and “Emissions After Application of Emission Reductions.”

However, under a standard of objective reasonableness, [**46] when the tables are considered along with the related narrative provided by the EIR, it is clear that (1) the

reductions and offsets listed in the EIR's tables and referred to in the text include the use of "allowances" and (2) allowances authorize the refinery to emit greenhouse gases, rather than requiring the refinery to eliminate those emissions. The EIR informs the reader that the use of an allowance means the allowance is surrendered under the cap-and-trade program to authorize emissions by the project. Consequently, the reader is informed the surrender of an allowance does not mean the project will emit fewer molecules of greenhouse gas than it would have emitted if the allowance had not been surrendered. Rather, it means the project has complied with the cap-and-trade program by establishing its emissions are authorized by the compliance instrument.

Accordingly, an objectively reasonable person who has reviewed the tables and read the related narrative would understand the references to reductions and offsets did not mean fewer molecules of greenhouse gas are being emitted by the project. Instead, that person would understand the references meant that the project's greenhouse ^[**47] gas emissions would *comply* with the cap-and-trade program because those emissions would be counterbalanced by the surrender of compliance instruments. In sum, the disclosure in the EIR provided an adequate and complete description of how allowances and offset credits were used to comply with the cap-and-trade program and, therefore, was not misleading about the actual consequences of the refinery's compliance with the cap-and-trade program. (See [Guidelines, §§ 15003, subd. \(i\), 15151.](#))

The conclusion that the EIR was adequate and not misleading in its description of greenhouse gas emissions is not undermined by the fact that ^[*741] the EIR could have been drafted in a way that used the words "reductions" and "offset" with more precision and accuracy. [CEQA](#) does not demand an EIR be perfect. (See [Guidelines, §§ 15003, subd. \(i\), 15151.](#)) Under the circumstances presented in this case, neither the decision makers nor the public would be better informed about the consequences

of the refinery's compliance with the cap-and-trade program if a writ of mandate was issued requiring the EIR to substitute other words in place of its references to reductions and offsets. Thus, requiring an additional disclosure would accomplish little.

*G. Application ^[**48] of Cap-and-trade Program to Significance Determination*

Here, the EIR based its determination that the project's greenhouse gas emissions would be less than significant based on the volume of those emissions *after* the application of compliance instruments (both allowances and offset credits) under the cap-and-trade program. The question of law presented is whether this application of the cap-and-trade program violated [CEQA](#). We conclude it did not violate [CEQA](#). Our conclusion is based on [Guidelines section 15064.4.](#)

1. Estimated Emissions

County complied with the provision stating "[a] lead agency should make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project." ([Guidelines, § 15064.4, subd. \(a\).](#)) Tables 4.5-2 and 4.5-3 in the EIR clearly set forth the proposed project's total annual greenhouse gas emissions, excluding and including mainline rail operations. The proposed project's total annual greenhouse gas emissions, excluding mainline rail operations, were calculated to be 88,248.9 metric tons of CO

2e per year. When mainline rail operations were included, the amount was 137,886.9 metric tons ^[**49] of CO

2e per year. We conclude these disclosures constitute "a good-faith effort ... to describe, calculate or estimate the amount of greenhouse gas emissions resulting from [the] project" in accordance with [Guidelines section 15064.4, subdivision \(a\).](#) Plaintiffs do not argue the EIR's estimates of the amount of greenhouse gas emissions failed to meet this standard. Instead, plaintiffs challenge the EIR's use and description of

compliance instruments to counterbalance the estimated emissions.

2. Cap And Trade Is a Statewide Plan

The text of [Guidelines section 15064.4](#) also presents the question of whether California's cap-and-trade program constitutes “regulations or requirements adopted to implement a statewide ... plan for the reduction or [*742] mitigation of greenhouse gas emissions.” ([Guidelines, § 15064.4, subd. \(b\)\(3\)](#).) As described in part III.B.4., *ante*, the cap-and-trade program is set forth in regulations promulgated by CARB for all of California for the purpose of addressing greenhouse gas emissions. (See [Cal. Code Regs., tit. 17, §§ 95801–96022](#) [cap-and-trade program].) In addition, the cap-and-trade program was implemented by the adoption of *regulations* and, therefore, need not comply with the criteria in the second sentence of [Guidelines section 15064.4, subdivision \(b\)\(3\)](#), which applies to *requirements* and omits any [**50] reference to *regulations*.¹⁰ Consequently, we conclude [Guidelines section 15064.4, subdivision \(b\)\(3\)](#) directed County to consider the project's compliance with the cap-and-trade program in assessing the significance of environmental impacts from the project's greenhouse gas emissions. The EIR complied with this direction.

3. County's Reliance on the Cap-and-trade Program Was Appropriate

(13) The next question involving the interpretation and application of the [Guidelines section 15064.4](#) is whether its directive to consider the project's compliance with the cap-and-trade program “when assessing the significance of impacts from greenhouse gas emissions on the environment” allows County to determine the environmental impacts of the project's greenhouse gas emissions were less than significant based on the project's

compliance with the program. ([Guidelines, § 15064.4, subd. \(b\)\(3\)](#).) We interpret [Guidelines section 15064.4, subdivision \(b\)\(3\)](#) as authorizing County to determine a project's greenhouse gas emissions will have a less than significant effect on the environment based on the project's compliance with the cap-and-trade program. Compliance was a factor to be considered and, in the circumstances presented, is part of the substantial evidence supporting the finding that the impact [**51] of the emissions was less than significant.

The importance of the overall effect of a statewide plan, rather than the plan's specific effect on the particular project's emissions was illustrated in *Center for Biological Diversity*. There, our Supreme Court stated the significance of the environmental impact of greenhouse gases does not depend on *where* they are emitted because of the global scope of the climate change impact. ([Center for Biological Diversity, supra, 62 Cal.4th at pp. 219–220](#).) Thus, examining the amount and location of the refinery's emissions is too narrow of an inquiry when the ultimate question is *global* climate change. The Supreme Court also stated: “For projects, like the present residential and commercial development, which are designed to accommodate long-term [*743] growth in California's population and economic activity, this fact gives rise to an argument that a certain amount of greenhouse gas emissions is as inevitable as population growth. Under this view, a significance criterion framed in terms of efficiency is superior to a simple numerical threshold because [CEQA](#) is not intended as a population control measure.” ([Id. at p. 220](#).)

By comparison, the modification of the refinery is designed to accommodate long-term growth in California's population [**52] and economic activity that expresses itself in increased demand for petroleum products. This increased demand will exist whether or not the project is approved. Therefore, an inquiry into significance that is based on compliance with a program that sets limits and requirements for California's petroleum refining

¹⁰The sentence provides: “Such *requirements* must be adopted by the relevant public agency through a public review process and must reduce or mitigate the project's incremental contribution of greenhouse gas emissions.” ([Guidelines, § 15064.4, subd. \(b\)\(3\)](#), italics added.)

industry as a whole is a rational approach to regulating that industry's contribution to global climate change.

(14) 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. Consequently, the overall (i.e., cumulative) impact of the cap-and-trade program cannot be judged by whether a particular project uses allowances, offset credits, or reduces its emissions. Rather, the significance [**53] of the cumulative impact should be assessed based on the program as a whole. Under the cap-and-trade program, the allowances issued for each compliance period decrease and this decrease provides the mechanism for meeting the targets for reduced greenhouse gas emissions in California. Based on this industry-wide perspective, we conclude it is appropriate for a lead agency to conclude a project 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.

Our conclusion about compliance with the cap-and-trade program is consistent with the diagram of the process for determining the significance of greenhouse gas emissions set forth in figure 7 of Air District's May 2012 draft *Guidance for Assessing and Mitigating Air Quality Impacts*. The diagram "provides for a tiered approach in assessing significance of project specific [greenhouse gas] emission increases." The first tier addresses whether project is exempt from [CEQA](#). If it is, no further analysis is required. If the project is not exempt, the lead agency proceeds to the second

tier and considers whether the project complies with [**54] an adopted, statewide, regional [*744] or local plan for reduction or mitigation of greenhouse gas emissions. If the answer is "yes," then the inquiry is completed with the agency concluding the impact of those emissions is less than significant. Our interpretation and application of [Guidelines section 15064.4, subdivision \(b\)\(3\)](#) is consistent with the second tier in Air District's guidance.

H. *Displaced Truck Trips as an Emissions Reduction*

1. *EIR's Contents*

One of the line items in tables 4.5-2 and 4.5-3 under the heading for greenhouse gas emission reductions referred to displaced truck trips (San Francisco Bay Area to Fresno). The metric tons of CO

2e per year for this line item was given as a negative 4,875.3. The EIR explained this decrease in truck trips and emissions by stating Alon USA anticipated that it would more than double shipments of diesel and gasoline to the Fresno market by pipeline, which would mean a smaller amount of these fuels would need to be delivered by truck from refineries located in the San Francisco Bay Area. The EIR estimated the increased volume of fuel delivered by pipeline as approximately 3,750,000 barrels per year, which would replace 7,400 transport truck trips per year.

The EIR relied on a [**55] December 2013 air quality/global climate change analysis prepared by Ashworth Leininger Group, which was attached to the EIR as appendix B. That document (1) stated Alon USA expects to ship by pipeline a total of 19,000 barrels per day of diesel and gasoline from the refinery to the Fresno market; (2) compared this amount to a baseline figure of 8,736 barrels per day; and (3) concluded approximately 10,300 fewer barrels per day would need to be delivered to the Fresno area by truck from San Francisco Bay Area refineries. When the figure of 10,300 barrels per

day is multiplied by 365 days per year, the total is 3,759,500 barrels per year, which supports the EIR's estimate of 3,750,000 fewer barrels of fuel needing to be delivered to Fresno by truck each year. The document also stated: "Emission reductions associated with these displaced truck trips were calculated using EMFAC2011 emission factors, based on estimated round trip distance between San Francisco Bay Area refineries and Fresno."

2. Plaintiffs' Contentions

Plaintiffs contend the EIR's reliance on emissions reduction from displaced truck trips is speculative and unsupported. In plaintiffs' view, the EIR does not support its [**56] claimed reduction of 4,875 metric tons of CO

2e per year from third party truck trips hundreds of miles away with any data or analysis and, therefore, the claim is not supported by substantial evidence. Plaintiffs argue [*745] facts are missing from the information presented and, as a result, it is mere speculation that Bay Area trucks (1) will stop driving to Fresno and (2) will not deliver the fuel that would have gone to Fresno to locations a similar distance from the Bay Area.

3. No Prejudicial Error Shown

Based on our earlier conclusion that County correctly relied on compliance with the cap-and-trade program to conclude the environmental impact of the project's greenhouse gas emissions was less than significant, it follows that an erroneous determination about reductions from displaced delivery truck trips could not have resulted in prejudice because that information *need not have been disclosed* for County to have reached its determination about significance. Thus, the information plaintiffs contend is missing from the EIR or its supporting documents is insubstantial and not grounds for relief. (*Neighbors for Smart Rail, supra*, 57 Cal.4th at p. 463; see § 21005, *subd. (b)* [prejudice is not presumed].)

Alternatively, the analysis presented by Ashworth

Leininger [**57] Group constitutes substantial evidence in the record from which County, in its role as trier of fact, reasonably could infer that the number of truck trips from the Bay Area to Fresno would decrease as a result of the delivery of fuel from the refinery to the Fresno market by pipeline. We recognize conflicting inferences could be drawn from the evidence presented, but the substantial evidence standard only requires sufficient evidence from which any reasonable trier of fact could find the fact in question. (See *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 639 [91 Cal. Rptr. 3d 571] [under substantial evidence standard, plaintiffs have burden of showing lead agency could not have reasonably made the factual determination challenged].) Here, that deferential standard is met.

IV. Rail Transport Safety* [NOT CERTIFIED FOR PUBLICATION]

V. Federal Preemption And Offsite Rail Impacts

A. Contentions of the Parties

Plaintiffs contend the EIR erroneously excluded an analysis of some (but not all) of the environmental impacts resulting from the offsite mainline rail operations that will deliver crude oil to the refinery. Plaintiffs argue this [*746] omission was caused by the incorrect legal conclusion that [ICC Termination Act of 1995 \(ICCTA; 49 U.S.C. § 10101 et seq.\)](#) preempted [CEQA](#) review. In plaintiffs' view, federal law does not preempt an *analysis* of the environmental impacts of the project's rail transport aspects and does not bar *all* mitigation measures that might address the offsite rail impacts to the environment.

As to mitigation measures that affect train movement on the railroad's main line, County argues the [ICCTA](#) prevents it from adopting that type of mitigation. As to [CEQA](#) review, County presents two arguments. First, County contends

* See footnote, *ante*, page 708.

“the [**58] EIR disclosed and analyzed the impacts associated with mainline rail activities.” Second, County contends “the information disclosure aspect of [CEQA](#) may be preempted by [ICCTA](#).”¹⁷

Plaintiffs' reply acknowledges the “[ICCTA](#) may preempt the County's ability to impose certain mitigation measures on mainline rail operations,” but argues federal law does not prevent or excuse the EIR from disclosing and assessing the significance of impacts caused by the rail activities associated with the project. Plaintiffs note that the project proponent, Alon USA, is not a rail carrier and requiring Alon USA to acknowledge the impacts of the rail operations and evaluate the significance of those impacts would not interfere with the federal regulation of rail carriers.

B. Legal Principles

1. Overview of the [ICCTA](#)

In 1995, Congress enacted the [ICCTA](#) and established the Surface Transportation Board (the successor to the Interstate Commerce Commission) to administer the federal regulatory scheme. A recent decision of the California Supreme Court addresses whether the [ICCTA](#) preempted application of [CEQA](#) to a railroad project undertaken by a state public entity. (*Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, 690–691 [220 Cal. Rptr. 3d 812, 399 P.3d 37] (*Eel River*).) Here, the offsite [**59] rail activity will be undertaken by a private railroad (BNSF Railway), not a public [**747] entity.¹⁸

¹⁷ County supports this contention by citing [Association of American Railroads v. South Coast Air Quality Management Dist.](#) (9th Cir. 2010) 622 F.3d 1094. In that case, the court concluded the [ICCTA](#) preempted the regional agency's rules that attempted to reduce air pollution emitted by idling trains, imposed reporting requirements, and listed penalties for noncompliant railyard operators. ([Association of American Railroads](#), *supra*, at p. 1096.) We conclude a rule that imposes a reporting requirement *on rail carriers* is distinguishable from a [CEQA](#) requirement that a nonrailroad disclose and analyze indirect environmental impacts of a project, such as the impacts of increased rail traffic. Preparing a document that completes a [CEQA](#) review would not interfere with the rail carrier or its operations.

Consequently, *Eel River* is not directly controlling in this appeal, but does provide useful insights and principles. For instance, our Supreme Court set forth “the text of the [ICCTA](#) preemption provision, the overall function of the [ICCTA](#), and the unifying and deregulatory purpose disclosed by legislative history of the federal law” in part II.C. of its opinion. (*Eel River*, *supra*, at pp. 702, 706–711 [pt. II.C.].) Moreover, the court addressed the preemptive effect of the [ICCTA](#) on state regulation, particularly its effect on [CEQA](#), in part II.D. of the opinion. (*Eel River*, *supra*, at pp. 711–720.)

Generally speaking, the [ICCTA](#) requires rail carriers to establish reasonable rates, rules, and practices related to transportation or services; prohibits discriminatory pricing; and establishes common carrier obligations requiring provision of transportation or services on reasonable request. ([49 U.S.C. §§ 10702, 10741, 11101](#).) Also, the [ICCTA](#) prohibits rail carriers from improper obstruction of through traffic or freight, and prohibits state or local tax discrimination against rail property. ([49 U.S.C. §§ 10744, 11501](#).)

The [ICCTA](#) assigns administrative and regulatory duties to the Surface Transportation Board. ([49 U.S.C. §§ 1301–1302](#).) A variety [**60] of transactions require its approval, such as railroad construction and operations, the abandonment of a rail line, or the discontinuation of service. ([49 U.S.C. §§ 10901, 10903](#).) The Surface Transportation Board also has authority to prescribe routes and certain rates and to adjudicate claims of unreasonable rates arising from market dominance. ([49 U.S.C. §§ 10705, 10707](#).)

The statutory provisions most relevant to the preemption arguments presented in this appeal explicitly address the Surface Transportation Board's jurisdiction and preemption. The Surface Transportation Board has exclusive jurisdiction

¹⁸ A project undertaken directly by a public entity is distinguishable from a project undertaken by a private party after receiving the approval of a state or local agency. ([§ 21065, subds. \(a\), \(c\)](#).)

over transportation by rail carriers and the construction and operation of tracks, yards and other facilities. ([49 U.S.C. § 10501\(b\)](#).) As to federal preemption, the [ICCTA](#) provides: “Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” ([49 U.S.C. § 10501\(b\)\(2\)](#).)

(15) The scope of (1) the [ICCTA](#)'s preemption of state regulations and (2) the Surface Transportation Board's exclusive jurisdiction is determined in part by the definitions of “rail carrier” and “transportation.” The term ““rail carrier”” means a person providing [*61] common carrier rail transportation. ([49 U.S.C. § 10102\(5\)](#).) The term “transportation” includes services related to [*748] the movement of goods, including the delivery, handling and interchange of goods. ([49 U.S.C. § 10102\(9\)](#).)¹⁹ Our Supreme Court summarized the jurisdiction and preemption provisions by stating that “under [49 U.S.C. section 10501](#), the [Surface Transportation Board] has exclusive jurisdiction over transportation by rail carrier, including the movement of goods and all services related to that movement. Its remedies are exclusive and expressly preempt state remedies ‘with respect to regulation of rail transportation.’ (*Id.*, [§ 10501\(b\)](#).)” (*Eel River, supra*, 3 Cal.5th at p. 711.)

2. Categorical Preemption

(16) In *Eel River*, the Supreme Court's discussion of the relationship between the [ICCTA](#)'s preemption provision and [CEQA](#) identified two types of preempted state actions or regulations. (*Eel River, supra*, 3 Cal.5th at pp. 714–720 [pt. II.D.2].) The first type refers to state actions and regulations that are facially (i.e., categorically) preempted. (*Id.* at p. 716.) Categorical preemption is subdivided into

two kinds. The first is any form of state or local *permitting or preclearance* that, by its nature, could be used to deny a rail carrier the ability to conduct some part of its operations or to proceed with activities authorized by the Surface Transportation [*62] Board. (*Id.* at pp. 716–717.) The second kind of categorical preemption invalidates state or local regulation of matters *directly regulated* by the Surface Transportation Board, such as the construction and operation of rail lines and the railroad's rates and service. (*Id.* at p. 717.) A state action or regulation of this type is invalid as a per se unreasonable interference with interstate commerce. (*Ibid.*) Thus, both kinds of categorical preemption address the state action or regulation *itself* and the reasonableness of the state action or regulation is irrelevant. (*Ibid.*)

3. As-applied Preemption

(17) The second type of federal preemption covers state actions and regulations on an ““as applied”” basis. (*Eel River, supra*, 3 Cal.5th at p. 717.) Whether a particular state action or regulation is preempted depends on the degree of interference the action or regulation has on railroad operations. (*Ibid.*) Thus, this type of preemption analysis requires an assessment of whether the state or local action, regulation or remedy would have the effect of preventing or unreasonably interfering with railroad transportation. (*Ibid.*) The phrase ““preventing or unreasonably interfering with”” is equated with having ““the effect of foreclosing or unduly restricting a [*749] railroad's [*63] ability to conduct any part of its operations or otherwise unreasonably burdening interstate commerce.”” ([New Orleans & Gulf Coast Railway Co. v. Barrois \(5th Cir. 2008\) 533 F.3d 321, 332.](#)) More specifically, the [ICCTA](#) preempts state and local environmental regulation requiring private railroad companies to acquire permits or preclearance *as a condition to operating the railroad*, as well as remedies that would prohibit the conduct of railroad business pending compliance with environmental requirements imposed by state or local agencies pursuant to

¹⁹ Under these definitions, BNSF Railway is a “rail carrier” and its delivery of tank cars containing crude oil to the refinery constitutes “transportation” for purposes of the [ICCTA](#). In contrast, Alon USA is not a rail carrier and the refinery's operations are not subject to the jurisdiction of the Surface Transportation Board.

CEQA. (*Eel River, supra*, 3 Cal.5th at p. 717.)

4. ICCTA Preemption and CEQA Review

Here, we are concerned with how the foregoing principles governing federal preemption under the ICCTA apply to the requirements of CEQA. In *Eel River*, our Supreme Court tangentially addressed preemption of CEQA's information provisions (which we regard as distinct from CEQA provisions addressing the adoption of mitigation measures or feasible alternatives) by stating: “The [Surface Transportation Board] has recognized, too, that a state law simply requiring, for example, the development of information concerning a railroad project would not *necessarily* be preempted. In *Boston & Maine*, for example, the [Surface Transportation Board] stated, ‘While a locality cannot require permits [**64] prior to construction, ... a railroad can be required to notify the local government “when it is undertaking an activity for which another entity would require a permit” and to furnish its site plan to the local government’ (*Boston & Maine [Corp. and Town of Ayer, MA, Petition* (STB, Apr. 30, 2001, No. FD 33971)) 2001 WL 458685, p. *5), adding that ‘[l]ike any citizen or business, railroads have some responsibility to work with communities to seek ways to address local concerns in a way that makes sense and protects the public health and safety’ with pragmatic solutions. (*Id.*, p. *7.) ‘Examples of solutions that appear ... reasonable include conditions requiring railroads to (1) share their plans with the community, when they are undertaking an activity for which another entity would require a permit, (2) use state or local best management practices when they construct railroad facilities; (3) implement appropriate precautionary measures ... ; (4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) submit environmental monitoring or testing information to local government entities for an appropriate [**65] period of time after operations begin.’ (*Ibid.*, fns. omitted.)” (*Eel River, supra*, 3 Cal.5th at p. 722.)

[*750]

(18) We interpret our Supreme Court's statement that the development of information concerning such a railroad project²⁰ would not necessarily be preempted to mean the development of information pursuant to CEQA is not preempted categorically, but might be preempted on an as-applied basis. Extending this interpretation to a refinery project serviced by a rail carrier, we conclude the development of information pursuant to CEQA is not preempted categorically, but is subject to scrutiny under the rules for as-applied preemption.

C. Analysis

Our analysis of the preemption questions presented begins by describing what the EIR said about federal preemption and then separately addresses the federal preemption of (1) CEQA's informational requirements and (2) CEQA's requirements relating to the adoption of mitigation measures.

1. Contents of the EIR

Chapter 3 of the EIR described the project. Section 3.4.1 of the EIR addressed the proposed improvements to onsite rail facilities, the offsite train movements, and the transport of Bakken crude oil. The EIR reported that the operation of unit trains to and from the project site would be performed by BNSF [**66] Railway on its property using BNSF trains operated by BNSF employees. The EIR addressed preemption by stating: “The movements of those trains within Kern County, to and from the project site, while described in this section of the EIR, *may be preempted* from local and state environmental regulations by federal law under the [ICCTA]. [¶] While the potential impacts of those train[] movements along the BNSF mainline within Kern County are described in appropriate chapters of this

²⁰The project in *Eel River* involved the resumption of freight service on a state-owned rail line between Lombard and Willits by Northwestern Pacific Railroad Company, a private entity that entered an agreement and lease with the state designating it as the state's franchisee. (*Eel River, supra*, 3 Cal.5th at pp. 691, 692, 694.)

EIR, the County as [CEQA](#) Lead Agency, and other state and local responsible agencies *could be preempted* from imposing mitigation measures, conditions or regulations to reduce or mitigate potential impacts of BNSF train movements on the mainline.” (Italics added.)

The EIR then stated the activities involving the expanded rail facilities at the project site were not protected by federal preemption because those activities would not occur on BNSF property and would not be performed by BNSF employees. Therefore, the EIR concluded County and the responsible agencies had the authority to impose mitigation measures or conditions to reduce potential impacts within the project site.

[*751]

Section 4.1 of the EIR, “Air Quality,” included a more definitive statement [*67] about preemption as it related to offsite rail activity. That statement did not use the indecisive phrases “may be” and “could be” preempted. Instead, it asserted “the [ICCTA](#) specifically preempts [CEQA](#) review of unit train movements to and from the proposed ... [p]roject.” This interpretation of the [ICCTA](#) was used to justify the EIR's omission of an analysis of criteria pollutant emissions from the unit train locomotives operating offsite on the main lines. However, the EIR stated unit train locomotive emissions were presented in one of the attachments to the air quality/global climate change analysis prepared by Ashworth Leininger Group. The document and its attachments were designated appendix B of the EIR.

2. [CEQA](#) Disclosure and Analysis

First, we consider whether the EIR was correct in its legal conclusion that the [ICCTA](#) preempts [CEQA](#) review (i.e., disclosure and analysis) of the unit train movements to and from the project site. In our view, this legal conclusion about preemption was wrong. The two types of preemption, categorical and as applied, do not preclude [CEQA](#) review of the project's reasonably foreseeable indirect physical changes to the environment caused by the

movement [*68] of unit trains to and from the project site.

Previously, we interpreted *Eel River* to mean [CEQA](#)'s informational requirements were not categorically preempted. (See pt. V.B.4., *ante*.) As an alternative to that broad legal conclusion, we will consider whether categorical preemption applies to the specific circumstances of this case.

(19) The first kind of categorical preemption involves state permitting and preclearance regulations that would have the effect of delaying or preventing railroad operations. (*Eel River, supra*, 3 Cal.5th at pp. 703, 716.) We conclude the completion of a [CEQA](#) review that includes an analysis of the significance of indirect environmental effects arising from the train activity on the main line would impose no permitting or preclearance by a state or local agency upon the delivery of crude oil to the project site by a rail carrier. Thus, [CEQA](#) review could not be used to deny a rail carrier the ability to conduct operations and transport crude oil to the refinery. Therefore, the first kind of categorical preemption that invalidates permitting and preclearance does not apply in this case. As a result, that kind of categorical preemption does not justify the EIR's omission of a description and analysis of environmental [*69] effects associated with offsite rail activity such as the emission of criteria pollutants by train locomotives.

The second kind of categorical preemption invalidates state and local regulation of matters *directly* regulated by the Surface Transportation Board, [*752] such as the operation of rail lines or railroad rates. (*Eel River, supra*, 3 Cal.5th at p. 717.) Here, a [CEQA](#) environmental review of Alon USA's proposed project and its indirect environmental effects would not control or influence matters directly regulated under federal law. As a result, conducting a [CEQA](#) review would not create the possibility of a rail carrier being subject to state or locally imposed requirements that address a matter within the Surface

Transportation Board's exclusive jurisdiction. Therefore, we conclude the second kind of categorical preemption does not preclude [CEQA](#) review of the environmental effects of offsite rail activities.

(20) The as-applied type of preemption is “based on the degree of interference the particular state action has on railroad operations” and requires a factual assessment of whether the effect of the state action would be to prevent or unreasonably interfere with railroad operations. (*Eel River, supra*, 3 Cal.5th at p. 717.) Here, the preparation and publication [*70] of an EIR that discloses and analyzes the environmental impacts of offsite rail activities would not prevent, burden or interfere with BNSF Railway's operation. The words set down in an EIR would have no actual effect on the actions taken by a rail carrier or how or when those actions were taken. Therefore, we conclude as-applied preemption does not preclude [CEQA](#) review of the reasonably foreseeable environmental effects that may be caused by the offsite rail activities associated with the project.

3. [CEQA](#) Mitigation Measures

Plaintiffs acknowledge the “[ICCTA](#) may preempt the County's ability to impose certain mitigation measures on mainline rail operations.” Taking a more emphatic view, County asserts it “is preempted by the [[ICCTA](#)] from imposing mitigation measures to reduce potential impacts of train movements on the mainline.” We agree with the parties' assertions to the extent that they overlap—that is, we conclude some mitigation measures that address the environmental impacts of mainline rail operations may be preempted by federal law.

(21) Under [CEQA](#), a public agency is required to mitigate or avoid significant environmental effects of a project if it is feasible to do so. (§ 21002.1, *subd. (b)*.) Mitigation [*71] measures adopted by the agency must be “fully enforceable.” (§ 21081.6, *subd. (b)*.) A mitigation measure that is preempted

by federal law is not “fully enforceable” and, in addition, it is not “feasible” because the concept of feasibility takes account of legal factors when assessing whether a particular mitigation measure is “capable of being accomplished in a successful manner.” (*Guidelines, § 15364* [definition of feasible].) Federal preemption is a legal factor affecting feasibility.

[*753]

The procedural posture of this case does not allow us to provide a definitive statement about which mitigation measures will or will not be preempted. For example, plaintiffs contend preemption would not apply to a voluntary emission reduction agreement requiring Alon USA to pay an emission reduction fee to Air District. Plaintiffs argue the [ICCTA](#) did not prevent the use of such an agreement to mitigate onsite rail emissions and, therefore, the [ICCTA](#) would not preempt an agreement requiring Alon USA to mitigate the 240 tons of smog-causing pollution resulting each year from offsite rail operations. We, however, cannot conclude that requiring a project proponent who is not a rail carrier to pay a fee would *never* amount to an [*72] unreasonable burden on interstate commerce. Instead, County must decide in the first instance whether a particular mitigation measure is or is not feasible, a decision that includes determining whether the [ICCTA](#) preempts the imposition of such a measure because the burden, imposed on a rail carrier's customer, indirectly imposes an unreasonable burden on or interference with rail transportation. As stated in *Eel River*, whether an action unreasonably interferes with railroad transportation requires a factual assessment. (*Eel River, supra*, 3 Cal.5th at p. 717.) The tests for the different kinds of preemption are discussed in parts V.B.2. and V.B.3., *ante*. Those tests should be used by County on remand when it determines whether a particular mitigation measure is preempted by the [ICCTA](#).

4. Conclusion

(22) The EIR incorrectly stated “the [ICCTA](#) specifically preempts [CEQA](#) review of unit train

movements to and from the proposed ... Project.” This error prejudicially affected the contents of the EIR and its adequacy as an informational document. In particular, the EIR did not disclose and analyze the significance of the criteria air pollutants emitted by the offsite rail activities associated with the project. If any impacts are found [**73] to be significant, then the EIR must address the feasibility of mitigating any significant impacts. (*§ 21100, subd. (b)(3).*) “An EIR that incorrectly disclaims the power and duty to mitigate identified environmental effects based on erroneous legal assumptions is not sufficient as an informative document.” (*City of Marina v. Board of Trustees of California State University (2006) 39 Cal.4th 341, 356 [46 Cal. Rptr. 3d 355, 138 P.3d 692].*)

In addition, the omission from *CEQA* review of the reasonably foreseeable physical changes to the environment, caused by emission of air pollutants associated with the movement of unit trains to and from the project site, rendered statements in the EIR about the project's environmental impact incomplete and thus inadequate. For example, the EIR addressed project's criteria pollutant emissions (table 4.1-13) without including the emissions resulting from increased offsite rail traffic. Thus, the forecast that the project [*754] will *reduce* annual emissions of reactive organic gases, NO_x, carbon monoxide, sulfur dioxide, and particulate matter does not account for all of the project's direct and indirect air quality impacts. As a result, the information provided in the EIR is misleading.

The EIR's erroneous legal conclusions regarding federal preemption must be corrected. Also, County [**74] must correct the EIR's failure to disclose and analyze the reasonably foreseeable environmental effects resulting from the offsite rail activities associated with the project.

VI. *Formulating Appellate Relief** [NOT CERTIFIED FOR PUBLICATION]

DISPOSITION

The judgment is reversed and the matter remanded for further proceedings. The superior court is directed (1) to vacate the order denying the petition for writ of mandate and (2) to enter a new order granting the petition for writ of mandate. The superior court shall issue a peremptory writ of mandate compelling County (1) to set aside its certification of the final EIR and its approval of the project and (2) to bring the EIR into compliance with *CEQA* before taking any action relying upon the EIR, such as adopting another resolution approving the project.

Plaintiffs shall recover their costs on appeal.

Gomes, Acting P. J., and Peña, J., concurred.

* See footnote, *ante*, page 708.

Table1 ([Return to related document text](#))

62,164	(2001);
67,426	(2002);
66,849	(2003);
65,144	(2004);
56,238	(2005);
51,842	(2006);
60,389	(2007);
57,900	(2008);
0	(2009);
0	(2010);
10,915	(2011);
	and
4,751	(2012).

Table1 ([Return to related document text](#))

End of Document