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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

COMMUNITIES FOR A BETTER ENVIRONMENT, Plaintiff and Appellant, v. SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, Defendant and Respondent; PHILLIPS 66 COMPANY, Real Party in Interest and Respondent.	B269258 (Los Angeles County Super. Ct. No. BS153472)

APPEAL from an order of the Superior Court of Los Angeles County. Joanne B. O'Donnell, Judge. Affirmed.

UC Irvine School of Law, Environmental Law Clinic, Suma Peesapati, Michael Robinson-Dorn; Communities for a Better Environment, Shana Lazerow and Roger Lin for Plaintiff and Appellant.

Woodruff, Spradlin & Smart, Bradley R. Hogin, Ricia R. Hager; South Coast Air Quality Management District, Kurt R. Wiese, Barbara Baird and Veera Tyagi for Defendant and Respondent.

Alston & Bird, Jocelyn D. Thompson, Roger A. Cerda and Andrea Warren for Real Party in Interest and Respondent.

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An oil refinery filed an application with the local air quality district to expand its capacity to store the crude oil it processes into a number of other products. The district prepared an initial study that found that the expanded crude oil storage would have no significant adverse effect on the environment because the refinery itself was already refining as much crude oil as it could. Over the objection of a nonprofit environmental group, the district issued a negative declaration and undertook no further environmental review. The environmental group has challenged this administrative action, arguing that the district's analysis is flawed because (1) the refinery has some excess refining capacity, such that the additional storage of crude oil could translate into additional refining, and (2) the expansion of the storage tanks is part of a larger project to expand the refinery. The trial court rejected these arguments. We independently examine the issue and conclude that the trial court got it right. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. Background on the Refinery

Real party in interest and respondent Phillips 66 Company (Phillips 66) operates a crude oil refinery on 224 acres of land in a

heavily industrial area that straddles the communities of Carson and Wilmington (the Refinery). The Refinery converts the crude oil into a variety of products, including unleaded gasoline, diesel fuel, jet fuel, petroleum gases, sulfuric acid, sulfur, elemental sulfur, and petroleum coke.

The Refinery receives its chief input—crude oil—from onshore pipelines as well as from tanker ships that dock at the nearby Port of Long Beach. In 2012, the Refinery stored the crude oil awaiting refining in four separate tanks, each with a capacity of 320,000 barrels. The crude oil entered the Refinery from those tanks. The refining process itself involves several steps, starting with separating the crude oil into various components and later subjecting those components to a number of different chemical processes. The Crude Oil Unit is the first step in this refining process, and thus the first place to which the crude oil in the storage tanks is pumped. At maximum, the Refinery is able to refine 139,000 barrels of crude oil per day (which comes to 50.735 million barrels per year).

Defendant and appellant South Coast Air Quality Management District (the District) is the public agency responsible for regulating air pollution from sources other than motor vehicles in portions of Los Angeles, Orange, Riverside and San Bernardino Counties. (Health & Saf. Code, §§ 40000, 40410; Cal. Code Regs., tit. 17, § 60104.) The District undertakes this task by issuing permits that regulate industrial conduct and thus the amount of emissions resulting from that conduct. (Health & Saf. Code, § 42300, subd. (a).) In 2012, the Refinery held a District-issued permit that allowed it to pump a certain quantity of oil—namely, 4.562 million barrels of oil per year—into and out

of each of the four storage tanks; this is called the tanks' "throughput."

B. Phillips 66's permit application

In late 2012, and early 2013, Phillips 66 filed an application with the District to modify the Refinery's permit to (1) increase the throughput for two of the existing tanks to 18 million barrels of oil per year (per tank), and (2) build a new 615,000 barrel storage tank with a throughput of 30 million barrels of oil per year (or 2.5 million per month).[1] Phillips 66 sought these modifications because it was receiving crude oil from supertankers that carried more crude oil than could be offloaded into the existing tanks in a single visit; as a result, these supertankers were having to dock, offload some of their crude oil, leave port and "hotel" off the California coast for seven to ten days while the Refinery processed that oil, then re-dock to offload the remainder. This procedure resulted in higher costs as well as greater air pollution as the supertankers polluted the air while waiting offshore.

C. The District's environmental review

The District conducted an initial study of Phillips 66's proposed "crude oil storage capacity project." The study found

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1 The application also requested a permit to (1) install two new feed/transfer pumps for, and build geodesic domes atop, the two tanks with the increased throughput; (2) build a 14,000-barrel water draw surge tank, a brine stripper machine and associated machinery to draw seawater out of the crude oil that arrives by ship; (3) build an electrical power substation near the storage tanks; and (4) install tie-ins to the pipeline that runs from the Port of Long Beach to the storage tanks. Because these aspects of the application are not challenged on appeal, we do not discuss them further.

that the overall increase in the throughput of the three affected storage tanks would result in the escape of more volatile organic compounds as crude oil was pumped in and out of those tanks, but that the total volume of these so-called "fugitive emissions" was less than the District's "significance threshold." The study also looked at the "downstream" impact of the increased storage capacity, and concluded that there would be no "emissions increase" from the Refinery. In light of the study's conclusion that "the proposed project could not have a significant effect on the environment," the District issued a Draft Negative Declaration and sought public comment.

Plaintiff and appellant Communities for a Better Environment (plaintiff), a "non-profit environmental health and justice organization," objected to the Draft Negative Declaration. Among other things,[2] plaintiff argued that the Draft Negative Declaration was flawed because (1) its "description" of the "baseline" of Refinery operations was "incorrect[]" and "incomplete" because it did not "analy[ze] . . . actual potential environmental impacts" or "actual levels of operation" of the Refinery; and (2) it did not account for the fact that the storage tank project was "part of [a] future expansion[]."

The District filed written responses to plaintiff's comments and also issued a Final Negative Declaration, both of which provided a more in-depth explanation of why, in the District's view, the expanded capacity and throughput of the Refinery's storage tanks would not have a significant effect on the environment. The District reaffirmed its view that the fugitive

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2 Plaintiff raised a number of other objections, but we do not discuss them further because plaintiff does not assert them as a basis for reversal on appeal.

emissions were below the threshold of significance. The District also rejected the argument that the increased storage capacity and throughput of the tanks meant that the Refinery could *refine* more crude oil (and thereby increase emissions from the refining process). The District explained that the Refinery was itself operating "at maximum capacity"—namely, 139,000 barrels per day—and that the changes to the storage tanks could not and thus did not in any way alter that daily throughput. The District further elaborated that (1) the Crude Oil Unit is the initial "bottleneck" at the Refinery, that its capacity is "limited by the size of the crude distillation column and the heat produced by the Crude [Oil] Unit heater," and that the heater was "operat[ing] at various firing rates and normally operates at or near the permit limit"; and (2) the "downstream" "process units" were also already operating at maximum capacity.

In December 2014, the District's Executive Officer adopted the Negative Declaration. Simultaneously, the District issued a new permit for the Refinery, authorizing construction of the new storage tank and increasing the throughput limits for two of the existing tanks. The District limited the storage tanks to holding crude oil; the tanks could not be used to hold finished products.

II. Procedural Background

Plaintiff filed a petition for a writ of mandate. In the operative first amended petition naming both the District and Phillips 66, Plaintiff alleged that the District's Final Negative Declaration violated the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) in six different

ways. As pertinent here,[3] plaintiff alleged that (1) the District did not provide an "accurate project description," (2) the District erred in not preparing an environmental impact report given the likely increases in air emissions, and (3) the District improperly "piecemealed" the project by not looking at the potential for a future increase in the Refinery's *refining* of crude oil.

Following a full round of briefing, the matter proceeded to a bench trial. Thereafter, the trial court issued a 30-page order denying plaintiff's petition. The court concluded that the District did not err in describing or analyzing Phillips 66's proposed project. Specifically, the court concluded that "the baseline refining capacity of the [Refinery] will not change" because the Crude Oil Unit's heater was "operat[ing] at or near the permit limit" and because the "downstream" "process units" were also operating at maximum capacity. The court accordingly rejected plaintiff's "insinuation that the [Refinery] is somehow planning to engage in increased refining activity" as "supposition" that was not only unsupported by the record but contradicted by it. The court next ruled that the Final Negative Declaration did not use an impermissibly vague "baseline" of current operations simply because the Declaration noted that the Crude Oil Unit's heater was operating "at or near capacity"; that notation did not change the undisputed fact that the "crude throughput of the Refinery"

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3 Plaintiff raised three additional claims with respect to the refusal of the Governing Board of the District to entertain plaintiff's appeal from the Executive Officer's adoption of the Final Negative Declaration. After the Executive Officer had issued the permit, plaintiff had purported to appeal to the Governing Board and requested a hearing. The Governing Board denied the appeal. Plaintiff does not press these claims here, so we will not discuss them further.

was already at its maximum. The court lastly concluded that the District did not impermissibly "piecemeal" its analysis by refusing to examine future expansions of the Refinery's *refining* capacity, finding that "the record contains no evidence of plans to expand [that] capacity."

After the trial court issued its judgment denying the writ of mandate, plaintiff filed this timely appeal.

DISCUSSION

Our Legislature enacted CEQA nearly a half-century ago "'to "[e]nsure that the long-term protection of the environment shall be the guiding criterion in public decisions."'" (*Friends of College of San Mateo Gardens v. San Mateo Community College Dist.* (2016) 1 Cal.5th 937, 944 (*Friends of College*), quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74.) CEQA operates not by dictating pro-environmental outcomes, but rather by mandating that "decision makers and the public" study the likely environmental effects of contemplated government actions and thus make fully informed decisions regarding those actions. (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 447 (*Neighbors for Smart Rail*); *Friends of College*, at p. 944; Pub. Resources Code, § 21061.)[4]

To achieve this goal, CEQA tasks state and local public agencies with undertaking a three-step analysis before taking any action, including any action that authorizes the activities of a private third party. (§§ 21065 [defining "project"], 21101 [state agencies], 21151 [local agencies]; *California Building Industry Assn. v. Bay Area Quality Management Dist.* (2016) 2 Cal.App.5th 1067, 1080 (*California Building Industry*).)

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4 All further statutory references are to the Public Resources Code unless otherwise indicated.

In the first step, the agency is to conduct a preliminary review to assess whether the contemplated action qualifies as a "project" falling within CEQA's ambit and, if it does, whether the project nevertheless falls within one of CEQA's threshold exemptions. (*California Building Industry*, *supra*, 2 Cal.App.5th at p. 1080; Cal. Code. Regs., tit. 14, §§ 15060 [discussing preliminary review], 15061 [listing exemptions], 15378 [defining "project"].) If the action is not a "project" or is exempt, CEQA requires no further action beyond the filing of a notice of exemption if the project falls within an exemption. (*California Building Industry*, at p. 1080; Cal. Code Regs., tit. 14, § 15062.)

In the second step, which is only reached for a non-exempt "project," the agency is to conduct a more in-depth "initial study" to assess whether there is "substantial evidence supporting a fair argument [that] the project may have significant adverse effects" on the environment. (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319 (*Communities*); Cal. Code Regs., tit. 14, § 15064, subd. (f)(1); § 21082.2, subd. (a); see also *Communities*, at pp. 320-321, fn. 5 [noting that this threshold question applies no matter how it is answered].) A "significant adverse effect" is a "substantial, or potentially substantial, adverse change in the environment." (§ 21068; see also §§ 21100, subd. (d), 21151, subd. (b).) If the initial study reveals no such effect or an effect that can be avoided entirely or mitigated into insignificance, the agency may issue a negative declaration or a mitigated negative declaration, respectively, that so indicates. (§ 21080, subd. (c); Cal. Code Regs., tit. 14, §§ 15063, subd. (b)(2), 15070, 15071.)

In the third step, which is only reached if there is a fair argument that the project may have significant adverse

environmental effects, the agency is to prepare a full-blown environmental impact report. (§§ 21080, subd. (d), 21082.2, subd. (d).)

On appeal, our task is to assess whether the public agency committed a "prejudicial abuse of discretion," and we do so independently of the trial court's assessment of the same question. (§ 21168.5; *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 171 [applying "prejudicial abuse of discretion" standard to agency's issuance of a negative declaration]; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 80 (*City of Richmond*) ["In reviewing compliance with CEQA, we review the agency's action, not the trial court's decision"].)[5] An agency abuses its discretion (1) "if the agency has not proceeded in a manner required by law," or (2) "if the [agency's] determination or decision is not supported by substantial evidence." (§ 21168.5.) A lapse that qualifies as an abuse of discretion is "prejudicial" if it ""precludes informed decisionmaking and informed public participation."' [Citation.]" (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 653 (*San Joaquin Raptor*).)

Where, as here, the appellant challenges a public agency's issuance of a negative declaration, we ask: Has the appellant carried its burden to show that ""there is substantial evidence in the record supporting a fair argument of significant environmental impact""? (*South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604, 1612, quoting *Architectural Heritage Assn. v. County of Monterey*

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5 We accordingly have no reason to address plaintiff's argument that the *trial court* misapplied the burden of proof.

(2004) 122 Cal.App.4th 1095, 1109; *Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677, 684 (*Joshua Tree*).) In examining whether a fair argument can be made, we must canvass the entire record, and "'give the lead agency the benefit of the doubt on any legitimate, disputed issues of credibility.'" (*Joshua Tree*, at p. 684.) Although an "agency should not be allowed to hide behind its own failure to gather relevant data" (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311), "'"[a]n absence of evidence in the record . . . is hardly evidence that there *will* be a significant impact"' [citation]" (*Joshua Tree*, at p. 688).

Plaintiff levels two main attacks upon the District's decision to issue a negative declaration: (1) the District ignored the potential that the Refinery's ability to store more crude oil immediately translates into an ability to *refine* more cruel oil, and (2) the District ignored that the expansion of the Refinery's storage capacity is part of a larger move to expand the Refinery's *refining* capacity. The District and Phillips 66 counter that plaintiff may not complain of these defects on appeal because those defects were not raised before the District during the administrative proceedings, and plaintiff is thus barred for failure to exhaust administrative remedies. We turn first to the threshold issue of exhaustion.

I. Exhaustion of Administrative Remedies

The District and Phillips 66 argue that plaintiff did not object, prior to the Executive Officer's adoption of the Final Negative Declaration, that the storage tank expansion project would lead to additional processing of crude oil or was the first step in a larger project to expand the Refinery's processing capacity. Thus, they argue, plaintiff may not do so now.

A party may not obtain a writ of mandate overturning a public agency's actions due to the agency's noncompliance with CEQA "unless the alleged grounds for noncompliance . . . were presented to the public agency orally or in writing during the public comment period." (§ 21177.) Because the point of this exhaustion requirement is to facilitate the development of a full record and to "draw[] on the administrative agency's expertise" (*Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 239), the requirement is met if *anyone* presents the alleged grounds for noncompliance administratively; it need not be the same party seeking writ review. (*Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 711-712.) We independently examine whether an issue has been administratively exhausted. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536 (*Sierra Club*).)

The exhaustion of administrative remedies doctrine does not bar our review of plaintiff's arguments on appeal for two reasons. To begin, neither the District nor Phillips 66 asserted nonexhaustion as to these arguments before the trial court.[6] Although the exhaustion of administrative remedies doctrine is "jurisdictional" (*Sierra Club*, *supra*, 163 Cal.App.4th at p. 535), it is not jurisdictional in the sense of depriving a court of subject matter jurisdiction and consequently may be waived if not raised before the trial court (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1215-1216). Here, it was waived.

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6 They raised nonexhaustion as to other arguments, and the trial court agreed. However, those arguments are distinct from the ones pressed by plaintiff in this appeal.

In any event, the issues plaintiff raises in this appeal *were* properly exhausted. An issue is exhausted only if "'[t]he "exact issue" [was] presented to the administrative agency . . . .'" (*Sierra Club*, *supra*, 163 Cal.App.4th at p. 535.) Here, it was. Plaintiff objected that the District (1) failed to "analyz[e] . . . actual potential environmental impacts" or the "actual levels of operation" of the Refinery; and (2) failed to consider that the storage tanks were "part of [a] future expansion[]." Those objections track the two main issues plaintiff raises on appeal. What is more, the District understood those objections to do so. In its subsequent comments and in the Final Negative Declaration, the District expressly noted that the storage tank expansion project "will not cause any changes to Refinery processing" "based on historical actual refinery operations," and that the project "does not contemplate any refinery expansion, now or in the foreseeable future." As explained below, these are the exact issues presented in this appeal.

II. Immediate Effect on Refinery's *Refining* Throughput

Plaintiff first argues that the Final Negative Declaration is defective because its conclusion that there is no fair argument of significant environmental impact (1) uses an invalid baseline for assessing the impact of the storage tank project, and (2) ignores that the increased storage capacity presents a potential for increased refining of crude oil. The selection of a baseline is reviewed for substantial evidence when an agency is choosing among viable alternative baselines (*North County Advocates v. City of Carlsbad* (2015) 241 Cal.App.4th 94, 101 (*North County Advocates*)), and is reviewed de novo when the baseline is alleged to be unlawful (see *Vineyard Area Citizens for Responsible*

Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 435). We will employ de novo review. The propriety of the District's finding that the project will not result in greater crude oil refining is a factual finding we review for substantial evidence. (E.g., *San Joaquin Raptor*, *supra*, 149 Cal.App.4th at p. 654.)

A. Selection of baseline

The only way to assess the potential environmental impact of a project is to compare what the environment would be like *without* the project to what it would be like *with* the project. The former measure is called the "baseline." (*Communities, supra*, 48 Cal.4th at p. 315 [the "baseline" is the "measure of the environment's state absent the project"]; *Neighbors for Smart Rail*, *supra*, 57 Cal.4th at p. 447.) The regulations interpreting CEQA "normally" define the "baseline physical conditions" as "the physical environmental conditions in the vicinity of the project" "at the time" before the project is implemented (Cal. Code Regs., tit. 14, § 15125, subd. (a)), although courts recognize that agencies "enjoy[] [a] discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured" (*Communities*, at p. 328; *North County Advocates*, *supra*, 241 Cal.App.4th at p. 101).

In assessing the impact of Phillips 66's proposed expansion to the Refinery's capacity to *store* more crude oil on its capacity to *refine* more crude oil, the District used as a "baseline" the "historical actual [R]efinery operations," and focused specifically on the "current operations of the Crude [Oil] Unit." In describing the operations of the Refinery as a whole, the District noted that, although the "refining processes rates fluctuate," the Refinery's crude oil "refining processes have operated at maximum capacity

in the past and are expected to continue to operate at maximum capacity in the future due to constraints," in part due to the full throughput capacity of the Crude Oil Unit and in part due to the full throughput capacity of the "process units located downstream of the Crude [Oil] Unit." In explaining the Crude Oil Unit more specifically, the District noted that its process capacity was a function of the "size of the crude distillation column and the heat produced by the Crude Unit heater," and reported that the heater "routinely operates at various firing rates and normally operates at or near the permit limit."

Plaintiff argues that this baseline is legally invalid for three reasons. First, plaintiff contends that the District's reference to the Crude Oil Unit's "permit limit" means that the District is committing the sin condemned in *Communities*, *supra*, 48 Cal.4th 310. There, the public agency defined a refinery's environmental baseline as the emissions that a refinery had the permits to release rather than the refinery's actual emissions. (*Id.* at p. 318.) Our Supreme Court concluded that was error, holding that a CEQA baseline had to be based on "'existing physical conditions in the affected area' . . . rather than the level of development or activity that *could* or *should* have been present according to a plan or regulation." (*Id.* at pp. 320-321, italics in original.) Here, by contrast, the District looked to the "historical . . . actual operations" of the Refinery and how it has "operated . . . in the past." The District alluded to the Crude Oil Unit's "permit limit" not to fix a hypothetical baseline, but instead to describe how that unit was *actually* operating.

Second, plaintiff asserts that the District's baseline is vague and "unstable" because (1) it refers to the Crude Oil Unit's operation at "various" rates and "near" the permit limit without

quantifying the various rates or specifying *how* near the limit, and (2) it inconsistently refers to "actual conditions" and "historical" conditions. Plaintiff cites the maxim that an environmental impact report must define the project it is analyzing in a manner that is "'accurate, stable and finite.'" (*San Joaquin Raptor*, *supra*, 149 Cal.App.4th at p. 655, quoting *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199.) Even if we adopt that same approach when it comes to defining a project's baseline, the District's baseline is "accurate, stable and finite." Although the Crude Oil Unit's heater might be operating at "various" rates and "at or near the permit limit," the Unit itself is operating at "maximum throughput." The fluctuations in heater usage reflect no more than the fact that the heater does not need to burn *at full power all the time* in order for the Crude Oil Unit itself to achieve maximum throughput; it does not indicate any ambiguity on the pertinent question, which is: Can the Crude Oil Unit process any more crude oil than it is already processing? Moreover, we perceive no inconsistency between "actual" and "historical" conditions; actual conditions become historical conditions as each minute passes, and the Final Negative Declaration makes clear it is referring to ongoing operations. Plaintiff relies upon *San Joaquin Raptor*, 149 Cal.App.4th 645 and *City of Richmond*, *supra*, 184 Cal.App.4th 70 for support. However, both of those cases invalidated environmental impact reports that contained irreconcilable inconsistencies about the likely environmental effect of the proposed project. (*San Joaquin Raptor*, at p. 655 [report indicates *both* that project will not result in increases in mine production *and* will result in "substantial increases" in mine production]; *City of Richmond*, at p. 83 [report indicates

both that project will not enable a refinery to process heavier crude oil *and* that it will allow more flexibility in refining crude oil supplies, including "increasingly heavier" crude].) There are no such inconsistencies here.

Lastly, plaintiff maintains that the baseline is deficient because the District never quantified the permit limit for, or provided data regarding the use of, the Crude Oil Unit's heater or the throughput of the Refinery. In *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 87-94, plaintiff argues, the court faulted the public agency for not disclosing an estimate of the volume of groundwater contained in an aquifer that was in jeopardy of contamination due to the project under consideration by the agency. In *Cadiz Land Co.*, "[a]n estimate of the volume of groundwater in the aquifer [was] critical to a well-informed determination of whether the risk of groundwater contamination [was] worth taking." (*Id.* at p. 94.) Here, by contrast, the actual heater permit limit and the associated data regarding its use do not affect the facts that the Crude Oil Unit and the Refinery as a whole are already at maximum throughput and thus can process no greater volume of crude oil than they are already processing. Because "[t]he description of the" baseline "shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives" (Cal. Code Regs., tit. 14, § 15125, subd. (a)), the District did not err in omitting this irrelevant information.

B. Potential for greater processing of crude oil

Plaintiff next asserts that there is substantial evidence in the record supporting a fair argument that the Refinery's increased *storage* capacity for crude oil translates into an increased *refining* capacity of crude oil, and that the Negative

Declaration's failure to consider the consequent "significant environmental impact" from this increased refining invalidates the Declaration. (See *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1202 (*Lighthouse Field*) ["'Where an agency . . . fails to gather information and undertake an adequate environmental analysis in its initial study, a negative declaration is inappropriate'"].)

The linchpin of plaintiff's argument is its assertion that the Refinery has excess refining capacity that Phillips 66 will be able to exploit with the additional crude oil being warehoused in the Refinery's storage tanks. However, that assertion is not supported by substantial evidence. The Final Negative Declaration consistently and repeatedly refutes that assertion when it reports that the Refinery's "refining processes have operated at maximum capacity in the past and are expected to operate at maximum capacity in the future due to constraints," such that "the baseline crude throughput rate and output of the [Refinery]" could not, and thus "would not[,] change."

Plaintiff rallies two categories of evidence in response. First, it cites the Final Negative Declaration's statement that the operation of the Crude Oil Unit "fluctuate[s]" and that the Unit's "heater routinely operates at various firing rates and normally operates at *or near* the permit limit." The fact that the Crude Oil Unit at times operates "near"—but nevertheless *below*—the permit limit, plaintiff reasons, implies that there is excess capacity to be exploited. This implication does not constitute substantial evidence that the Refinery—or, for that matter, the Crude Oil Unit—has any excess processing capacity. To begin, the District elsewhere explains that the Crude Oil Unit has already "achieved maximum throughput." This statement is

consistent with the disclosure that the Crude Oil Unit's heater burns at "various firing rates" because, as noted above, those fluctuations in firing rate reflect no more than the fact that the heater does not need to burn *at full power all the time* in order for the Crude Oil Unit itself to achieve maximum throughput. Moreover, the throughput of the Refinery as a whole is limited not only by the Crude Oil Unit's processing capacity but also by the capacity of all of the "process units located downstream," which are the very "refining processes" that the District reports are "operat[ing] at maximum capacity."

Second, plaintiff cites the District's statement that "[t]he refining *processes rates* fluctuate and have achieved maximum capacity periodically in the past and are expected periodically in the future." Just as the fluctuating rate of the Crude Oil Unit's heater does not mean that Unit is not at its maximum throughput, the fluctuation of the Refinery's process rates does not mean the Refinery's throughput is not at its maximum; in other words, the *rate* of crude oil processing need not be at its maximum in order for the Refinery's *throughput* to be at its maximum. Because the current level of throughput is what causes the current level of air pollution and because it is undisputed that the Refinery's throughput is at its maximum, the variable processing rate is of no consequence to the issue of pollution.

At bottom, plaintiff asks us to infer excess processing capacity from variations in the Crude Oil Unit's heater use and in the Refinery's processing rate—notwithstanding the undisputed fact that both the Unit and the Refinery are operating at maximum throughput. Plaintiff's insistence that the declarations of maximum throughput are wrong and its bald assertion that

the fluctuating rates amount to excess capacity are supported by nothing more than "speculation" and "unsubstantiated opinion or narrative"; neither constitutes "substantial evidence." (§ 21082.2, subd. (c); *San Joaquin Raptor*, *supra*, 149 Cal.App.4th at p. 654.)

III. Impermissible Piecemealing

Plaintiff next asserts that the Final Negative Declaration is invalid because Phillips 66's storage tank expansion project is part of a larger project to expand the Refinery, and the District has wrongly opted not to study the environmental effects of this larger project. We independently review whether one project is part of a larger project subject to study under CEQA. (*City of Richmond*, *supra*, 184 Cal.App.4th at p. 98.)

CEQA "forbids 'piecemeal' review of the significant environmental impacts of a project." (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1358 (*Berkeley Jets*).) This prohibition stems from two sources—a public agency's duty to define the "project" being evaluated by "the whole of an action" (Cal. Code Regs., tit. 14, § 15378, subd. (a)), and its duty to "consider[] the effects, both individual and collective, of all activities involved in [the] project" (§ 21002.1, subd. (d)). (See generally *Berkeley Jets*, at p. 1358.) Because CEQA does not require the examination of long-range planning proposals (Cal. Code Regs., tit. 14, § 15262), a public agency's duty to avoid piecemealing requires it to walk a very careful line: The agency cannot sidestep meaningful review by "'"chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences" [citation]'" (*Lighthouse Field*, *supra*, 131 Cal.App.4th at p. 1208), but it need not analyze "specific future action that is merely contemplated or a gleam in

a planner's eye" (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 398 (*Laurel Heights*)).

Our Supreme Court has explained how a public agency is to walk this line, and requires that an agency discuss the potential environmental impacts of related projects slated for the future if and only if (1) the future project "is a reasonably foreseeable consequence of the initial project" (*Laurel Heights*, *supra*, 47 Cal.3d at p. 396); and (2) the current project and the future project are "interdependent"—that is, the current project is "a crucial functional element of the [future,] larger project such that, without it, the larger project could not proceed" (*City of Richmond, supra*, 184 Cal.App.4th at pp. 99, 101; *Laurel Heights*, at p. 398; *Berkeley Jets*, *supra*, 91 Cal.App.4th at pp. 1360-1362).

Neither prerequisite is met in this case with respect to plaintiff's suspicion that the storage tank expansion project is part of a larger Refinery processing expansion at some point in the future. As the District noted in its responses to plaintiff's comments, "[t]his project does not contemplate any refinery expansion, now or in the foreseeable future." Further, there is no evidence in the administrative record indicating that an increase in the storage and throughput of the Refinery's crude oil storage tanks was a necessary precursor to—let alone a "crucial functional element" of—any future increase in the Refinery's refining capacity.

Because Phillips 66 and the District did not impermissibly "piecemeal" this project, the District did not prejudicially abuse its discretion in declining to consider the environmental impact of changes to the Refinery's crude oil processing plant that were

neither contemplated nor functionally linked to the current project.

DISPOSITION

The judgment is affirmed. The District and Phillips 66 are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
GOODMAN

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* Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.