

BS105930 and BS105960
Revised TENTATIVE ORDER

Petitioner AES ALAMITOS, LLC's petition for a writ of mandate is **GRANTED**.
CCP § 1094.5(f), PRC § 21168.5.

Petitioners LOS CERRITOS WETLANDS LAND TRUST and UNIVERSITY
PARK ESTATES NEIGHBORHOOD ASSOCIATION's petition for a writ of
mandate is **GRANTED**. CCP § 1094.5(f), PRC § 21168.5.

The CITY OF LONG BEACH is **ORDERED** to fully comply with the
requirements of the California Environmental Quality Act by preparing complete
and comprehensive EIR for the project. Any project approvals already obtained
are invalid. Respondents and Real Party in Interest STUDEBAKER, LLC are
restrained from any actions in furtherance of the project unless the EIR has been
prepared, publically circulated, and approved in a manner required by law.

All original requests for judicial notice are **GRANTED**. Petitioners's
supplemental request for judicial notice is ~~Granted~~ ^{EX} ~~part of~~ ^{part of} Objections to Exhibits
A and C are **SUSTAINED**.

A challenge to the EIR is reviewed for an abuse of discretion. PRC § 21168.5.
"Abuse of discretion is established if the agency has not proceeded in a manner
required by law or if the determination or decision is not supported by substantial
evidence." *Id.* An agency fails to proceed "in a manner required by law" when it
fails to comply with the informational and procedural requirements of CEQA.
Save Our Peninsula Com. v. Bd. of Supervisors (2001) 87 Cal. App. 4th 99, 115.
"A prejudicial abuse of discretion occurs if the failure to include relevant
information precludes informed decisionmaking and informed public participation,
thereby thwarting the statutory goals of the EIR process." San Joaquin Raptor
Rescue Center v. County of Merced (2007) 149 Cal. App. 4th 645, 670.

An EIR cannot validly require a neighbor to mitigate the project's significant
impacts. Nevertheless, the EIR included Mitigation Measure 4.6.10 requiring
review of Operating Plans of the Power Plant to determine "whether additional
measures/revisions are necessary based on the project implementation." 738. The
court recognizes that the City responded to petitioner's comment by stating "that

restrictions would not be placed on AES with respect to their current operations.” 2887. However, the mitigation measure was not eliminated and the City did not evaluate other changes in the project that would reduce public safety impacts such as (1) requiring the project to construct a 12 foot high security wall between the project and the Power Plant (2) eliminating areas where large numbers of people will congregate (such as outdoor eating areas) or (3) providing a greater buffer adjacent to the power plant. A requirement to comply with existing regulations is not adequate under CEQA. Sundstrom v. County of Mendocino (1968) 2002 Cal. App. 3d 296 307-309. Furthermore, the law only requires updates to the operating plan when an “Off Site Consequence Analysis” is needed. 19 CCR §§ 2745.10(a)(6), 2750. The obligation to prepare an “Off Site Consequence Analysis” arises “(b) if changes in processes, quantities stored or handled, or any other aspect of the stationary source might reasonably be expected to increase or decrease risks to public.” 19 CCR § 2750(b). Additional measures required by existing laws, if any, should be imposed on AES only after all feasible measures are implemented by the developer.

Furthermore, mitigation measure 4.6.11 which requires STUDEBAKER to submit an undefined emergency response program to the City, is vague. 738, see also 11189-11190. There are no performance criteria or standards associated with the measure and no way to evaluate whether the measure can effectively mitigate the impacts. Existing laws impose standards for the stationary source handling the hazardous materials. They do not provide standards for a neighboring property. See, e.g., H & S Code §§ 25503.5, 25534. There is no substantial evidence in the record to show that the mitigation measures are adequate to support the City’s finding that the project will have a less than significant public safety impact.

The City must either (1) impose meaningful conditions on project proponent and real party in interest, rather than on the adjacent landowner, to mitigate the project’s public safety impacts to a less than significant level or (2) conclude, if its findings so indicate, that those project impacts were significant and unmitigable.

The conditional use of the site within the IG Zone for retail is consistent with a plain reading of the City’s Municipal Code. Respondent’s Request For Judicial Notice, Ex. B, Table 33-2, use category 7. The City staff opined that “Utilizing the site for commercial activities instead of a heavy industrial use provides greater compatibility with the surrounding neighborhood, and in the long term, is a benefit to the City.” 96. Thus, the City’s decision, as far as the CUP is concerned, is

supported by substantial evidence. The decision to issue of variances appears to be justified, under the circumstances, and the City's findings are supported by substantial evidence. 87, 104, 628, 796, 1978, 1980, 7422, 8050, 11226. Such discretionary determinations must be afforded deference. Therefore, the petitioner's fourth cause of action fails and the writ is not granted on that ground. This ruling, however, does not preclude a finding by the Coastal Commission that the project does not comply with the Local Coastal Program or the Coastal Act. The approval or denial of a Coastal Development Permit is currently under de novo review by the Commission.

ADEQUACY OF THE FEIR

The court has serious concerns about the adequacy of the FEIR. Despite comments received from various government agencies and the public regarding its shortcomings, the City discounted claims that the EIR was insufficient or incomplete.

Biological Impacts

Specifically, the Department of Fish and Game (DFG) commented that the finding of no potentially significant impacts "is not adequately supported for either the burrowing owl or sensitive annual plant species." 2844. The DFG has promulgated survey protocols which include winter surveys, buffer zone surveys, and surveys of the entire project area. Request for judicial notice, Ex G at 3. However, no surveys were conducted between December 1 and January 31, the buffer zones were not surveyed and no survey was conducted at the 7th Street parcel. 1235, 1233, 1976. Respondents simply conclude that there was no need to follow the DFG protocol because there was enough evidence about the burrowing owls presence such that there was no need to follow the protocol. Opp. at 39 citing Association of Irrigated Residents v. County of Madera (2003) 107 Cal. App. 4th 1383. Burrowing owls have been observed on site, burrows were observed in local berms and yet winter surveys were not conducted as required by the DFG. Ignoring available protocol information does not satisfy the requirement that a "thorough investigation" be conducted and that a public agency use its "best efforts to find out and disclose all that it reasonably can." 14 CCR § 15145, 15144.

DFG also observed that the survey for sensitive plants was inadequate, that only one survey was conducted in February and that some plants could have been overlooked. 2844. Instead of conducting additional surveys, respondents relied on earlier surveys of which DFG was aware when it concluded that the surveys were inadequate. 701, 2844.

Wetlands Delineation

The need for wetlands delineation was ignored. Even degraded areas are protected because of the potential they have for returning to natural conditions. Bolsa Chica Land Trust v. Superior Court (1999) 71 Cal. App. 4th 493, 506. Despite respondents' contention that the area is totally paved and developed for 50 years, a biologist reported that "Flat unvegetated dirt in the bottom of the basins surrounds each abandoned tank." Photographs indicate that the berms and swales are at least vegetated. 652 (views 5 and 6). Furthermore, respondents' own biologist found wildlife on the site, further evidence that the site is not "totally paved." Respondents have not conducted a delineation and there is no substantial evidence in the record to support their assumption that no portion of the project site needed to be evaluated for its potential of being wetlands.

Light and Noise

Night lighting and noise impacts to the nearby Los Cerritos wetlands were not analyzed. The City concluded that the project would not have an effect on the wetlands from "traffic, light and noise." The EIR states simply, without support, that "These sources already exist and are not expected to increase substantially." 707. Respondents reasoned that (1) there was already light and noise from traffic and AES activities, (2) there will be controls on the lighting and (3) that the wetlands is 200 feet away, separated by Studebaker Road. Opposition at 42. During the administrative process comments were received, citing expert studies and reports, explaining why the conclusion was wrong. 10531-10536. Yet, no baseline study of lighting was done and noise measurements were taken only during one late morning period. 10533, 808. Testimony showed that there would be a perceptible increase in noise and light. 801, 808, 10533, 10535, 10536.

Traffic and Circulation

The City can rely on its own expert's analysis instead of other competing analyses. Greenbaum v. City of Los Angeles (1984) 153 Cal. App. 3d 391, 413. Here, the City completed a complete traffic analysis which included cumulative impacts from other proposed projects. The City imposed all feasible traffic mitigation measures, including re-striping, new signals, signal connections and coordination and did not improperly defer mitigation. 1957-1960, 2489. The City has no jurisdiction over the SR-22 ramps and, as stated in the EIR, CalTrans has no plans for improving them. 1957-1958. Some of the confusion over trip counts was due to a typographical error and the inadvertent inclusion of Table D, which was clearly for another project. Although, the court is not ordering further analysis of traffic and circulation impacts, the EIR should be revised to correct the errors and, if appropriate, to include any other matter necessary as the result of any changed conditions.

Air Quality

An agency must use a “reasonably conscientious effort” to obtain relevant data. Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners (2001) 91 Cal. App. 4th 1344, 1370. The City’s use of baseline air quality data from a remote station in North Long Beach is not justified. Recent data from a closer monitoring station is readily available and, if needed, can be augmented by historical data from the older station. Without the data from the PCH station, the analysis is incomplete and “entitled to no judicial deference.” *Id.* at 1355. A prejudicial error analysis is not applicable when relevant information is omitted from the environmental analysis. Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova (2007) 40 Cal. 4th 512, 435. Mitigation measures adopted by the agency must be made fully enforceable “through permit conditions, agreements, or other measures.” PRC § 21081.6(b), 14 CCR § 15126.4(a)(2). Respondents provide no explanation for their rejection of the feasible measures proposed by the SCAQMD.

Alternatives

Exclusion of an offsite alternative solely because of “jurisdictional boundaries” was improper. Municipal boundaries are but one of the numerous factors to be considered. 14 CCR § 15126(f)(1). No one of these factors establishes a fixed limit on the scope of reasonable alternatives. *Id.* (citing Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal. 3d 553). A suggested Seal Beach site, was rejected without analysis.

A reduced project was also rejected without being declared infeasible. “CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment. . . unless the measures to mitigate those effects are truly unfeasible.” City of Marina v. Board of Trustees of the California State University (2006) 39 Cal. 4th 341, 368. The EIR rejected a smaller alternative that would have been economically feasible and would have fulfilled most of the project alternatives, except size. The City’s project objectives were “unnecessarily restrictive and inflexible” to permit a reasoned choice. See Preservation Action Council v. City of San Jose (2006) 141 Cal. App. 4th 1336, 1360.

Availability of Documents

CEQA requires that the agency provide “the address where copies of ...all documents referenced in the draft environmental impact report are available for review. PRC § 21092(b)(1). Some of the documents relied on by respondents were not made available to the public for review. 2595-2597, 2915, 2594.

For the above reasons, the EIR is declared invalid and the petitioners’ writs are granted.