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FEATURE ARTICLE

BACK TO BASICS: SETTING THE ENVIRONMENTAL BASELINE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

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Three recent decisions under the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 *et seq.*) focus on determining the "environmental baseline" against which a proposed project's potentially significant impacts must be measured. (*See, Communities for a Better Environment v. South Coast Air Quality Mgmt. Dist.*, 48 Cal.4th 310 (2010); *Cherry Valley Pass Acres and Neighbors v. City of Beaumont*, ___Cal.App.4th___, Case No. E049651 (4th Dist. 2010); *Sunnyvale West Neighborhood Assoc. v. City of Sunnyvale City Council*, ___Cal. App.4th___, Case No. H035135 (6th Dist. 2010).) These decisions hold the baseline must realistically reflect actual physical conditions occurring before project approval, with a lead agency maintaining discretion to determine what temporal "snapshot" best captures such conditions. By contrast, in setting the baseline, a lead agency generally cannot rely on hypothetical levels of activity or impacts derived from permitted—but never realized — operations or post-approval projections.

The environmental baseline is the starting point for any meaningful CEQA analysis, since "[i]t is only against this baseline that any significant environmental effects can be determined." (*County of Amador v. El Dorado County Water Agency*, 76 Cal.App.4th 931, 952 (1999).) It is critical to producing a legally-sufficient CEQA analysis that lead agencies, and their technical consultants and legal counsel, understand the rules for "setting the baseline."

While the CEQA baseline is "normally" the physical conditions existing in the project's vicinity at the time the notice of preparation of an environmental impact report (EIR) is published, or if no notice is published when the environmental analysis commences (14 CCR § 15125(a)), the lead agency has discretion to deviate from the general "time-of-review" baseline rule in some circumstances. (*Fat v. County of Sacramento*, 97 Cal.App.4th 1270, 1278 (3rd Dist. 2002).) Because the existing pre-project "existing environment" is not a diorama, but a dynamic and varying set of physical conditions, the lead agency's determination in setting the baseline rule also requires the exercise of discretion and judgment in determining just what the relevant "existing conditions" actually are. Baseline setting can be particularly challenging when analyzing scientifically complex and commonly-litigated areas of fluctuating environmental impacts such as traffic, noise, water usage/supply and pollution emissions—impact areas specifically addressed by the recent decisions. A lead agency can face even greater complexity when it considers projects that modify existing operations, or is confronted with claims of vested rights or legal entitlements to cause certain impacts.

This article examines CEQA's rules for setting the environmental baseline, including the impact of the recent judicial decisions, such that public agencies, planners, consultants and land use lawyers hopefully may prepare more defensible documents.

Environmental Baseline Basics

CEQA requires lead agencies to prepare and certify an EIR prior to approving any non-exempt discretionary project that may have a significant, adverse environmental effect. (Pub. Resources Code, §§ 21080(a); 21082.2(a); 21100; 21151; 14 CCR § 15064.) Among other things, the EIR must analyze in detail "[a]ll significant effects on the environment of the proposed project." (Pub. Resources Code § 21100(b)(1).)

A "significant effect on the environment" is defined as "a substantial, or potentially substantial, adverse change in the environment." (Pub. Resources

Code, § 21068.) The "environment" is defined as "the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise [and] objects of historic or aesthetic significance." (§ 21060.5; *see*, § 21100(d) ["any significant effect on the environment shall be limited to substantial, or potentially substantial, adverse changes in physical conditions which exist within the area as defined in § 21060.5."].)

The CEQA Guidelines define "environment" to mean "the physical conditions which exist within the area which will be affected by a proposed project" and clarify that the environment "includes both natural and man-made conditions." (14 CCR § 15360.)

> 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.... (14 CCR § 15125(a), emph. added; *see id.* at § 15126.2.)

Hence, the general rule is that the "environmental baseline" is the physical conditions in the project area at the time environmental review commences although, as noted above, the lead agency has some discretion to depart from this rule where appropriate. (*Fat*, 97 Cal.App.4th at 1278.)

Additional considerations apply in the context of planning actions. Where an EIR compares a project to an adopted land use plan, it must examine impacts to *both* existing physical conditions *and* potential future conditions discussed in the plan, a "two-baselines approach." (*Woodward Park Homeowners Assn., Inc. v. City of Fresno*, (5th Dist. 2007) 150 Cal.App.4th 683, 707, citing 14 CCR § 15125.) When the project itself is the amendment or revision of an existing land use plan or policy, a legally sufficient analysis of its impacts must still compare those impacts to the "existing physical conditions in the affected area" (*Environmental Planning & Information Council v. County of El Dorado* [EPIC], 131 Cal.App.3d 350, 354, 355-358 (1982)), although the EIR's mandatory "no project" alternative must in this context also include an analysis of the impacts of "the continuation of the existing plan, policy or operation into the future" and a comparison of "the projected impacts of the proposed plan or alternative plan ... to the impacts that would occur under the existing plan." (14 CCR, § 15126.6(e)(3)(A).)

In the context of existing facilities, a number of courts have, under some circumstances, upheld use of maximum permitted operations levels or other impacts authorized by pre-existing entitlements as the "existing conditions" baseline. (*E.g.*, *Fairview Neighbors v. County of Ventura*, 70 Cal.App.4th 238, 242-243 (2nd Dist. 1999) [EIR for renewed use permit for long-operating mining facility appropriately assumed existing traffic baseline to be that generated when mine operated at full capacity under existing, CEQA-reviewed entitlement]; *Benton v. Board of Supervisors*, 226 Cal.App.3d 1467, 1476 (1st Dist. 1991) [mitigated negative declaration for modified use permit, allowing relocation of already-approved and partially-built winery, properly analyzed only additional impacts from relocation where rights to build winery in original location had already vested under original permit which had obtained final CEQA approval]; *San Joaquin Raptor Rescue Center v. County of Merced*, 149 Cal.App.4th 645, 658 (5th Dist. 2007) ["in the situation of an existing mine operation, a description of baseline environmental setting may reasonably include the mine's established levels of permitted use."].)

Application of the rules in the areas of "existing facilities" and ongoing operations has been murky at best, however, especially regarding the significance to the baseline analysis of claimed vested rights, prior CEQA review, prior illegal activities, and large pre- or post-project fluctuations or changes in historic operations impacts. (*E.g.*, *Bloom v. McGurk*, 26 Cal. App.4th 1307, 1309-1315 (1994) [interpreting baseline for applying CEQA's existing facilities categorical exemption to mean facility as it existed at time of agency's exemption determination, regardless of past CEQA compliance]; *compare Lewis v. Seventeenth Dist. Agricultural Assn.*, 165 Cal.App.3d 823, 838 (1985) [refusing to apply existing facilities categorical exemption, holding "unusual circumstances" exception applied where facility had undergone past upgrades causing significant environmental impacts following CEQA's 1970 enactment but without any CEQA review]; *see also*, *Riverwatch v. County of San Diego*, 76 Cal.App.4th 1428, 1452-1453 (1999)

[applying normal "time of review" baseline rule and holding EIR need not account for impact of prior illegal activities preceding that time]; *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors*, 87 Cal.App.4th 99, 121-128 (6th Dist. 2001) [rejecting argument that water use entitlement established baseline, and rejecting County's use of "late" baseline to measure water use impacts, where developer increased pumping substantially after project application was filed and new pumping levels did not reflect historical usage or level of pumping at commencement of environmental review].)

Anticipating myriad circumstances might arise affecting the calculus, the *Save Our Peninsula* court opined in significant dicta that:

> ...the date for establishing baseline cannot be a rigid one. Environmental conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods. In some cases, conditions close to the date the project is approved are more relevant to a determination whether the project's impacts will be significant .... For instance, where the issue involves an impact on traffic levels the EIR might necessarily take into account the normal increase in traffic over time. Since the environmental review process can take a number of years, traffic levels as of the time the project is approved may be a more accurate representation of the existing baseline against which to measure the impact of the project. (*Save Our Peninsula.* at 125-126.)

The New Baseline Decisions

The 2010 cases apply CEQA's baseline-setting rules in problematic, much-litigated areas – with results that have surprised many land use practitioners and consultants. These decisions address the nature and significance of vested rights and entitlements, and prior CEQA review; modification of existing industrial operations resulting in changes in air pollutant emissions; redevelopment of agricultural property for residential use resulting in changes in historical water use impacts; and development of major transportation infrastructure projects that will take years to complete, resulting in traffic impacts on a future environment that does not yet exist. These decisions refine and reinforce a number of basic baseline-setting principles.

Agency Retains Flexibility in Creating Baseline, but Purely Hypothetical Conditions Cannot Inform It

The California Supreme Court's March 2010 decision in *Communities for a Better Environment v. South Coast Air Quality Management District* (*CBE*) clarified a CEQA baseline must take account of *realized* physical conditions on the ground and that, in general, permitted—but not actually realized—operations constitute unacceptable "hypothetical" conditions. (48 Cal.4th at 318-19.) *CBE* did not provide any groundbreaking holdings, but did summarize, clarify, and harmonize a number of seminal cases.

Petitioners in *CBE* challenged a regional air district's decision to issue permits enabling an oil refinery to construct equipment upgrades and modifications as part of a new project that would increase the refinery's capacity to generate steam, with an ultimate goal of producing ultra-low sulfur diesel. Steam generation equipment generates nitrogen oxide, a major contributor to smog and health effects such as respiratory disease. In claiming the project's negative declaration failed to recognize and analyze the significant environmental impacts of the project's increased nitrogen oxide emissions, petitioners argued the lead agency erroneously adopted an emissions baseline assuming maximum permitted operation of the plant's existing boilers. (48 Cal.4th at 320.) Under that baseline, since the project's anticipated nitrogen emissions were actually less than emissions generated under the maximum permitted operation of the existing equipment, the air district determined the project would have less-than-significant air quality impacts. (48 Cal.4th at 318.) In reality, however, any given boiler ordinarily ran at the maximum allowed capacity only when one or more of the other boilers shut down for maintenance, and simultaneous operation of all boilers at their collective maximums was "not the norm." (48 Cal.4th. at 322.)

The Supreme Court held by "comparing the proposed project to what *could* happen [under the existing permits], rather than to what was actually happening," the district set an incorrect baseline. A baseline must account for "established levels of a particular use," and not "merely hypothetical conditions allowable" under previous approvals. Use of hypotheticals results in "illusory" comparisons that would

"mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts." (*citing EPIC*, 131 Cal.App.3d at 358.) The court referenced the general rule of CEQA Guidelines § 15125(a), with its focus on actual conditions existing at the time of the notice of preparation or, alternatively, the commencement of environmental review, but also recognized the need for flexibility:

> In some circumstances, peak impacts or recurring periods of resource scarcity may be as important environmentally as average conditions. Where environmental conditions are expected to change quickly during the period of environmental review for reasons other than the proposed project, projects might reasonably be compared to predicted conditions at the expected date of approval, rather than conditions at the time analysis has begun...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... (48 Cal.4th at 328.)

Thus, the court confirmed a lead agency "enjoys the discretion to decide ... how the existing physical conditions without the project can most realistically be measured, subject to review ... for support by substantial evidence." (48 Cal.4th at 328.).

Interpreting this holding, in December 2010 the Court of Appeal in *Sunnyvale West Neighborhood Association v. City of Sunnyvale* suggested, in *dicta*, that a lead agency may ignore "time-of-review" conditions where an "unusually poor economy" temporarily has depressed operations, or where levels of activity may increase significantly during the environmental review process due to other, relevant development. (2010 WL 5116526, *15.)

Another appellate court applied *CBE*'s holdings in late 2010, in the context of water supply/demand impacts in an overdraft groundwater basin area of Riverside County. In *Cherry Valley Pass Acres and Neighbors v. City of Beaumont*, a developer sought to convert a former egg farm into a 560-unit master-planned residential development on a 200-acre site. (2010 WL 4705953.) Upon buildout, the residential development's anticipated water use equaled about 500 acre feet per annum (afa). Petitioners challenged the project EIR, arguing the city erred in using a water use baseline exceeding 1,400 afa, which approximated average annual demand for water during the 40-year period the site had operated as an egg farm, even though the farm ceased operation during project EIR preparation. While the project site still accommodated a functioning egg farm when the city published the notice of preparation, thereby enabling the court to approve the higher baseline under CEQA Guidelines § 15125's plain language, the court instead cited *CBE*'s flexibility holdings, and rejected petitioners' claims on the basis that baseline setting was "quintessentially a discretionary determination of how the existing physical conditions without the project could most realistically be measured." (2010 WL 4705953, *9.) The court noted baseline water usage, set at 1,484 afa, was not substantially higher than the egg farm's documented annual average usage of 1,340 afa during a recent five-year period of operation.

Interestingly, the 1,484 afa figure described the egg farm's *adjudicated* water rights as overlying owners in the relevant basin which, while based on historical usage, nevertheless somewhat exceeded the documented past average. (The decision cited no evidence that annual water usage ever actually rose to such a level.) While petitioners likened this permitted usage to the type of hypothetical baseline *CBE* rejected, *Cherry Valley* held the:

> comparison fails because [the egg farm] not only had a history of pumping substantially the same amount of Beaumont Basin groundwater in its egg farm operations ... but was entitled to pump up to 1,484 afa on the 200-acre project site. (2010 WL 4705953, *11.)

It may be argued that, in approving an "entitlement" baseline, the court failed to sufficiently distinguish its facts from those of *CBE*, which rejected use of a permitted level of activity that in fact did occur, albeit rarely. One reading of *Cherry Valley* is that the "entitled" baseline was appropriate because it so closely approximated documented average historical usage which consistently had occurred as the "norm" during a long period of time. Another reading factors in the significance of the developer's judicially-adjudicated water use right as an overlying owner in the basin—a legal right directly authorizing a certain level of impact on the water supply—which arguably is distinct from the "entitlement" in *CBE*, which consisted of air district permits conferring no vested rights to pollute at any particular level. (48 Cal.4th at 324.) In any event, while *Cherry Valley* may gener-

ate some confusion, it is consistent with the general rule allowing lead agencies to exercise discretion in setting a baseline most accurately reflecting actual conditions on the ground when review commences.

It should be noted the cases approve of allowable or permitted baselines in other, distinct and limited circumstances, such as the subsequent review context. The Supreme Court explained in *CBE* that a CEQA baseline may incorporate a permitted level of activity where the project merely seeks to modify a previously analyzed project, such that the project is either exempt from CEQA or only requires preparation of a subsequent or supplemental EIR. (48 Cal.4th at 326, *approving Fairview Neighbors*, 70 Cal.App.4th at 242-43 [permitted baseline allowed where mining production project modified project previously analyzed under CEQA]; *Temecula Band of Luiseño Mission Indians v. Rancho Cal. Water Dist.*, 43 Cal.App.4th 425, 437-38 (1996) [modified water supply pipeline already had undergone CEQA review]; *Benton*, 226 Cal.App.3d at 1477-84 [modified location of winery construction project with CEQA review already was complete]; *Bloom*, 26 Cal.App.4th at 1311-1312; *Committee for a Progressive Gilroy v. State Water Resources Control Bd.*, 192 Cal.App.3d 847, 862-865] (1987).)

Vested Rights Are Not Disturbed

As indicated above, *CBE* also answered important questions about vested rights. In *CBE*, the oil refinery claimed that disallowance of a "permitted" baseline impinged on the refinery's vested rights; that is, in compelling use of a lower baseline, the CEQA analysis might result in a condition of approval that would limit the boilers' pollution to levels below those previously permitted. (48 Cal.4th at 324.) The California Supreme Court held that the previous permits did not confer a vested right to pollute the air at any particular level, and that an air district, irrespective of a project or permit, can require an emission source to reduce pollution under its regulatory authority.

Moreover, nothing about using actual pre-project emissions as the CEQA baseline in analyzing the new project could possibly affect any vested right to operate the existing boilers at permitted levels. While proper CEQA review recognizing significant impacts from the new project's increased emissions might result in conditions on or denial of that project, it would not prevent the refinery from operating its existing boilers at the levels allowed under existing permits. (48 Cal.4th at 323-324.)

Even assuming the refinery had a vested right to continue operations of existing equipment at certain levels, *CBE* held such a right would not provide the refinery with a vested right to operate at any specific level under the *proposed* project—*i.e.*, a *new* set of operations not in existence when the air district issued the original permits, and for which the refinery sought and required new discretionary permits. The court further reasoned in *dicta* that even if a CEQA analysis indicated that adverse impacts could only be mitigated by a condition of approval requiring a party to limit its operations so as to contravene existing vested rights, this would not justify non-performance of environmental review; rather, it might compel the lead agency either to disapprove the project or find that legal infeasibility renders impacts significant and unavoidable, necessitating a statement of overriding considerations.:

Future (Post-Approval) Baselines Not Alone Sufficient

In past years, an industry practice has developed among environmental consultants, particularly in noise and traffic analyses, whereby environmental documents establish existing and future baselines so as to realistically account for evolving changes to roadway networks and other infrastructure. Where it is foreseeable that a project will not become operational for a period of years, many CEQA documents omit an evaluation of a project's impacts on conditions existing at the time environmental review begins. This approach found support in the reasoning of the *Save of Our Peninsula* dicta quoted above. However, based on the Court of Appeal's December 2010 decision in *Sunnyvale West Neighborhood Association v. City of Sunnyvale*, this practice no longer appears defensible. *Sunnyvale* disallows sole reliance on future baselines, holding that while they provide valuable information, CEQA also demands at a minimum the use of an existing baseline. (2010 WL 5116526, *14.)

In *Sunnyvale*, the city prepared an EIR for a new freeway and railway overpass meant to alleviate congestion along a major city thoroughfare. The EIR compared the project's traffic, noise, and air impacts to a baseline of forecasted "buildout" conditions in year 2020, when the city expected the project to become operational. This baseline assumed the construction of various other roadway improvements that would become operational before that year.

Petitioners attacked use of the future baseline on the basis of the "time of review" requirement in CEQA Guideline § 15125(a). The city's more compelling response focused on the *dicta* in *Save Our Peninsula Committee*, which acknowledged "traffic levels as of the time the project is approved may be a more accurate representation of the existing baseline against which to measure the impact of the project." (*citing* 87 Cal.App.4th at 125-126.) The city noted *CBE* impliedly approved this *dictum* when it suggested the baseline might be the "predicted conditions at the expected date of approval" under limited circumstances. (*citing* 48 Cal.4th at 328.) *Sunnyvale* acknowledged this endorsement, but noted *CBE* established the time of project *approval* as the end point for the permissible temporal range of the required existing conditions baseline; further, in this case, the project approval date was in 2008—not 2020. The court concluded a lead agency does *not* have "carte blanche to select the conditions on some future, post-approval date as the 'baseline' so long [as] it acts reasonably as shown by substantial evidence." (2010 WL 5116526, *14.) Rather, a lead agency has discretion to set a baseline *at or prior to* project approval, subject to the substantial evidence standard, and sole reliance on a *future*, post-approval baseline is a failure to proceed as required by law, outside the lead agency's discretion.

Notwithstanding that the city justified its CEQA approach based on compliance with regional transportation agency guidance that recommended use of future baselines, the court held adherence to such guidelines does not provide a defense to CEQA challenge: "It is important to keep in mind that the administrative regulations implementing CEQA ... cannot contravene the governing statute." (2010 WL 5116526, *14.) The court also observed use of future baselines can confuse the cumulative impacts analysis, precluding adequate discussion of whether a project's incremental effects are cumulatively considerable. (2010 WL 5116526, *22.)

One legitimately may wonder why an existing conditions analysis is necessary if a project's opening date is far-term. Indeed, the city argued use of future baselines would result in more conservative and meaningful analyses, as more future traffic would make the environment more sensitive to project contributions. The court rejected these arguments, first questioning the certainty of the "build-out" assumptions that other development and roadway improvements actually would be built and become operational by the baseline date, and then relying on the fundamental rationale for the general "time-of-review" rule, holding use of a future baseline "fails to answer how and to what extent the proposed project itself would adversely change the existing traffic conditions *without* those other roadway improvements assumed to be in place by the year 2020." (2010 WL 5116526, *20-21.)

Conclusion

Setting the CEQA baseline remains a complicated endeavor. *CBE* is valuable insofar as it harmonizes past decisions, and reaffirms that lead agencies retain discretion and flexibility in selecting a baseline that realistically accounts for actual—not hypothetical—activities at or prior to project approval. *Cherry Valley* teaches that actual vested rights can still play an important role in the baseline analysis so long as substantial evidence supports their use as a proxy for actual (not purely hypothetical) activities and conditions. *Sunnyvale* invalidates a widespread industry practice through its insistence that CEQA documents *always* include an existing conditions baseline analysis—even when the project will not be built and become operational until many years after approval. Preparers of CEQA documents should pay careful attention to these decisions in undertaking traffic, noise, and air quality studies, and the growth inducing and cumulative impacts analyses that complement them.

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