



**MITCHELL
CHADWICK**

John T. Wheat
jwheat@mitchellchadwick.com
916-462-8874
916-788-0290 Fax

May 23, 2018

VIA ELECTRONIC MAIL

Jeannie Lee
California Office of Planning and Research
Jeannie.Lee@opr.ca.gov

Re: Proposed Rulemaking on Amendments to the State CEQA Guidelines

Dear Jeannie:

Our firm has recently received and addressed similar questions from clients regarding the appropriate baseline for subsequent review CEQA documents. (Cal. Pub. Res. Code § 21166; 14 CCR 15162.) For your convenience, excerpts of an analysis prepared by this firm to address those questions are included in the attached memorandum.

In summary, we believe that the current draft Amendments and Additions to the State CEQA Guidelines require additional language at the end of 14 C.C.R. section 15125(a)(3), to clarify that the prohibition against “hypothetical baselines” does not apply to subsequent review documents. In cases where a subsequent environmental document is required, the acceptable baseline is the prior environmental review completed in contemplation of the original project.

We therefore propose that section 15125(a)(3) be amended to read: “A lead agency may not rely on hypothetical conditions, such as those that might be allowed, but have never actually occurred, under existing permits or plans, as the baseline. This prohibition of a hypothetical baseline is not intended to apply to projects with a previous CEQA document that are undergoing modification pursuant to Cal. Pub. Res. Code section 21166, in which case the acceptable baseline is the project as previously studied, even if not yet built.”

Thank you for considering our comments, and please don't hesitate to contact us if you have any questions or wish to discuss further.

Best regards,

MITCHELL CHADWICK LLP

John T. Wheat

cc (via electronic mail):

Chris Calfee, California Natural Resources Agency
(Christopher.Calfee@resources.ca.gov)

Pat Mitchell, Mitchell Chadwick LLP

Enclosure:

Subsequent Review Baseline Analysis



MEMORANDUM

To: [EXCERPTS FROM MEMORANDUMS TO CLIENTS]
From: PAT MITCHELL AND JOHN WHEAT
Date: MAY 14, 2018
Re: **EXCERPTS FROM MITCHELL CHADWICK'S ANALYSIS OF
BASELINE IN CEQA SUBSEQUENT REVIEW DOCUMENTS**

I. The California Supreme Court addresses use of prior permitted levels for previously analyzed projects in *Communities for a Better Environment*.

The California Supreme Court has explained that the baseline for environmental review “must ordinarily be the actually existing physical conditions rather than hypothetical conditions that could have existed under applicable permits or regulations.” (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 448; emphasis added.) However, the Court also concluded that “factual circumstances can justify an agency departing from that norm when necessary to prevent misinforming or misleading the public and decision makers.” (*Neighbors for Smart Rail, supra*, 57 Cal.4th at p. 448.) As explained by the California Supreme Court in the *Communities for a Better Environment* case discussed below, subsequent review conducted pursuant to section 21166 is one of the factual circumstances justifying departure from existing physical conditions baseline analysis.

In *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010), the California Supreme Court considered whether an EIR prepared by the air district for a refinery expansion project used the proper CEQA baseline. (48 Cal.4th 310.) The air district relied on a baseline that assumed refinery boilers would be operating at the maximum capacity set in prior boiler permits, rather than the current existing levels of emissions from the boilers. (*Id.* at p. 326.) The Court addressed several appellate cases supporting the use of maximum operation levels allowed under a permit rather than existing physical conditions, holding:

The District and ConocoPhillips cite several Court of Appeal decisions as supporting the use of maximum operational levels allowed under a permit, rather than existing physical conditions, as a CEQA baseline. In each of these decisions, however, the appellate court characterized the project at issue as merely a modification of a previously analyzed project and hence requiring only limited CEQA review under section 21166 and CEQA Guidelines section 15162 (Cal.Code Regs., tit. 14, § 15162)...

(*Id.* at p. 326, underline added.) The Court then clarified that ConocoPhillips “applied for a new permit” and that the air district treated the application “as a new project.” (*Ibid.*) Thus, the preexisting boiler permits could not be used to establish the baseline for CEQA analysis. In

circumstances of subsequent environmental review following the approval of permits, the proper baseline is the project as it was permitted under the initial EIR.

II. The *Fairview Neighbors v. County of Ventura* case upheld an aggregate mine EIR that assumed full capacity of entitlements based on prior CEQA review.

Fairview Neighbors v. County of Ventura (1999), cited by the California Supreme Court in *Communities for a Better Environment*, involved an application to expand an existing mine site. (70 Cal.App.4th 238, 240-241.) The county originally approved a CUP, which allowed 1.8 million tons of aggregate, and certified an EIR in 1976. Twenty years later, in 1996, the county approved an EIR for a site expansion and increase in production. Project opponents complained that the county improperly compared increased truck trips associated with the proposed expansion to the maximum number of previously permitted number of truck trips, “rather than the actual, existing traffic.” (*Id.* at p. 242.) The court rejected this argument, noting that:

The instant EIR appropriately assumes the existing traffic impact level to be the traffic generated when the mine operates at full capacity pursuant to the entitlement previously permitted by CUP-1328...A complete new EIR may not have been necessary here; a supplemental EIR, a narrowed EIR under the concept of “tiering” or a partial exemption may have been reasonable here.

(*Fairview Neighbors, supra*, 70 Cal.App.4th 238, 242–243.) Relying on maximum permitted project conditions, as previously analyzed, is therefore the appropriate baseline standard when a project is characterized as a subsequent EIR, as the court suggests the EIR in *Fairview Neighbors* should have been.

III. Two California Court of Appeals unpublished cases used the same analysis when applying the *Communities for a Better Environment* case.

While unpublished, these two cases demonstrate that California Appellate Courts are applying the same interpretation of *Communities for a Better Environment* as this firm.

- A. The Second District Court of Appeal, in *City of Duarte v. City of Azusa*, confirms the existing-levels baseline interpretation of *Communities for a Better Environment*.

City of Duarte v. City of Azusa provides an instructive example for the application of the *Communities for a Better Environment* analysis of appropriate baseline in new project cases versus subsequent review cases. (Cal. Ct. App., Feb. 19, 2013, No. B235097) 2013 WL 605453.)

The *City of Duarte* case involved an aggregate mining company (Vulcan) proposing modifications to a reclamation plan many decades after the initial EIR for Vulcan’s facility and reclamation plan was certified. Project opponents complained that the city’s 2010 EIR contained no analysis of air quality and traffic impacts associated with trucking and conveyance of up to 6 million tons per year of mined material and processing of up to 7 million tons per year at

Vulcan’s Reliance facility. Rather, the city relied on the prior environmental review of these potential impacts contained in the city’s twenty year old 1990 EIR for the Reliance facility, even though the quarry had never produced more than 1.7 million tons per year. The court affirmed this approach to baseline, stating:

the use of operational levels allowed under a permit as a baseline is proper in certain special cases, for example, when the project is ‘a modification of a previously analyzed project and hence requir[es] only limited CEQA review’ (Pub. Res. Code § 21166; CEQA Guidelines § 15162)

(2013 WL 605453, at *3-6.) The 2010 EIR for modifications to the Reliance facility “effectively incorporated into the project’s baseline the operational levels examined in the 1990 EIR.” (*Id.* at *6.) The court found this baseline proper, even though the 2010 EIR was not characterized as a subsequent EIR.

- B. The Sixth District Court of Appeal also upheld the use of the previously approved project as the appropriate baseline in the context of subsequent CEQA review.

In *SJJC Aviation Services, LLC v. City of San Jose* (Cal. Ct. App., May 24, 2017, No. H041946), project opponents challenged an addendum prepared by the City of San Jose for an airport master plan, contingent on the baseline issue. The city initially approved the airport master plan and certified a master plan EIR in 1997. The city subsequently certified a SEIR in 2003 and several addendums, culminating in the tenth addendum, which drew a CEQA challenge from SJJC. In the background discussion, the court notes that the city proceeded under CEQA’s subsequent review provisions, citing section 21166 and CEQA Guidelines sections 15162 to 15164. (2017 WL 2269550, at *2.)

One of the specific CEQA challenges raised by SJJC claimed that the City of San Jose relied on the wrong baseline. SJJC argued that the city should have relied on existing noise levels rather than projected noise levels from the 2003 SEIR to establish the baseline. Specifically, SJJC argued that the tenth addendum “erroneously compared the anticipated impacts of [the project] to speculative noise projections from a 2003 document.” (2017 WL 2269550, at *21-22.) The Sixth District Court of Appeal disagreed with SJJC’s assertion that the environmental effects of changes to a project must be compared against a new baseline of currently existing conditions:

A well-respected CEQA treatise states that “if the project under review merely constitutes a modification of a previously approved project, previously subjected to environmental review, the agency may restrict its review to the incremental effects associated with the modification, compared against the **anticipated** effects of the previously approved project.” (Remy et al., *Guide to CEQA* (California Environmental Quality Act) (11th ed. 2007) p. 198; see *id.* at pp. 206–207, bold and underline added.)

(2017 WL 2269550, at *22.) In CEQA subsequent review circumstances, the lead agency is not required to consider a new, existing conditions baseline. Instead, the project as studied in the prior environmental analysis may be considered the baseline.

IV. The CEB and Remy Guide to CEQA both support the position that the previously-approved project is the appropriate baseline for subsequent review.

The CEB CEQA Book provides the following:

In effect, the baseline for subsequent review purposes is adjusted such that the originally approved project is assumed to exist.

(*Practice Under the California Environmental Quality Act* (2d ed. Cal CEB) § 12.23.)

Similar guidance is found in the Guide to CEQA, authored by Michael H. Remy, Tina A. Thomas, James G. Moose, and Whitman F. Manley, and which is a leading treatise on CEQA that has been cited by numerous California courts. The Guide to CEQA succinctly summarizes how “baseline” conditions for a subsequent EIR should be determined:

In such a situation, the agency must treat the impacts of the previously approved project, **upon build-out**, as the “baseline” for determining whether newly revealed environmental impacts are sufficiently severe to justify preparing a second round of environmental review. This approach is proper even where the “existing environment” remains pristine because no physical changes have resulted from the first project approval. (Remy et al., Guide to CEQA (California Environmental Quality Act) (11th ed. 2007) p. 206, bold and underline added.)

The Guide to CEQA provides a discussion of cases supportive of this approach, including *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467. The Guide to CEQA similarly summarizes the court’s approach in *Temecula Band of Luiseno Indians v. Rancho California Water District* (1996) 43 Cal.App.4th 425 as follows:

In other words, if the project under review merely constitutes a modification of a previously approved project previously subjected to environmental analysis, then the “baseline” for purposes of CEQA is adjusted such that the originally approved project is assumed to exist. (Guide to CEQA, *supra*, p. 207, underline added.)