Proper CEQA Baseline – Is It Always Existing Conditions?

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What is “Baseline”?  

- Our definition: the time and conditions used as the point of comparison for determining the significance of a proposed project’s environmental effects
- No precise statutory or guidelines definition
- Key question: What timeframe and conditions constitute the appropriate baseline for evaluating a project?
What Do CEQA and the Guidelines Say?

- Description of “environmental setting” and baseline guidance are located in Guidelines § 15125(a)
- Initial study content requirements include “environmental setting” in Guidelines § 15063(d)(1).
- So…a baseline is needed for ISs, NDs, MNDs and EIRs
- Guidelines § 15126.6(e)(1) relates baseline to the no project alternative
- Special baseline rules for military base reuse EIR in Statute § 21083.8.1 and Guidelines § 15229
§ 15125(a) Environmental Setting

- EIR must include a description of the physical environmental conditions at time the NOP is published or, if no NOP, when environmental analysis is commenced.

- This is essentially the definition of “environmental setting.”
Relationship of Baseline to Existing Setting and the “No Project Alternative”

- § 15125(a): The environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.
- “Normally” provides opportunity to deviate from the environmental setting, if there is good reason to do so.
- If you deviate, support your reasoning for an “abnormal” baseline with substantial evidence.
- § 15126.6(e)(1): no project alternative analysis is not the baseline for determining significance, unless it is identical to the existing environmental setting.
Why “Normally” Was Included in § 15125?

• Idea was introduced in 1998 by practitioners as input to The Resources Agency during preliminary review of proposed guideline changes.

• Intent: to provide flexibility for unusual circumstances.

• Litigation issues that have arisen were not anticipated at the time.

• Court interpretation in Sunnyvale case: where the physical conditions existing exactly at the time of the NOP or start of environmental analysis “may not be representative of the generally existing conditions”.
Examples of Allowable Deviation from Environmental Setting at the Time of NOP

- River systems use an historic record of weather (70-year record), because of wide annual fluctuations.
- Average historic water use may be more representative than the actual year of NOP.
- Infrastructure under construction at time of NOP with completion assured at or near time of project approval – use the post-completion condition.
- Abnormal, temporary environmental situation, e.g., traffic volumes depressed by temporary construction detour.
Most Common Baseline Questions

- Are unauthorized existing uses part of the baseline?
- Do prior illegal actions influence the baseline?
- Is baseline a policy choice by lead agency at the end?
- What is the influence of approved permits or water rights?
- What is the influence of adopted plans, zoning, or economic predictions?
- Should planned and approved infrastructure be in the baseline?
Unauthorized Existing Uses Are Allowed to be Part of the Baseline

**Kenneth F. Fat v. County of Sacramento (ND)**

- Small airport in continuous use since 1934.
- 1971 CUP approved by the County, expired in 1973 and not renewed.
- 1972 Caltrans Aeronautics Division airport permit issued, active continuously since.
- Airport expanded without building permits.
- 1992 CLUP adopted with ND, not challenged.
- 1997 CUP application for airport use, cure for building permit issuance, and 24 new hangers.
Unauthorized Existing Uses Are Allowed to be Part of the Baseline

Kenneth F. Fat (cont.)

- ND adopted using existing “illegal” airport operations in 1997 as baseline.

- Fat argued that in absence of prior environmental review, baseline should be 1970, the date of CEQA enactment.

- Court held that 1997 baseline was supported by substantial evidence, citing 1992 CLUP ND that was not challenged and surrounding land use remained rural.
Take-Home Messages

• Existing, unauthorized land use does not require rolling back the baseline.

• Facts are important. Here, they included long-term continuous use, despite lack of CUP. Also, other agency approvals of the use existed.

• Rolled back baselines are considered difficult to define, and a hypothetical comparison.
Existing Conditions Are Not Rolled Back to Discount Prior Illegal Actions

**Riverwatch v. County of San Diego (EIR)**

- Major use permit for rock quarry on Rosemary Mtn. Remove east slope of mtn.

- In the past, illegal sand mining removed riparian habitat and illegal discing occurred on floodplain of San Luis Rey River.

- Both were subject to enforcement actions by USACE.

- In comments, USFWS sought description of vegetation before illegal activity.
Existing Conditions Are Not Rolled Back to Discount Prior Illegal Actions

Riverwatch (cont.)

- Importantly, USACE did not raise objections to CEQA certification.
- Court felt early baseline would impose a burden of determining the “nature of the illegality” and could interfere with enforcement.
- CEQA is not to be used as enforcement for violation of other environmental laws
- Existing conditions deemed the proper baseline, despite prior illegal discing and habitat removal
Take-Home Messages

• Prior illegal activity does not require rolling back the baseline

• Enforcement to rectify past illegal activity is not in the realm of CEQA.

• Important fact here: the enforcement agency, USACE, was pursing the illegality and did participate in the CEQA process. This seemed to be enough for the court.
Baseline is Not a Policy Choice To Be Made at the End of CEQA Review

Save Our Peninsula Committee v. Monterey County (EIR)

- September Ranch, 891 acres in Carmel Valley, contained equestrian center and pasture land, on well water since 1930s.
- (Residents said pasture was not irrigated.)
- Proposed for 117 units, supported by well water, because surface water unavailable.
- Water supply was a known, key issue in Carmel Valley. DEIR: Any water use above baseline would be significant.
Baseline is Not a Policy Choice To Be Made at the End of CEQA Review

Save Our Peninsula Committee (cont.)

- Board of Supervisors given three choices: 43 AF last 2 years; 51 AF last 3 years; or 30 AF last 7 years.
- BOS “selected” 51 AF after DEIR review and approved 109 units.
- BOS decided based on policy, not substantial evidence.
- Water pumped for irrigation from 1997 – 1999 (after the 1997 project application) was higher than 6 prior years, based on data.
- Residents commented that pasture was not irrigated prior to that, and no data existed to show prior irrigation pumping.
Baseline is Not a Policy Choice To Be Made at the End of CEQA Review

Save Our Peninsula Committee (cont.)

- Court said (suspiciously perhaps) it was in applicant’s interest to elevate water production figures.
- Post-application data was not credible, not substantial evidence, so BOS abused its discretion by using it.
- Court concluded EIR choices were not supported by analysis, just raw (and suspect) data. BOS choice was arbitrary
- Selecting baseline at the end of process deprived public of meaningful chance to review
Take-Home Messages

- Baseline should be what is supported by evidence and analysis, identified early, and presented in the DEIR, so public can review it

- While weighing competing evidence is an appropriate lead agency role, choice of baseline is not merely a policy decision without substantial evidence backing it

- Evidence about baseline developed after a project application may “be regarded with some caution,” if it doesn’t represent pre-project conditions
Approved Permit May Define the Baseline Only Under Certain Conditions

Fairview Neighbors v. County of Ventura (EIR)

- Project site mined since 1948, operating under 1976 CUP approved with an EIR that was not challenged.
- CUP allowed up to 1,800,000 tons, which generated up to 810 daily truck trips.
- 1993 proposal to expand mine boundaries.
- Action modified an existing project that was already subject to CEQA review.
Approved Permit May Define the Baseline Only Under Certain Conditions

Fairview Neighbors (cont.)

- EIR used permitted operation with up to 810 daily truck trips as the baseline.
- Opponents asserted baseline should be existing traffic without the mine.
- In 1989, mine operation reached 837 daily truck trips.
- Court said full capacity pursuant to CUP entitlement was appropriate.
- To use actual traffic counts in one year would be “misleading and illusory” under the facts.
Approved Permit May Define the Baseline Only Under Certain Conditions

Communities for a Better Environment (CBE) v. SCAQMD (ND)

- ConocoPhillips proposed Ultra Low Sulfur Diesel Fuel Project, a new industrial process at an existing refinery.
- Required adding new and replacing equipment and increasing use of existing cogen plant and four boilers for process heat.
- SCAQMD threshold for NO\textsubscript{x} was 55 lb. per day. ND estimated 201 to 420 lb. per day increase compared to current operation.
- SCAQMD determined less than significant because permit for existing boilers allowed higher emissions and permit level was the baseline, rather than existing conditions.
Approved Permit May Define the Baseline Only Under Certain Conditions

CBE (cont.)

- If all four boilers ran at max, they would emit less than permitted. History showed max operation of all four together had not occurred and was unrealistic.

- Court deemed ND baseline as “mere hypothetical conditions allowed under permits”, not supported by substantial evidence

- “Permits give no vested right to pollute.” (Court felt the baseline disguised significant air pollution impact.)

- Court directed SCAQMD to use “physical conditions actually existing at the time of the analysis” or “realized physical conditions on the ground”, rather than “hypothetical conditions”
Vested Water Right at Time of NOP May Define Baseline (With Supporting Facts)

Cherry Valley Pass Acres v. City of Beaumont (EIR)

- City certified EIR and approved specific plan authorizing 560 units on 200-acre site formerly used as egg farm.
- Water supply assessment assumed “baseline” water usage at site was equivalent to landowner’s adjudicated right to pump 1,484 acre-feet per year (afy) of groundwater.
- Actual water use following closure of egg farm: 50 afy.
- Selection of 1,484 afy baseline was within city’s discretion in light of adjudication (court-settled) water right, which existed at time of NOP. 1997 – 2001 average was close to water right (1,340 afy)
- Adjudicated amount was, therefore, not a “hypothetical” baseline. (Also, project water use predicted to be 531 afy, much less than historical use as egg farm.)
Take-Home Messages

- Entitled, permitted capacity may define the baseline, if for a modified project with prior CEQA review. But facts must support, including history of reaching the limit.

- In *Fairview Neighbors*, court recognized special character of mining where “operation fluctuates considerably based on demand.” Capacity was reached.

- In *CBE*, project was a new process. Permit limits were merely “hypothetical”. Capacity not realistically reached. Use actual existing physical conditions as baseline.

- In Cherry Valley, water right at time of NOP was OK. Historic use approximated the water right level.
Environmental Planning and Information Council (EPIC) v. County of El Dorado County (EIR)

- 1969 General Plan adopted with population capacity of 63,000 for Camino-Fruitridge area and 70,000 for Greenstone.
- Proposed GP amendment would reduce planned population capacity to 22,000 (Camino-Fruitridge) and 5,800 (Greenstone).
- Existing population was 3,800 (Camino-Fruitridge) and 400 (Greenstone).
Approved Plan Conditions Do Not Define the Baseline

**EPIC (cont.)**

- EIR compared the proposed amendments to the existing General Plan to determine significant impacts (future plan-to-plan comparison).
- EIR pointed to reduced planned population as reasoning of environmental benefit, lack of significant impact.
- Court said this conclusion was illusory, because substantial growth over existing population would occur.
- EIRs “failed as informative documents.”
Existing Zoning and Zoned Density Do Not Define the Baseline

*City of Carmel-by-the-Sea v. County of Monterey (ND)*

- Mission Ranch, 21-acre resort with 13 cottages, 7-room motel, 6-room inn, zoned R-1 (inconsistent with existing use).
- Existing land use plan allowed clustered residential use, outside of wetlands, up to 75 du.
- Proposed rezoning to R-3-S for clustered residential and O for open wetland area; ultimate density maximum would be 65 du.
- County argued the rezoning did not sanction expanded use because allowable density would decrease from 75 to 65 du.
- Similar to EPIC, Court said comparison with approved density, rather than existing conditions, conflicts with CEQA.
An Economically Expected Future Does Not Define the Baseline

**Wal-Mart Stores, Inc. v. City of Turlock (§ 21083.3 partial exemption)**

- City of Turlock adopted an ordinance that banned discount superstores. (A 100,000 square foot store that includes a full-service grocery department.)

- Wal-Mart argued that future conditions would be worse because multi-tenant uses would replace the big box retail.

- Court found that Wal-Mart failed to compare future conditions against the existing baseline.

- Instead, Wal-Mart improperly compared one future condition (Wal-Mart’s super store) with another (Multi-Tenant Retail).
An Economically Expected Future Does Not Define the Baseline

Wal-Mart Stores, Inc. (cont.)

- Court ruled that the existing physical conditions must be compared to the physical conditions that are predicted to occur because of a project.

- Court used the idea of photographic “snapshots” at the time when the environmental review begins and then an array of snapshots to create a picture of the reasonably foreseeable future. The baseline “snapshots” are compared to the array of future “snapshots.”
Take-Home Messages

• Baseline is not defined by the outcome of an existing, adopted plan, zoned density, or predicted economic future.

• Comparing plan-to-plan, project-to-zoning buildout, or alternative economic futures are improper for determining significance.

• Must compare the outcome of a proposed plan or project with existing physical conditions.

• (The other comparison may be appropriate for discussion of the no-project alternative.)
Post-Approval Scenario with Predicted Traffic Conditions Is Not a Proper Baseline

Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council (EIR)

- EIR for a proposed transportation project including the construction of a bridge.
- Traffic conditions for 2020 used as the baseline in the traffic analysis. Project was not to be completed until then.
- 2020 traffic estimate based on buildout under general plan along with the development of numerous roadway improvements planned for completion by 2020.
- Court criticized City choice of a baseline more than a decade after project approval.
Post-Approval Scenario with Predicted Traffic Conditions Is Not a Proper Baseline

Sunnyvale West Neighborhood Assn. (cont.)

- “By using future traffic conditions as its ‘baseline,’ [the City] did not adequately explain to an engaged public how the proposed project was expected to change the present conditions.”

- “Predicted conditions at the expected date of approval” may be allowed where environment is changing quickly for reasonably foreseeable factors unrelated to the project, but…

- “Normally” does not give lead agency “carte blanche” to select a future, post-approval condition, even if it acts reasonably with substantial evidence, i.e., court said baseline definition is a matter of law, not open to complete lead agency discretion.

- NOTE: Requests to de-publish have been submitted.
Take Home Messages

• This typical approach to traffic analysis needs to be modified to be defensible

• A distant future baseline, well after project approval, should not be used to define significant project impacts, (but still can be a comparison presented under cumulative analysis).

• Considering future, reasonably foreseeable projects or rapidly changing environmental conditions existing at the time of approval may be permissible

• Watch for decision on de-publishing…
Summary of Key Baseline Practice Pointers

• For a new project, courts have required that the baseline reflect actual existing physical conditions at the start of environmental review.

• Permit limits may be allowable as baseline only in very select situations, e.g., where an action modifies a prior project that had CEQA review and the facts support it (i.e., reaching the limit is not hypothetical).

• Court-settled water rights at the time of NOP may OK.

• Existing conditions in a baseline are not changed by illegal past activities and unauthorized land uses.
Summary (cont.)

- Comparison of a proposed project or plan to what might hypothetically happen under an adopted plan or zoning designation, i.e., a plan-to-plan comparison, is not adequate for defining significance of project impacts.

- Determine the baseline early in the review, using facts of the project and setting, and disclose during public review, not afterwards.

- Degree of lead agency discretion about how to define existing conditions that constitute the CEQA baseline is in question: a matter of law or subject to more discretion as long as baseline is backed by substantial evidence.
Thank You

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