



CEQA Baseline Confusion Threatens Projects Throughout California

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Summary

A spate of recent court decisions concerning the identification of the environmental "baseline" under the California Environmental Quality Act ("CEQA") have further confused the already murky world of environmental baselines. Unless clarified by the Legislature or the courts, the decisions will stimulate a wave of new CEQA litigation and delay critical infrastructure projects throughout California.

In *Sunnyvale West Neighborhood Association v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351 (*Sunnyvale*), the court held that the selection of the "baseline" for determining whether a project will have a significant impact on traffic is a question of law and that public agencies have no discretion under CEQA to select an environmental baseline other than conditions at the time of the preparation of the environmental impact report. *Sunnyvale* is contrary to the 2010 decision of the California Supreme Court that stated "the date for establishing baseline cannot be a rigid one" and that the selection of an appropriate baseline is a factual determination within the discretion of the public agency, subject to the substantial evidence standard of review. (*Cmtys. for a Better Env't. v. S. Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 327-328.) On behalf of a number of transportation agencies, Nossaman has requested that the California Supreme Court depublish *Sunnyvale*.

Discussion

Environmental impact reports must include a description of the "environmental setting," which is defined as "the physical environmental conditions in the vicinity of the project." (Cal. Code Regs., tit. 14, § 15125, subd. (a).) The CEQA Guidelines provide that the existing physical conditions in the vicinity of the project "will **normally** constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant." (*Id.*, emphasis added.) It is this use of the word "normally" that has led to the confusion in the

courts.

The CEQA Guidelines also provide that "where failure to proceed with the project will not result in preservation of existing environmental conditions, the analysis should identify the practical result of the project's non-approval and not create and analyze a set of artificial assumptions that would be required to preserve the existing physical environment." (*Id.*, § 15125, subd (e).) The common-sense purpose of the above provisions is to insure that the environmental impact report provides a realistic evaluation of the effects of the project—not overstating and not understating the impacts. The requirement to describe both existing and future conditions reflects the importance of evaluating the effects of the project over time, taking into account population and other changes that are projected to occur during the life of the project.

Sunnyvale comes on the heels of yet another conflicting baseline decision. In *League to Save Lake Tahoe v. Tahoe Regional Planning Agency* (E.D. Cal. 2010) 739 F.Supp.2d 1260, the court held that it is **improper** to include existing, but unauthorized, improvements in the definition of the environmental baseline in an analysis of regulations adopted by the Tahoe Regional Planning Agency. Although decided under the Lake Tahoe Compact, the court applied CEQA and NEPA caselaw.

The only thing that is clear from these recent cases is that the CEQA "baseline" issue is hopelessly muddled. This confusion will inevitably result in a new wave of CEQA litigation and delays in the construction of critical infrastructure projects.