
Like Athena From the Head of Zeus: *Neighbors for Smart Rail* Authorizes Future Baselines in CEQA Review

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*A new California Supreme Court decision, *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*, authorizes reliance on anticipated future conditions as the “baseline” for evaluating impacts of long-term infrastructure projects under the California Environmental Quality Act. To the perplexity of land use and transportation planners, recent cases had directed agencies to analyze a project’s impacts on current traffic and population conditions, ignoring expected changes in those conditions by the time construction is completed, as though major transportation improvements suddenly sprang into existence fully formed like Athena from the head of Zeus. In *Neighbors*, the Court concluded that agencies have discretion to utilize a future conditions baseline, in circumstances where a baseline of conditions that have long ceased to exist would only mislead and undermine the informative purposes of CEQA for decision-makers and the public.*

The CEQA Baseline: Representative Past Conditions, Not an Instant Snapshot

The California Environmental Quality Act (“CEQA”)¹ requires public agencies to consider and, if feasible, avoid or mitigate the potentially significant environmental impacts of projects that they undertake or approve. A critical early step in conducting CEQA review is identifying the existing environmental setting or “baseline” conditions for the proposed project. For example, locating a project in a pristine site, such as a wetland, may be expected to result in environmental impacts. Conversely, agencies and private project developers are not responsible for degraded environmental conditions that already exist.

 ¹ Cal. Pub. Res. Code § 21000, et seq.

The CEQA Guidelines (regulations implementing CEQA) provide that the baseline should “normally” reflect the existing physical environment at the start of CEQA review.² While it is clear enough that “normally” does not mean “always”, CEQA and the Guidelines are unhelpful in deciding when and what other baselines may be appropriate, inevitably leading to litigation.

In a leading case, the California Supreme Court found that historical data may constitute the CEQA baseline. In *Communities for a Better Environment v. South Coast Air Quality Management District*,³ the Court rejected the agency’s main argument that emissions attributable to a refinery modification project should be compared to a baseline of emissions at the facility’s permitted level of operation (although it had never operated at the permitted level). Instead, the Court held, the agency could have compared project emissions to actual past emissions, based on historical operations data. Where environmental conditions have varied over time, a representative range of variation can constitute the proper baseline. For example, the baseline for evaluating impacts on water supply should take into account a representative period of years; an instantaneous snapshot at the start of CEQA review could fall during a drought or flood, yielding misleading results and over- or understating project impacts. The decision provided guidance for addressing variable conditions in the past, but left open the question of how to consider baseline conditions that are likely to change in the future.⁴

Can a Representative Baseline Account for Future Conditions?

Project impacts on future conditions were the issue in *Sunnyvale West Neighborhood Association v. City of Sunnyvale*.⁵ The City’s Environmental Impact Report (“EIR”) for a street extension compared project traffic impacts to traffic conditions in 2020 (when the extension would be in place), predicted by a traffic model which incorporated regional growth projections. On the contrary, the Sixth District Court of Appeal held, the EIR should have examined project impacts on the existing environment in 2008, when the EIR was prepared. The City objected that its consultants had followed conventional traffic modeling practice, project construction would take years, and 2008 conditions were not representative of the future conditions when the project will actually exist. Nevertheless, the Sixth District Court found nothing in the administrative record supporting a baseline other than the existing conditions at the time of CEQA review. Later decisions have either followed *Sunnyvale West* or upheld EIRs utilizing baselines based on both existing and future conditions, further confusing readers with conflicting presentations.⁶

However, the Second Appellate District, considering the EIR for a light rail project in *Neighbors for Smart Rail*, found itself in disagreement with *Sunnyvale West*: “As a major transportation infrastructure project that will not even begin to operate until 2015 at the earliest, its impact on *presently existing* traffic and air quality conditions will yield no practical information to decision makers or the public.... An analysis of the project’s impacts on anachronistic 2009 traffic and air quality conditions would rest on the false hypothesis that everything will be the same 20 years later.”⁷ To avoid this misleading result, the court concluded, CEQA cannot forbid the use of projected future conditions as the baseline. The California Supreme Court granted review, affirmed the Second District’s opinion and denied *Neighbors*’ appeal.⁸

² Cal. Code Regs. tit. 14, §§ 15125(a), 15126.2(a).

³ 48 Cal.4th 310 (2010).

⁴ The Court also noted that where conditions are expected to change by the time an agency completes CEQA review, such conditions may provide a better baseline than those at the start of CEQA review. However, the Court did not look to changes beyond completion of CEQA review.

⁵ 190 Cal. App. 4th 1351 (2010).

⁶ *Pfeiffer v. City of Sunnyvale*, 200 Cal.App.4th 1552 (2011); *Madera v. Oversight Coalition v. County of Madera*, 199 Cal. App. 4th 48 (2011).

⁷ 205 Cal. App. 4th 552, 569 (2012) (emphasis in original).

⁸ Case No. S202828 (Aug. 5, 2013).

The Supreme Court Decision

Citing its previous decision in *Communities for a Better Environment*, the Court explained that CEQA analysis must “employ a realistic baseline” that provides “the most accurate picture practically possible” of potential environmental impacts. Thus, an agency may, where appropriate, utilize a baseline that accounts for a major change in environmental conditions expected to occur before project implementation, completely omitting analysis of impacts on existing conditions. The Court’s opinion therefore rejects *Sunnyvale West* and its progeny to the extent that those cases held that an agency may never use predicted future conditions as the sole baseline. However, noting the uncertainties involved in projecting future baselines through traffic modeling and similar methodologies, the Court also imposed a higher evidentiary standard for doing so than had the court of appeal in *Neighbors*: projected future conditions may be used as the sole baseline if substantial evidence in the record supports a finding, not merely that the analysis of impacts on future conditions would be useful, but also that including an analysis of impacts on existing conditions would be uninformative or misleading to decision-makers and the public. In particular, the Court found, “For a large-scale transportation project like that at issue here, to the extent changing background conditions during the project’s lengthy approval and construction period are expected to affect the project’s likely impacts, the agency has discretion to consider those changing background conditions in formulating its analytical baseline.”⁹

The Court’s decision may have broader implications, beyond providing direction to traffic and air quality modelers. For example, agencies preparing EIRs have struggled to appropriately address the impacts of cumulative greenhouse gas (“GHG”) emissions on the global climate. Some look to the California Air Resources Board’s Scoping Plan for the Global Warming Solutions Act (AB 32), which calls for reducing statewide GHG emissions to 1990 levels by 2020 – approximately a 29% reduction below projected 2020 GHG emissions if no reductions were implemented (known as the “business as usual” or “BAU” level). Some agencies have concluded that, if a project’s GHG emissions are reduced to 29% below BAU, its contribution to cumulative climate impacts will be less than significant.¹⁰ However, the BAU approach was rejected by at least one trial court as incorporating an impermissible future baseline into the CEQA analysis.¹¹ Following the *Neighbors for Smart Rail* decision endorsing reliance on future baselines, the BAU approach (if sufficiently supported with evidence in the record) should no longer be vulnerable to this particular objection.

If you have questions, please contact the Pillsbury attorney with whom you regularly work, or the authors.

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⁹ The Court found that the evidentiary standard was not met by the record in this case, in particular because the agency had failed to justify utilizing a 2030 traffic baseline when the project would begin operating in 2015. Still, the Court reasoned, that error was not prejudicial, because there was no reason to believe that consideration of existing conditions would have yielded substantially different results. The Court also noted that an agency has discretion to utilize both existing and future conditions baselines, as suggested by the court of appeal in *Pfeiffer v. Sunnyvale*.

¹⁰ See e.g., *CREED v. City of Chula Vista*, 197 Cal. App. 4th 327 (2011).

¹¹ *Center for Biological Diversity v. Cal. Dept. of Fish & Game*, L.A. Sup. Ct., Case No. BS131347 (Oct. 15 2012), appeal pending.

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