

## CALIFORNIA SUPREME COURT REJECTS THE USE OF PERMIT LIMITS AS THE ENVIRONMENTAL BASELINE FOR NEW PROJECTS

In its recent decision in *Communities for a Better Environment v South Coast Air Quality Management District*, the California Supreme Court considered for the first time the important question of the environmental baseline that is used to evaluate whether the impacts of a proposed new project are significant. Generally, the CEQA Guidelines provide that the baseline normally consists of the existing physical conditions when the lead agency begins its environmental impact review. For facilities with existing permits, however, several appellate opinions had indicated it was appropriate to include the existing permit in the environmental baseline. The Supreme Court has now rejected that approach as it applies to new projects evaluated under CEQA.

The *CBE* case arose out of the South Coast District's approval of equipment modifications to produce ultra low sulfur diesel at ConocoPhillips' Wilmington refinery. In determining whether additional emissions could be significant, the District concluded that no EIR was required because any new emissions would be within the maximum levels allowed under the refinery's pre-existing permits. The Los Angeles Superior Court upheld the District's approach, but the Court of Appeal had rejected it.

The Supreme Court also rejected the reliance on emissions allowed under existing permits, holding that the District should have calculated the baseline conditions based on existing physical conditions. Significantly, however, the Court also noted that lead agencies have substantial discretion to determine how existing physical conditions are most appropriately measured, and the Court declined to answer any technical questions as to how existing refinery operations should be measured for baseline purposes in this case. The Court noted that the date for establishing the baseline cannot be a rigid one, as environmental conditions may vary from year to year. Also, where environmental conditions are expected to change, project impacts might reasonably be compared to predicted conditions of the expected date at project approval, rather than to conditions at the time the environmental review begins. The court stated that CEQA does not mandate a uniform or inflexible rule for determining baseline. Instead, an agency has discretion to decide how the existing physical conditions can best be measured, subject to judicial review, as with all CEQA factual determinations, for support by substantial evidence.

The court also noted that the refinery modification project was a "new" project, as distinguished from a project reviewed previously under CEQA. Accordingly, this decision applies only to determining the baseline for new projects. Once a project has undergone CEQA review, changes to that project are reviewed to determine whether there are new or substantially more severe impacts compared to the prior CEQA analysis, under Public Resources Code section 21166 and a long line of interpretive decisions.

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