

# Baselines Under CEQA Must Be Set According To Existing Conditions

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In determining whether a project required preparation of an Environmental Impact Report (“EIR”) under the California Environmental Quality Act (“CEQA”), the California Supreme Court recently held that the South Coast Air Quality Management District (“SCAQMD”) improperly used the permitted levels of emissions for an oil refinery’s baseline in calculating emission increases that would result from the refinery’s expansion. The court held that the SCAQMD should have instead used existing emission levels to determine the baseline.

The lawsuit involved a project proposed by ConocoPhillips to produce ultralow sulfur diesel fuel at a refinery in Wilmington, California. The SCAQMD, the agency responsible for regulating non-vehicular air pollution in the area, failed to prepare an EIR before approving a permit for the refinery project. The SCAQMD reasoned that ConocoPhillips already had permits to operate the equipment, the refinery was an established use with operations fluctuating over time, and the proposed project did not call for any equipment to exceed this permitted capacity. Thus, the SCAQMD argued that the baseline for the project should be the maximum permitted operating capacity of the equipment. When this baseline was applied, no significant emissions increase would result to trigger environmental review. Further, the SCAQMD maintained, failure to use the maximum permitted operating capacity as the baseline would contravene CEQA’s statute of limitations and deprive the permittee of its vested rights.

Upholding a decision by the Second District Court of Appeal, the court rejected the SCAQMD’s arguments and held that the baseline should have been the physical conditions existing at the time of the CEQA impacts analysis, rather than the maximum permitted capacity. Under CEQA, impacts of a proposed project must be compared to existing conditions, not allowable conditions or illusory hypothetical situations. Vested rights under the existing permits did not justify the SCAQMD’s failure to perform an environmental review. As the court explained, preparation of an EIR alone would not deprive ConocoPhillips of any rights under its existing permits. The SCAQMD’s statute of limitations argument also failed because CEQA analysis was not a challenge to the issuance of the permits themselves, but rather the SCAQMD’s failure to prepare an EIR.

*Communities for a Better Environment v. South Coast Air Quality Management Dist.*, No. S161190, 2010 Cal. LEXIS 1894 (Cal., Mar. 15, 2010).