
Baseline in the Sand: *Communities for a Better Environment v. South Coast Air Quality Management District*

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Environmental review statutes like the National Environmental Policy Act and the California Environmental Quality Act require that an agency review a proposed action for significant environmental impacts. In order to do so, agencies must choose a baseline or “status quo” that serves as a basis for comparison, allowing the agency to assess the existence and importance of any potential environmental impacts. In March 2010, the California Supreme Court held that under the California Environmental Quality Act existing conditions set the baseline, and permits to develop or emit at a certain level cannot set the baseline, absent other evidence. Federal courts should apply the existing conditions rule to the National Environmental Policy Act and prohibit baselines based on permitted rights. The existing conditions rule is consistent with National Environmental Policy Act precedent and the environmental purpose of National Environmental Policy Act, and promotes critical accuracy and transparency in the review process.

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INTRODUCTION

The integrity of the National Environmental Policy Act¹ (NEPA) is at stake. NEPA requires environmental review of “major federal actions significantly affecting the quality of the human environment”²—meaning agencies must compare the world with and without the proposed action to discover any potential environmental impacts. The world without the proposed action is the baseline. The baseline, often referred to as the “status quo” by federal courts,³ allows impacts from the proposed action to be isolated and made comprehensible to decision makers and the public. This critical function, the foundation of NEPA, is threatened when the baseline used in the environmental review process does not reflect actual conditions on the ground.

NEPA is an information gathering and information dissemination statute that encompasses two phases.⁴ First, the federal decision maker typically conducts a preliminary assessment of the environmental impacts of a proposed action.⁵ Next, if environmental impacts are significant or may be significant, NEPA demands an in-depth study known as an environmental impact statement (EIS).⁶ NEPA does not prohibit agencies from carrying out projects that result in significant environmental impacts, nor does it require that environmental concerns take precedence.⁷ Instead, NEPA’s power derives from its ability to disclose environmental effects to both the agency decision makers and the

1. 42 U.S.C. §§ 4321–4375 (2006).

2. 42 U.S.C. § 4332(c).

3. See *Overseas Shipholding Grp. v. Skinner*, 767 F. Supp. 287, 297–98 (D.D.C. 1991).

4. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 336–37 (1989).

5. See 40 C.F.R. §§ 1501.3–1501.4 (2006).

6. See 42 U.S.C. § 4332(2)(C) (2006).

7. See *Robertson*, 490 U.S. at 352; *Kleppe v. Sierra Club*, 427 U.S. 390, 405–06 (1976).

public.⁸ At a minimum, this ensures that environmental costs are calculated and considered.

Setting the baseline is critical to both phases of NEPA. The preliminary review stage under NEPA separates project impacts from the ambient environment to determine whether there may be significant impacts that require more review. Later, if potential significant impacts are found such that an EIS is required, where the baseline is set dictates how significant those impacts will appear. While simple in concept, in practice setting the baseline can be controversial. For example, if conditions at the site are changing, over what time period will those conditions be measured? The focus of this paper is one question: Can previously permitted pollution or development rights set the baseline?

California has addressed this question of permitted rights under its environmental review statute, the California Environmental Quality Act (CEQA).⁹ Some in California have argued, with resistance from the courts, that pre-existing permitted rights should be the baseline against which environmental impacts are measured.¹⁰ Assuming permitted levels have not been exceeded, allowing a pre-existing permit to set the baseline would allow the applicant to pollute or develop up to the permitted level without triggering environmental review. In *Communities for a Better Environment v. South Coast Air Quality Management District (CBE)*,¹¹ the California Supreme Court rejected an oil refinery's arguments that permitted emission levels constitute the baseline for environmental review under CEQA.¹² Instead, the Court held that "actual environmental conditions existing at the time of [review]" set the baseline for assessing environmental impacts.¹³

This Note argues that the existing conditions rule adopted by the California Supreme Court should be the rule for setting the baseline for federal environmental review under NEPA. The federal courts have yet to address this particular baseline issue. However, the existing conditions rule, as applied to permitted rights, is consistent with NEPA precedent and the environmental

8. See *Robertson*, 490 U.S. at 350.

9. CAL. PUB. RES. CODE §§ 21000–21177 (West 2010); see *Cmtys. for a Better Env't v. S. Coast Air Quality Mgmt. Dist.*, 226 P.3d 985 (Cal. 2010).

10. See, e.g., *San Joaquin Raptor Rescue Ctr. v. Cnty. of Merced*, 57 Cal. Rptr. 3d 663, 673–74 (Cal. Ct. App. 2007); *Woodward Park Homeowners Assn. v. City of Fresno*, 58 Cal. Rptr. 3d 102, 108–10, 119–22 (Cal. Ct. App. 2007); *Cnty. of Amador v. El Dorado Cnty. Water Agency*, 91 Cal. Rptr. 2d 66, 81–82 (Cal. Ct. App. 1999); *City of Carmel-by-the-Sea v. Bd. of Supervisors*, 227 Cal. Rptr. 899, 911 (Cal. Ct. App. 1986); *Envtl. Planning & Info. Council v. Cnty. of El Dorado*, 182 Cal. Rptr. 317, 319–22 (Cal. Ct. App. 1982).

11. *Cmtys. for a Better Env't v. S. Coast Air Quality Mgmt. Dist. (CBE)*, 226 P.3d 985 (Cal. 2010).

12. See *id.* at 322.

13. See *id.* at 320. Throughout this paper, I refer to this as the "existing conditions rule."

purpose of NEPA, and promotes critical accuracy and transparency in the review process.

Part I provides background on NEPA and its parallels to CEQA. Part II discusses some of the precedent that led to the California Supreme Court's decision. Part III describes the California Supreme Court's decision in *Communities for a Better Environment v. South Coast Air Quality Management District*, and the "existing conditions rule" for setting the baseline. Finally, Part IV argues that federal courts evaluating the baseline under NEPA should adopt the existing conditions rule.

I. BACKGROUND

A. Introduction to the National Environmental Policy Act

President Richard Nixon signed NEPA into law in 1970 on a tide of interest in environmental issues.¹⁴ The Supreme Court in *Robertson v. Methow Valley Citizens Council* described NEPA as "declar[ing] a broad national commitment to protecting and promoting environmental quality."¹⁵ The Court goes on to articulate two main goals of NEPA. First, NEPA seeks careful consideration of "detailed information concerning significant environmental impacts."¹⁶ Second, NEPA "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision."¹⁷

Courts have emphasized the procedural nature of NEPA.¹⁸ The Court in *Robertson v. Methow Valley Citizens Council* wrote, "other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action."¹⁹ As such, the heart of NEPA lies in its "action-forcing procedures."²⁰ NEPA requires that federal agencies prepare an EIS for any "major Federal actions significantly affecting the quality of the human environment."²¹ An EIS contains the environmental impacts of a proposed action, including any unavoidable adverse effects, and a statement of alternatives to the proposed action.²² Federal regulations allow agencies to avoid preparation of an EIS if they find no

14. *National Environmental Policy Act*, COUNCIL ON ENVTL. QUALITY, <http://ceq.hss.doe.gov> (last visited Mar. 14, 2011).

15. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989).

16. *Id.* at 349.

17. *Id.*

18. *See id.* at 353; *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

19. *Robertson*, 490 U.S. at 351.

20. *Id.* (citing 115 CONG. REC. 40,416 (1969) (remarks of Sen. Jackson)); *see also Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979); *Kleppe*, 427 U.S. at 409; S. REP. NO. 91-296, at 19 (1969).

21. 42 U.S.C. § 4332(2)(C) (2006).

22. *See* 42 U.S.C. § 4332(2)(C); *see also Robertson*, 490 U.S. at 348.

significant impacts after completing the simpler, less costly environmental assessment (EA).²³

B. The Parallels between NEPA and CEQA Make the Baseline Analysis under CEQA Relevant to the Analysis under NEPA

In basic structure and purpose, CEQA is similar enough to NEPA that the baseline analysis under CEQA is nearly identical to the baseline analysis under NEPA. In 1970, on the heels of federal passage of NEPA, the California legislature enacted CEQA, modeled on its federal predecessor. The California legislature intended that “all [state] agencies . . . which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage.”²⁴

In essence, CEQA applies the same information gathering and dissemination strategy to state agencies that NEPA applies to federal agencies. CEQA requires preparation of an environmental impact report (EIR) where an activity managed, funded, or authorized by a government entity may have a “significant effect on the environment.”²⁵ An EIR is a comprehensive assessment of the environmental impacts of a project.²⁶ Essentially, an EIR must include the significant impacts of the proposed project,²⁷ ways to mitigate those impacts,²⁸ alternatives to the project,²⁹ and a statement explaining why the agency considered any impacts to be insignificant.³⁰ CEQA defines “significant effect on the environment” as “a substantial, or potentially substantial, adverse change in the environment.”³¹

An EIR is not required when no substantial evidence exists of significant environmental impacts, or if an initial study by the agency determines that any such impacts can be mitigated.³² When an EIR is not required, the agency prepares a negative declaration, which explains why no significant impacts exist, or a mitigated negative declaration, which explains how any significant impacts can be rendered insignificant.³³

23. See 40 C.F.R. § 51508.13 (2006). In addition, the regulations direct agencies to establish additional regulations that specify actions that normally require an EIS, normally require neither an EIS nor an EA, or normally require an EA but not an EIS. Thus, sometimes an EIS is prepared without an initial EA. See 40 C.F.R. § 1507.3 (2006).

24. CAL. PUB. RES. CODE § 21000(g) (West 2010).

25. CAL. PUB. RES. CODE § 21151(a); see also CAL. PUB. RES. CODE § 21100(a).

26. See CAL. PUB. RES. CODE § 21100(b).

27. See *Id.* § 21100(b)(1).

28. See *Id.* § 21100(b)(3).

29. See *Id.* § 21100(b)(4).

30. See *Id.* § 21100(b)–(c).

31. CAL. PUB. RES. CODE § 21068.

32. See CAL. PUB. RES. CODE § 21080(c), (f).

33. See CAL. PUB. RES. CODE §§ 21064, 21080(c).

CEQA does have several provisions that go beyond the basic NEPA requirements, but those provisions do not significantly alter the baseline analysis. For example, CEQA requires additional justification when an agency decides to proceed with a project that an EIR has determined will produce significant environmental impacts.³⁴ However, the baseline issue is so fundamental to their shared procedural goals such that a baseline analysis under one statute is equally applicable to the other. How the status quo or baseline is defined determines the existence, extent, and nature of the environmental impacts being assessed, irrespective of any substantive law that arises later in the process.

II. CALIFORNIA PRECEDENT: PERMITTED RIGHTS IN OTHER CONTEXTS

Although federal courts have not addressed the question under NEPA, California courts have been assessing the effect of permitted rights on the baseline for decades.³⁵ Prior to the California Supreme Court's holding in *CBE*, these cases generally asserted one of two types of rights: water and land development. These cases show the development of and reasoning behind the California Supreme Court's "existing conditions" rule in the CEQA context.

In *County of Amador v. El Dorado County Water Agency*,³⁶ the court, in dicta,³⁷ rejected the use of pre-existing water rights as a baseline.³⁸ There, Pacific Gas & Electric (PG&E) operated a hydroelectric power station that stored water in three high Sierra lakes and periodically released water to generate electricity.³⁹ In response to a draft general plan projecting growth in water demand in El Dorado County, the El Dorado County Water Agency and the El Dorado Irrigation District proposed the conversion of PG&E's largely non-consumptive rights, used for electricity generation, into consumptive water rights.⁴⁰ The draft EIR stated that no change in operation of the lakes would occur under the new project.⁴¹

The plaintiffs, notably the Department of Fish and Game, Alpine County, and the League to Save Sierra Lakes, challenged the defendants' EIR.⁴² That EIR relied on years of data describing month-end water levels for the lakes, but

34. See CAL. PUB. RES. CODE § 21081.

35. This is likely because of the prevalence of this issue in land use cases, which are most often handled under state law—in this case, under CEQA.

36. 91 Cal. Rptr. 2d 66 (Cal. Ct. App. 1999). Notably, the court dismissed Amador County as a party to the appeal pursuant to a settlement agreement. See *id.* at 73 n.3.

37. The court held that an EIR "predicated on a draft general plan is fundamentally flawed and cannot pass CEQA muster." *Id.* at 79. The court goes on to discuss the adequacy of the baseline "[f]or the guidance of the parties." *Id.*

38. See *id.* at 79–82.

39. See *id.* at 72.

40. See *id.*

41. See *id.* at 72–73.

42. See *id.* at 71.

provided no detail as to how PG&E managed the lakes.⁴³ Moreover, the EIR omitted any description of the timing, magnitude, and impact on fisheries of water releases from the lakes.⁴⁴ The court agreed with the plaintiffs, holding that in order to assess environmental impacts, the EIR needed to show clearly how PG&E was operating the facility prior to the new project and how the facility would operate with the project in place.⁴⁵

The court went on to reason that the Federal Energy Regulatory Commission license under which PG&E had both non-consumptive and consumptive water rights, could not provide this baseline.⁴⁶ That license required PG&E to maintain minimum stream flow levels.⁴⁷ However, PG&E itself had asserted at the time of licensing that it would maintain the highest possible flows “consistent with project demands.”⁴⁸ Thus, if PG&E followed through on that promise it seems probable that minimum flow levels would not be an accurate indicator of existing conditions. The court agreed, requiring more specificity regarding past and future operations than the broad requirements set out by the license.⁴⁹

In many California cases, the proponents of a prospective development argued that a land use plan or zoning ordinance conferred a right to develop, and therefore constituted the baseline for environmental review of the proposed project.⁵⁰ For example, in *Woodward Park Homeowners Assn., Inc. v. City of Fresno*, the project site’s zoning at the time of review allowed construction of a 694,000 square-foot office park.⁵¹ The proposed project totaled only 477,000 square-feet and consisted of office and retail shopping space.⁵² The EIR, which led the city to approve the project, compared the project to the “massive hypothetical office park” instead of the vacant land existing at the site.⁵³

43. *See id.* at 80.

44. *See id.* at 79–80.

45. *See id.* The EIR stated, and proponents of the project maintained, that the shift from hydroelectric use to consumptive use would not change the operation of the lakes in any way. *See id.* at 72–73. Thus, the court may also have been interested in preventing the use of such an unsubstantiated claim to avoid the full review process. *See id.*

46. *See id.* at 81.

47. *See id.*

48. *Id.*

49. *See id.*

50. *See id.*; *San Joaquin Raptor Rescue Ctr. v. Cnty. of Merced*, 57 Cal. Rptr. 3d 663, 673–74 (Cal. Ct. App. 2007); *Woodward Park Homeowners Assn. v. City of Fresno*, 58 Cal. Rptr. 3d 102, 108–10, 119–22 (Cal. Ct. App. 2007); *City of Carmel-by-the-Sea v. Bd. of Supervisors*, 227 Cal Rptr. 899, 911 (Cal. Ct. App. 1986); *Envtl. Planning & Info. Council v. Cnty. of El Dorado*, 182 Cal. Rptr. 317, 319–22 (Cal. Ct. App. 1982).

51. *See Woodward Park Homeowners Assn.*, 58 Cal. Rptr. 3d at 112.

52. *See id.* In addition, the hypothetical office park allowed under existing zoning was also used as the “no-project alternative. A 502,000 square-foot development comprised the “reduced-intensity alternative.” *See id.*

53. *See id.* at 107.

The court in *Woodward Park* held that the actual undeveloped condition of the land constituted the baseline for review.⁵⁴ It reasoned that the “existing physical conditions” requirement “protect[s] the fundamental essence of an EIR, its evaluation of a project’s environmental impacts.”⁵⁵ The court went on to suggest that any EIR evaluating impacts on a vacant site, which used anything other than the vacant site as a baseline, would be invalid.⁵⁶

III. THE CALIFORNIA RULE: EXISTING CONDITIONS SET THE BASELINE FOR CEQA REVIEW

In *CBE*,⁵⁷ the California Supreme Court rejected the use of hypothetical baselines. The court refused to allow maximum permitted emission levels to set the baseline, absent other evidence, and held that the baseline must reflect “actual environmental conditions existing.”⁵⁸ ConocoPhillips sought permits to modify and expand use of an existing petroleum refinery to produce ultra low sulfur diesel.⁵⁹ When ConocoPhillips proposed the project, the refinery already produced diesel fuel and other chemical products.⁶⁰ The ultra low sulfur diesel project (“diesel project”) involved a substantial increase in the operation of the already-permitted power plant and boilers.⁶¹ In addition, ConocoPhillips planned to replace or modify various parts of the plant, and to install new equipment.⁶² Prior to the diesel project, the refinery operated below maximum permitted emission levels.⁶³

During the public comment period, plaintiffs, a coalition of environmental groups, organized labor, and local residents,⁶⁴ provided evidence of increased nitrogen oxide (NO_x) emissions of as much as 661 pounds per day.⁶⁵ The South Coast Air Quality Management District, (“District”) which was responsible for issuing permits, produced different figures, finding that increased steam generation and other activities associated with the project would produce an additional 237 to 456 pounds of NO_x emissions per day.⁶⁶ By either estimate,

54. *See id.* at 122.

55. *Id.* at 119.

56. *See id.* at 119. In fact, the court approved the “two baselines approach” when, as here, *CEQA Guidelines* section 15125(e) applies. That guideline states that where an agency action alters an adopted plan, the project should be compared with both existing physical conditions and “potential future conditions discussed in the plan.” *See Woodward Park Homeowners Assn.*, 58 Cal. Rptr. 3d at 707; CAL. CODE REGS. tit. 14, § 15125(e) (2010).

57. *CBE*, 226 P.3d 985 (Cal. 2010).

58. *Id.* at 992–93.

59. *See id.* at 990.

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.* at 991.

64. *See id.* at 990.

65. *See id.*

66. *See id.* at 990–91.

emissions from the project would exceed the fifty-five pound per day threshold set by the District, above which emissions are generally significant and environmental review is required.⁶⁷

However, the District reviewed and ultimately approved ConocoPhillips's permit application for the diesel project without the more detailed EIR.⁶⁸ The District found that the diesel project would create no significant impacts because the increased NO_x emissions would not cause ConocoPhillips to exceed permitted levels, even in the worst-case scenario.⁶⁹ Under the District's logic, because ConocoPhillips operated below maximum emissions in association with the existing facility, NO_x emissions could not be significant unless they exceeded the existing permits.⁷⁰ Thus, the District used maximum allowable emissions under existing permits, rather than actual current emissions, as the baseline for environmental review, and found no need to prepare an EIR.⁷¹

The plaintiffs filed a writ of mandate challenging the failure to prepare an EIR under CEQA.⁷² The trial court agreed with the District and ConocoPhillips that the baseline was appropriate and no EIR was required.⁷³ However, the Court of Appeal held that "realized physical conditions on the ground" and not "hypothetical" conditions must set the baseline.⁷⁴ The court remanded with the order that an EIR be prepared; the District and ConocoPhillips appealed to the California Supreme Court.⁷⁵

The Supreme Court looked to the *CEQA Guidelines*, regulations promulgated by the California Natural Resources Agency, and prior California Court of Appeal decisions in holding that maximum permitted emission levels do not establish the baseline for review, absent other evidence.⁷⁶ The *CEQA Guidelines* provide:

An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute

67. *See id.* at 990; *see also* CAL. CODE REGS. tit. 14, § 15064.7(a) (2010) (allowing agencies to develop thresholds of significance, "non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant").

68. *See CBE*, 226 P.3d at 991.

69. *See id.* at 990–91.

70. *See id.*

71. *See id.*

72. *See id.* at 991.

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.* at 992–93.

the baseline physical conditions by which a lead agency determines whether an impact is significant.⁷⁷

Despite the reference to the contents of an EIR, the court and all parties agreed that the *Guidelines* were applicable in the initial determination of significance as well.⁷⁸ The *CEQA Guidelines* also allow for some discretion, stating that such physical conditions “normally” constitute the baseline.⁷⁹ ConocoPhillips used this language to argue for an exception where previously permitted maximum levels are not exceeded.⁸⁰ Relying on the language of CEQA and the regulations, the court rejected this argument.⁸¹

Instead, the court pointed out the error of the District’s baseline, which presumed all four boilers would operate simultaneously at maximum capacity.⁸² The maximal operation of even one boiler would not normally occur unless the other boilers were shut down for maintenance; thus, according to the court, to declare maximal operation of all four boilers as the baseline was error.⁸³ The court further describes this baseline as “not a realistic description of the existing conditions without the diesel project.”⁸⁴ The court made this finding despite the negative declaration’s candid statement that the increased emission levels “could” occur in the absence of the project.⁸⁵ Thus, even though emissions allowable under existing permits could produce the same NO_x levels as the diesel project, the court was concerned with the emissions associated with a particular project, not emission levels more generally.⁸⁶ The court stated that the hypothetical baseline, based on existing permits, merely created the illusion of no environmental impact.⁸⁷

Ultimately, the court found sufficient evidence of potential impacts to require an EIR, but left intact flexible standards for determining the baseline.⁸⁸ Instead of wading into the technicality required to determine the background emission levels that constitute the baseline, the court conceded broad discretion to the agency in determining how, when, and where to measure emissions.⁸⁹

The court also rejected ConocoPhillips’s argument based on vested rights by characterizing the diesel project as new, rather than the modification of a previously permitted project.⁹⁰ The doctrine of vested rights is prevalent in land

77. CAL. CODE REGS. tit. 14, § 15125(a) (2010).

78. See *CBE*, 226 P.3d at 993 n.5.

79. See CAL. CODE REGS. tit. 14, § 15125(a) (2010).

80. See *CBE*, 226 P.3d at 994.

81. See *id.*

82. See *id.* at 993–94.

83. See *id.*

84. *Id.* at 993.

85. See *id.* at 993–94.

86. See *id.*

87. See *id.* at 994.

88. See *id.* at 992.

89. See *id.* at 997–98.

90. See *id.* at 994–95.

use law. Where a party has expended substantial sums of money and effort under a permit, it cannot subsequently be denied the opportunity to complete the project; such reliance on a valid permit creates a vested right.⁹¹ ConocoPhillips argued it had a vested right to emit up to the maximum permitted levels without further review.⁹² The court rejected this argument, reasoning that the diesel project was a new project beyond the scope of prior permits.⁹³ The court reasoned that the diesel project was new because it “add[ed] a new refining process to the facility, requiring the installation of new equipment as well as the modification and significantly increased operation of other equipment.”⁹⁴ Thus, no vested right existed to expand or “complete” the facility, nor to produce the emissions associated with the expansion.⁹⁵ The court distinguished the precedents proffered by ConocoPhillips as cases where courts characterized activities as modifying existing projects.⁹⁶

Thus, *CBE* reaffirmed that permitted rights for one project do not create more generalized rights to emit or develop.⁹⁷ In *CBE*, ConocoPhillips possessed a specific right to emit a certain compound up to a certain level.⁹⁸ The proposed diesel project would emit those permitted pollutants in an amount below permitted levels.⁹⁹ However, as the California Supreme Court pointed out, such permits gave ConocoPhillips the right to emit in association with a particular project—not a general right to emit.¹⁰⁰ By categorizing the diesel project as new, the court prevented ConocoPhillips from setting the baseline at the maximum permitted level.¹⁰¹ Using a baseline of actual existing emissions, the court found significant impacts from the project and required preparation of an EIR.¹⁰²

91. See *Russ Bldg. P’ship v. City & Cnty. of San Francisco*, 750 P.2d 324, 327 (Cal. 1988).

92. See *CBE*, 226 P.3d at 994.

93. See *id.* at 995.

94. *Id.* at 996. CEQA has particular rules to distinguish new projects from modifications of existing projects. See CAL PUB. RES. CODE § 21166 (West 2010); CAL. CODE. REGS. tit. 14, § 15162 (2010). This distinction also arises under NEPA, and has the potential to interact with the existing conditions rule in important ways. However, that discussion is beyond the scope of this Note.

95. See *CBE*, 226 P.3d at 995.

96. See *id.* at 996–97.

97. See *id.* at 995.

98. See *id.* at 990–91.

99. See *id.*

100. See *id.* at 995.

101. See *id.* at 995.

102. See *id.* at 997–98.

IV. THE EXISTING CONDITIONS RULE SHOULD BE APPLIED TO
PERMITTED RIGHTS UNDER NEPA

A. *Federal Courts Use the Environmental Status Quo as the Baseline*

Federal courts have not addressed whether permitted rights can set the baseline for NEPA review; however, the question of what constitutes the baseline has arisen under NEPA, outside the context of permitted rights. These cases embrace use of the environmental “status quo” to set the baseline.¹⁰³ Generally, the “status quo” is equivalent to the “existing conditions” requirement for the baseline embraced by the California Supreme Court in *CBE*. Although they occasionally stray from a strict interpretation of “existing conditions,” federal courts frame any baseline issue as requiring use of actual conditions on the ground.¹⁰⁴ This suggests federal courts will not allow permitted rights to set the baseline under NEPA. The following cases provide an overview of how federal courts have approached the baseline in other contexts.

*Overseas Shipholding Group, Inc. v. Skinner (Overseas Shipholding)*¹⁰⁵ shows the general adherence of federal courts to a status quo that approximates the existing conditions rule. Overseas Shipholding Group (OSG) challenged the U.S. Maritime Administration’s (MARAD) failure to prepare an EIS for a final rule that allowed four crude oil tankers to permanently operate in domestic trade, despite receiving subsidies that would normally only allow international operation.¹⁰⁶ Pursuant to the Merchant Marine Act of 1936, the Secretary of Transportation provided subsidies for the construction of these ships on the condition that they be used only for international shipping.¹⁰⁷ In the 1970s, demand for foreign oil declined, and an unmet need for shipping domestic oil arose.¹⁰⁸ In response, MARAD developed a program in which ships constructed with subsidies could repay those subsidies and, in return, would be granted limited rights to operate domestically.¹⁰⁹

The baseline question arose because ships operating under the program entered domestic waters in 1980, long before MARAD issued its final rule in

103. See *Sierra Club v. Hassell*, 636 F.2d 1095, 1099 (5th Cir. 1981); *Overseas Burbank Anti-Noise Group v. Goldschmidt*, 623 F. 2d 115, 116 (9th Cir. 1980); *Shipholding Group, Inc. v. Skinner*, 767 F. Supp. 287, 300 n.10 (D.D.C. 1991).

104. See *Hassell*, 636 F. 2d at 1099; *City & Cnty. of San Francisco v. United States*, 615 F.2d 498, 501 (9th Cir. 1980) (holding that thirty years of a site’s use as a naval shipyard could set the baseline and constituted the status quo, despite two years of inactivity immediately preceding environmental review).

105. 767 F. Supp. 287, 298 (D.D.C. 1991).

106. See *Overseas Shipholding Group Inc.*, 767 F. Supp. at 289.

107. See *id.*

108. See *id.*

109. See *id.*

1987.¹¹⁰ In 1980, the Secretary of Commerce issued the first interim rule, and the first tanker entered domestic waters.¹¹¹ Between 1980 and 1987, MARAD announced several different versions of the rule, each followed by new procedural challenges, but the NEPA claims were not reached until the challenge to the final rule in 1987.¹¹² Tankers continued to operate in domestic waters throughout this period.¹¹³ Through temporary waivers, oil tankers that had received the subsidy did for seven years what the final rule allowed them to do permanently.¹¹⁴ Thus, when MARAD used the years preceding environmental review as the baseline for assessing the impacts of the final rule, it found none.¹¹⁵

Despite the alteration of the baseline through the use of temporary waivers and informal rules, the D.C. Circuit upheld the finding of no significant impact.¹¹⁶ OSG accused the agency of unfairly “bootstrapping” the rule onto the temporary waivers, and thereby evading environmental review.¹¹⁷ However, the D.C. Circuit rejected this argument, stating that OSG “incorrectly attempt[ed] to unravel the series of temporary waivers granted by MARAD over a period of years rather than focus its challenge on the particular regulation . . . by which it has been aggrieved.”¹¹⁸ The court voiced no concern that MARAD had effectively avoided environmental review of its decision by issuing temporary waivers that altered the baseline, such that the final rule merely maintained the status quo. The adherence to the status quo, no matter how it came to be, is fairly absolute.

The reasoning in *Overseas Shipholding* is consistent with the *CBE* rule.¹¹⁹ The D.C. Circuit upheld the agency’s decision not to undertake further environmental review because “the agency correctly refused to extrapolate based upon a situation which no longer exists, and correctly evaluated the status quo at the time of the rulemaking.”¹²⁰ This adherence to the “status quo” is consistent with the line of California cases cited in *CBE*, where the courts refused to construct hypothetical baselines based on conditions altered through prior illegal activity.¹²¹ This line of California cases is analogous to *Overseas*

110. *See id.* at 290.

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.* at 290, 297–98.

116. *See id.* at 298.

117. *See id.*

118. *Id.*

119. The D.C. Circuit delves into the baseline issue after a long discussion of whether standing exists for the NEPA claim; however, the court devotes substantial space to the baseline question and it is a critical piece of the court’s holding. *See id.* at 296–300.

120. *Id.*

121. *See CBE*, 226 P.3d 985, 993 n.7 (Cal. 2010) (citing *Fat v. Cnty. of Sacramento*, 119 Cal. Rptr. 2d 402, 407–10 (Cal. Ct. App. 2008); *Eureka Citizens for Responsible Govt. v. City of Eureka*, 54 Cal.

Shipholding in that the courts refused to analyze or weight how the existing conditions came to be.¹²²

City and County of San Francisco v. United States further exemplifies the federal approach to the baseline.¹²³ In that case, San Francisco challenged the Navy's authorization of a new lease to a private ship repair company at the Hunter's Point shipyard.¹²⁴ Over most of the preceding thirty years, the site operated as a shipyard, and at the time of environmental review the site was a "modern fully equipped industrial facility."¹²⁵ However, over the two years immediately prior to the lease, the shipyard was inactive.¹²⁶ The Ninth Circuit upheld the Navy's finding of no significant impact even though the Navy's initial study accepted shipyard use "as given," and did not use the preceding two-year period of inactivity as a baseline.¹²⁷

Although the court embraced the language of setting the baseline based on physical conditions on the ground,¹²⁸ it is questionable whether it truly used existing conditions to set the baseline. If the two years of inactivity prior to the new lease form the baseline, then reactivation of the site under a new lease is much more likely to produce significant impacts. Instead, the court explained, "it was not unreasonable to regard the leasing of the yard as a phase in an essentially continuous activity."¹²⁹ Thus, the thirty years of use as a naval shipyard at the site outweighed the importance of the two-year lull in activity when determining the baseline.¹³⁰

This holding suggests a possible tension between NEPA precedent and the existing conditions rule as expounded by the California Supreme Court in *CBE*. However, the court's reasoning in straying from a strict interpretation of actual physical conditions does not apply in the context of permitted rights. It is less

Rptr. 3d 485, 493-94 (Cal. Ct. App. 2007); *Riverwatch v. Cnty. of San Diego*, 91 Cal. Rptr. 2d 322, 338-39 (Cal. Ct. App. 1999)).

122. See *CBE*, 226 P.3d at 993 n.7 (citing *Riverwatch*, 91 Cal. Rptr. 2d 322, 338-39; *Fat*, 119 Cal. Rptr. 2d 402, 407-10; *Eureka Citizens for Responsible Govt.*, 54 Cal. Rptr. 3d 485, 493-94). These cases require adherence to the existing conditions rule, even where illegal activity has altered the baseline. This does not suggest that MARAD's temporary waivers in *Overseas Shipholding* were illegal, but rather that the waivers had the same effect of altering the baseline and that the D.C. Circuit's analysis was consistent with the California approach. See *Overseas Shipholding*, 767 F. Supp. at 298.

123. See *City & Cnty. of San Francisco v. United States*, 615 F.2d 498 (9th Cir. 1980).

124. See *id.* at 500.

125. *Id.* at 501.

126. See *id.*

127. See *id.*

128. See *id.*

129. *Id.*

130. See *id.* The Ninth Circuit in *San Francisco* may also have made a policy choice to extend the baseline back in time. The court might have been concerned about requiring an EIS to restart an existing facility. On the other hand, it might have decided that adequate attention had been paid to the reactivation of the facility. The court noted that the Navy's sixty-eight page study recognized the adverse effects of the reactivation including air and water pollution and increased traffic and noise. See *id.* at 500-01.

speculative to look at past conditions and view them as a phase of present use of the site than to look at what is hypothetically allowed and presume it already done. In *San Francisco*, a visit to the Hunter's Point Shipyard at the time of environmental review, or in the two years prior, would show an inactive shipyard.¹³¹ The court implies that this is much like a visit to the shipyard on a weekend when no work takes place—an inappropriate snapshot not representative of average existing conditions at the site. Essentially, this exposes the very common problem of what timeframe to use in setting a baseline. When it comes to the use of permitted rights as a baseline, the issue is not what particular time periods or measurements to use. With permitted rights, there is no guarantee that the permitted levels will ever be reached or even approached in actuality.

The Fifth Circuit case *Sierra Club v. Hassell* provides a starker example of federal courts straying from the strict use of existing conditions as the baseline. In *Hassell*, a hurricane had destroyed a twenty-four year old bridge to Dauphin Island.¹³² The Federal Highway Administration and the Coast Guard found no significant impacts in their initial study on the proposal to rebuild the bridge.¹³³ Sierra Club challenged the agencies' failure to prepare an EIS, arguing that the bridgeless post-hurricane island represented the baseline from which impacts should be measured.¹³⁴ However, the court, citing *San Francisco*, upheld use of the pre-hurricane island with the bridge as the "status quo."¹³⁵ Since the proposed bridge did not differ significantly from the old bridge, the court held that NEPA did not require preparation of an EIS.¹³⁶

The court's approach to the baseline in *Hassell* is more difficult to reconcile with the existing conditions rule than in *San Francisco*. In *Hassell*, both the federal courts' stated approach of using the status quo and the California Supreme Court's requirement of "existing conditions" seem to support Sierra Club's view of the baseline. After all, any visit to the site after proposal of the new bridge would show no bridge connecting the island to the mainland. Moreover, the case seems distinguishable from *San Francisco*. It is hard to argue that the periods before and after destruction of the bridge are a "continuous phase" like the operation of the naval shipyard. While operation of a shipyard may ebb and flow with the economy or wartime necessity, the existence or non-existence of a bridge does not seem similarly fluid. In *Hassell*,

131. *See id.*

132. *See Sierra Club v. Hassell*, 636 F.2d 1095, 1099 (5th Cir. 1981).

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.* Notably, the old bridge had been constructed in 1956, prior to NEPA, without environmental review. *See id.* at 1097. Thus, there was no argument that an EIS would simply duplicate a review that had already been completed.

it seems much clearer that the old bridge destroyed in the hurricane no longer reflected existing conditions at the site.¹³⁷

Still, federal courts are unlikely to jump from using a past condition that did exist for many years as a baseline to using a hypothetical permit level that does not and has never reflected actual conditions. The kind of baseline stretching seen in *San Francisco* and *Hassell* can be characterized as akin to using average emissions from a certain period of time to set the baseline emissions from a source. With emissions, it is more obvious why one instantaneous reading might not be the best baseline. In *San Francisco* and *Hassell*, the same sort of averaging of conditions over time is occurring, to set what is arguably a more accurate baseline than one snapshot at the site. However, permitted rights do not necessarily reflect an average or even a snapshot in time. Thus, it seems unlikely, especially given the most recent language of *Overseas Shipholding*, that federal courts would embrace a purely hypothetical baseline based on permitted rights.¹³⁸

B. Federal Courts Should Adopt the Existing Conditions Rule and Reject Baselines Based on Permitted Rights

Despite *Hassell*, current NEPA caselaw leaves adequate space for the existing conditions rule. As discussed above, federal courts have not addressed the precise question of whether maximum permitted emission or development rights can set the baseline for environmental review. At a minimum, though, federal courts have embraced the concept of existing conditions as the status quo.¹³⁹ Although *San Francisco* and *Hassell* suggest a willingness by federal courts to stretch the concept of the baseline to incorporate past activity,¹⁴⁰ this reasoning does not appear to stretch the baseline to include hypothetical allowable emissions or development. Furthermore, there are at least three strong policy reasons for the existing conditions rule as applied to permitted rights: it is consistent with the purposes of NEPA; it promotes accuracy and

137. *See id.* Interestingly, before the court decision, the agencies involved had already adopted new regulations suggesting that a replacement bridge requires an EIS or a written finding of no significant impact. *See id.* at 1100.

138. *See Overseas Shipholding*, 767 F. Supp at 297–98 (reasoning that “the agency correctly refused to extrapolate based upon a situation which no longer exists, and correctly evaluated the status quo at the time of the rulemaking” where the agency found no change in the status quo because its issuance of temporary waivers had substantially altered the baseline).

139. *See Sabine River Auth. v. Dep’t of Interior*, 951 F.2d 669, 679 (5th Cir. 1992) (holding that plans for use as a reservoir cannot set the baseline where agency action is the acquisition of a negative easement preventing any change in use of the site); *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116–17 (9th Cir. 1980) (holding that no EIS was required for an agency action to finance purchase of an airport that already existed); *Overseas Shipholding*, 767 F. Supp. 287, 290 (D.D.C. 1991).

140. *See Hassell*, 636 F.2d 1095, 1099 (5th Cir. 1981); *City & Cnty. of San Francisco v. United States*, 615 F.2d 498, 501 (9th Cir. 1980).

transparency; and the rule generally results in greater protection of the environment.

1. *The Rule Adheres to the Purposes of NEPA*

The statutory language of NEPA indicates a broad interest in environmental protection, and in improving environmental decision making. Congress described its purpose this way: “recognizing . . . the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, . . . it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare.”¹⁴¹ Allowing the use of permitted rights as the baseline would generally lessen the environmental protection envisioned by Congress.¹⁴² This is true because these permitted rights create an additional artificial threshold¹⁴³ over which impacts must rise in order to be considered significant.

NEPA has two specific goals connected to its general interest in environmental protection;¹⁴⁴ using permitted rights as a baseline would undermine both. First, NEPA seeks consideration of every significant environmental impact of a proposed action.¹⁴⁵ Second, NEPA promotes the dissemination of information in a manner encouraging public participation in agency decision making.¹⁴⁶ Accuracy in reporting the impacts of a proposed action is critical to ensuring that “every significant aspect”¹⁴⁷ of those impacts is considered. In addition, if impacts are not easily discernible, public participation will be hampered. Thus, the purposes of NEPA cannot be carried out without the critical accuracy and transparency that the existing conditions baseline provides.

2. *The Rule Promotes Accuracy and Transparency*

Using a hypothetical baseline inherently adds a level of complexity to an environmental review document, which contravenes the information dissemination purpose of NEPA. Some California courts have recognized this issue in the CEQA context; their arguments are equally applicable to NEPA.

In *Woodward Park*, a California Court of Appeal recognized this potential for permitted rights to obscure environmental impacts for decision makers and

141. 42 U.S.C. § 4331(a) (2006).

142. For the exception to this statement, where permitted rights have been exceeded, see discussion *infra* Part IV.C.

143. There may also be thresholds imposed by law, such as the threshold for NO_x emissions set by the Air Quality District in *CBE*. See *CBE*, 226 P.3d 985, 990 n.2 (Cal. 2010); discussion *supra* Part III.

144. See *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

145. See *Vt. Yankee Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978).

146. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

147. *Vermont Yankee*, 435 U.S. at 553.

the public. The court rejected the use of a hypothetical office park allowed under existing zoning as the baseline for review of another project at the site.¹⁴⁸ In doing so, the court stated that readers of an EIR should not have to “puzzle it out,” referring to the actual impacts of a project.¹⁴⁹ The court in *Environmental Planning & Information Council v. County of El Dorado (EPIC)*¹⁵⁰ made a similar finding, rejecting an EIR where information on the actual impacts of the plan must be “painstakingly ferreted out of the [EIR].”¹⁵¹ This does not merely refer to the complexity of what is often a massive document, but rather to the conceptual difficulty of comparing project impacts with a hypothetical baseline that does not, and may never, exist.

In addition to the inherent murkiness of hypothetical baselines, they also can hide the true impacts of a project. The *EPIC* court recognized this when it stated that comparison of a proposed plan with an existing plan, rather than the existing environment, would “mislead the public . . . and subvert full consideration of the impacts.”¹⁵² There, the existing plan for two areas set population caps at 70,400 and 63,600, respectively.¹⁵³ The proposal at issue would lower those growth caps to 5800 and 22,440, respectively.¹⁵⁴ However, the actual populations of the areas were just 418 and 3800, respectively.¹⁵⁵ Therefore, if the proposed plan is seen as the reduction of allowable population growth, then it seems proper that the proposed plan would have no adverse effects on the physical environment because the new growth caps are substantially below the old ones. If, however, the plan is viewed as allowing a certain amount of growth beyond the current population, then any cap higher than the current population is a potential significant environmental impact.

The issue comes down to certainty. It is often unclear what the future holds in the absence of a project. If there were sufficient certainty that the population would reach the level of the old caps in a reasonable timeframe, it might be more accurate to frame the plan as reducing the impacts by reducing the caps. However, as with all hypothetical baselines, there is no guarantee, and seldom a likelihood, that the hypothetical will ever occur. Under the facts in *EPIC*, it seems too uncertain that the current population levels under 5000 will ever reach the caps under the old plan.¹⁵⁶ Thus, accuracy demands that existing

148. See *Woodward Park Homeowners Assn. v. City of Fresno*, 58 Cal. Rptr. 3d 102, 122 (Cal. Ct. App. 2007); discussion *supra* Part II.

149. See *Woodward Park Homeowners Assn.*, 58 Cal. Rptr. 3d at 121.

150. *Envtl. Planning and Info. Council v. Cnty. of El Dorado (EPIC)*, 182 Cal. Rptr. 317 (Cal. Ct. App. 1982).

151. *EPIC*, 182 Cal. Rptr. at 321.

152. *Id.* at 321–22.

153. See *id.* at 320–21.

154. See *id.*

155. See *id.* at 321.

156. See *id.*

conditions set the baseline, rather than hypotheticals, even when such permitted maximums seem to approximate existing conditions more closely than in *EPIC*.

3. *The Rule Generally Enhances Environmental Protection*

Given NEPA's broad goal of environmental protection,¹⁵⁷ any uncertainty should be resolved in favor of the environment. Thus, even where a hypothetical baseline is likely to approximate existing conditions, agencies should err on the side of environmental protection and use actual measurements of existing conditions as the baseline.

Moreover, NEPA's ultimate goal of environmental protection¹⁵⁸ outweighs the administrative ease and lower cost of using maximum permit levels. Looking at a permit or planning document is clearly easier, less time consuming, and cheaper than measuring emissions or conducting an actual site visit. Given the already tremendous costs of NEPA compliance, and doubts in some corners about its efficacy in protecting the environment,¹⁵⁹ one could argue that using regulations or permits as the baseline is a good way to make NEPA cheaper and easier to administer. However, given the trade-offs with respect to accuracy in assessing environmental impacts and the subsequent decrease in environmental protection, this is a poor way to reduce costs. As long as NEPA is going to be on the books, it should fulfill its primary purpose of providing accurate information about the environmental consequences of an agency decision. It cannot do so if cost-cutting undermines its fundamental commitment to the accurate assessment of environmental impacts.

C. *The Benefits of the Rule Are Not Outweighed by Its Drawbacks Where Permitted Rights Have Been Exceeded*

One argument against the existing conditions rule of the *CBE* court is its logical extension to cases where development or emissions exceed the permitted level. In such cases, applicants or agencies can potentially benefit from the lower baseline created by their illegal degradation of the environment.¹⁶⁰ Even if we presume that agencies act independently of industry interests and will faithfully implement the requirements of NEPA, it still might

157. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989) ("Section 101 of NEPA declares a broad national commitment to protecting and promoting environmental quality.").

158. See *id.*

159. See FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 887–88 (2d ed. 1990) (noting discontent with the bureaucracy and ineffectiveness of NEPA, especially excessive paperwork and undue delay for worthwhile projects, while failing to prevent agencies from undertaking undesirable projects).

160. See *Eureka Citizens for Responsible Gov't v. City of Eureka*, 54 Cal. Rptr. 3d 485, 493–94 (Cal. Ct. App. 2007) (upholding an EIR that used an allegedly illegally constructed school playground as the baseline for review of the school playground project); *Riverwatch v. Cnty. of San Diego*, 91 Cal. Rptr. 2d 322, 338–39 (Cal. Ct. App. 1999).

be unwise to allow the party with an economic interest in a finding of no significant impact to control the baseline. If, by degrading a site or exceeding emission levels, one can avoid an EIS or ensure an ultimate finding of no significant impacts, the rule could create an incentive to degrade the environment or at least not protect it to the full extent possible. Of course not all actors would respond to such an incentive, especially in the face of countervailing environmental laws. This could be a problem, though, where enforcement of other environmental laws is lax.

An examination from a case cited by the *CBE* court is instructive. In *Riverwatch v. County of San Diego*, the California Court of Appeal held the baseline for CEQA review of a proposed rock quarry was the actual condition of the land, despite degradation resulting from its use in an illegal sand mining operation.¹⁶¹ There, local residents challenged approval by the County of San Diego of a rock quarry to be operated by Palomar Aggregates.¹⁶² The quarry site contained 13.1 acres of land that would have been high-value habitat, but for its prior use as an unpermitted sand mine.¹⁶³ The Army Corps of Engineers was involved in an enforcement action at the site stemming from the illegal activity.¹⁶⁴ However, the Army Corps of Engineers confirmed that Palomar was not in violation of any law at the time of review.¹⁶⁵ On these facts, the trial court held that the EIR improperly failed to take into account the prior illegal activity at the site.¹⁶⁶

The appellate court reversed, holding that how site conditions came to exist was immaterial under CEQA.¹⁶⁷ Thus, the court upheld the rule that “the environment as it exists when a project is approved” sets the baseline for review.¹⁶⁸ The court reasoned that, “in general, preparation of an EIR is not the appropriate forum for determining the nature and consequences of prior conduct of a project applicant.”¹⁶⁹ Moreover, the court noted the “burden . . . on drafters” of the EIR to determine culpability of the applicant for past activity at the site.¹⁷⁰ In addition, the court expressed concerns that moving the baseline back to discount prior illegal activity could “interfere [with], conflict [with] or unfairly amplify [the] enforcement action.”¹⁷¹

The court’s first two arguments for following the existing conditions requirement despite prior illegal activity seem compelling, the third less so. To

161. See *Riverwatch*, 91 Cal. Rptr. 2d at 338–39.

162. See *id.* at 325.

163. See *id.* at 337–38.

164. See *id.* at 338.

165. See *id.*

166. See *id.* at 326.

167. See *id.* at 338–39.

168. See *id.* at 338.

169. *Id.*

170. *Id.*

171. *Id.* at 338–39.

include past activities at the site undergoing review seems to invite assessment not just of the project at hand, but the moral character of the applicant. This seems outside the scope of both CEQA and NEPA.¹⁷² To ask the reviewing agency to extend the baseline back in time essentially requires the agency to investigate past wrongdoing and determine any culpability on the part of the applicant.¹⁷³ Also, even if past environmental enforcement were indeed insufficient, the investigation of prior illegal activity goes against the fundamental interest in the accuracy of assessing project impacts. In the *Riverwatch* case, for example, had the agency moved the baseline back over a decade to a time before the sand mine operated (and the illegal activity began), the degradation attributable to the mine would appear to be a project impact of the rock quarry. This is incorrect, misleading to the public, and highlights the irrelevance of the pre-existing degradation to the project at issue.

On the other hand, the *Riverwatch* court's argument that extending the baseline back to encompass prior illegal activity would interfere with and amplify enforcement is unconvincing. The agency's use of any particular baseline for reviewing a project cannot interfere with an enforcement action, as it does not, in and of itself, affect activities at the site. It does seem like a new project might interfere with enforcement.¹⁷⁴ As for amplification of enforcement activities, this does not seem like amplification, but rather preventing the applicant from benefitting from their past bad behavior. Even if this is amplification of punishment for violating the law, such amplification might well be within the environmentally protective purposes of both NEPA and CEQA.¹⁷⁵

172. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) (discussing the procedural nature of NEPA thus: "other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.").

173. Another option, which avoids this problem, would be to have the agency use the baseline that is the lower of existing conditions and permitted levels. However, this would seem to punish applicants who did not control the site when the illegal activity took place. Further, given the negative impact this would have on clarity and accuracy in isolating project impacts, the tradeoff does not seem worthwhile. Such illegal activities are better addressed through traditional environmental enforcement.

174. For example, a new project might put an end to clean-up or revegetation undertaken as part of a prior enforcement action. However, this might be a way that prior illegal activity can be addressed in environmental review. Where enforcement is ongoing at a site, the interruption of such enforcement could be considered an environmental impact of the new project. This consideration of illegal activity would appear consistent with the interest in accurately assessing project impacts, while preventing applicants from avoiding the consequences of their prior conduct at the site.

175. See 42 U.S.C. § 4331(a) (2006) ("recognizing . . . the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, . . . it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare"); CAL. PUB. RES. CODE § 21000(g) (West 2010) ("[A]ll [state] agencies . . . which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage . . ."); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989) ("Section 101 of NEPA declares a broad national commitment to protecting and promoting environmental quality.").

Adjusting the baseline for prior illegal activity seems even less likely to gain traction under NEPA than CEQA. NEPA's procedural purpose¹⁷⁶ makes federal courts unlikely, at least explicitly, to stray from the "status quo" requirement for reasons of substantive environmental policy. NEPA prohibits "uninformed rather than unwise" decisions;¹⁷⁷ thus, the interest in accuracy of information likely outweighs any interest in a particular substantive outcome. Furthermore, as discussed above, the policy arguments for extending the baseline for illegal activity do not clearly weigh in favor of the shift. The drawbacks of the existing conditions rule in some instances where prior illegal activity has occurred are outweighed by its support for accuracy and transparency and environmental protection in most contexts under NEPA.

CONCLUSION

Despite their differences,¹⁷⁸ the baseline issue goes to the heart of both NEPA and CEQA. The core of both statutes is the disclosure of environmental impacts to decision makers and the public, in order to better protect the environment and human welfare. The isolation of project impacts from the background environment is key to this goal, and the baseline creates this critical distinction. The use of permitted rights to set the baseline merely clouds the already complex issues put before decision makers and the public.

ConocoPhillips in *CBE* essentially wanted the court to presume it would reach maximum levels of pollution under its permits irrespective of whether the new project went forward. To make such a projection would not only be premature, but would create a misleading picture of project impacts. The baseline is meant to assess the state of the world without the project, so that society can assess what the environmental effects of the new project will be. Without the project, ConocoPhillips's oil refinery does emit below permitted levels and, therefore, those emissions may lawfully increase; but with the project, those emissions will certainly increase.¹⁷⁹ Revealing that known increase in NO_x is important to the integrity of public participation, and ultimately the protection of human health.¹⁸⁰ This information represents exactly the type of impact Congress wanted NEPA to elucidate for decision makers and the public.¹⁸¹

176. See *Robertson*, 490 U.S. at 351 ("Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.").

177. *Robertson*, 490 U.S. at 351.

178. See discussion *supra* Part I.B.

179. See *CBE*, 226 P.3d 985, 990–91 (Cal. 2010).

180. This is evident from the fact that by all accounts, nitrogen oxide emissions from the project would exceed the Air Quality District's own threshold for significance, above which environmental review is generally required. See *CBE*, 226 P.3d at 990–91.

181. See 42 U.S.C. § 4332 (2006).

Setting baselines that reveal the true impact of a project on the environment is technical but critical work. The baseline will determine whether environmental impacts are significant, and, sometimes, whether a project will go forward at all. In turn, this determines whether large amounts of money and time will be spent on environmental review. I have not addressed whether environmental review statutes are worth the huge costs associated with them or whether they produce the desired environmental outcomes. However, it makes little sense to have such laws if the impacts they are meant to assess are not accurately conveyed to decision makers and the public. Using permitted rights as the baseline for NEPA review would be fundamentally inaccurate and therefore misleading to the public.

Over time, the Supreme Court has narrowed the reach of NEPA. From standing requirements¹⁸² to its interpretation as procedural rather than substantive,¹⁸³ courts have allowed NEPA to drift from its goal of environmental protection. Allowing maximum permitted development or emissions to set the baseline would further undermine that goal. Only by setting a realistic baseline of existing conditions can the public and decision makers know the true environmental impacts of a project. The time has come to draw a line in the sand and protect the integrity of the NEPA environmental review process.

182. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572–76 (1992).

183. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 375 (1989).

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