

# Proper CEQA Baseline – *Is It Always Existing Conditions?*

Tiffany Wright, *RTMM*

Amanda Olekszulín/Gary Jakobs, *Ascent Environmental, Inc.*

Christopher Calfee, *Office of Planning and Research*

# What is “Baseline”?

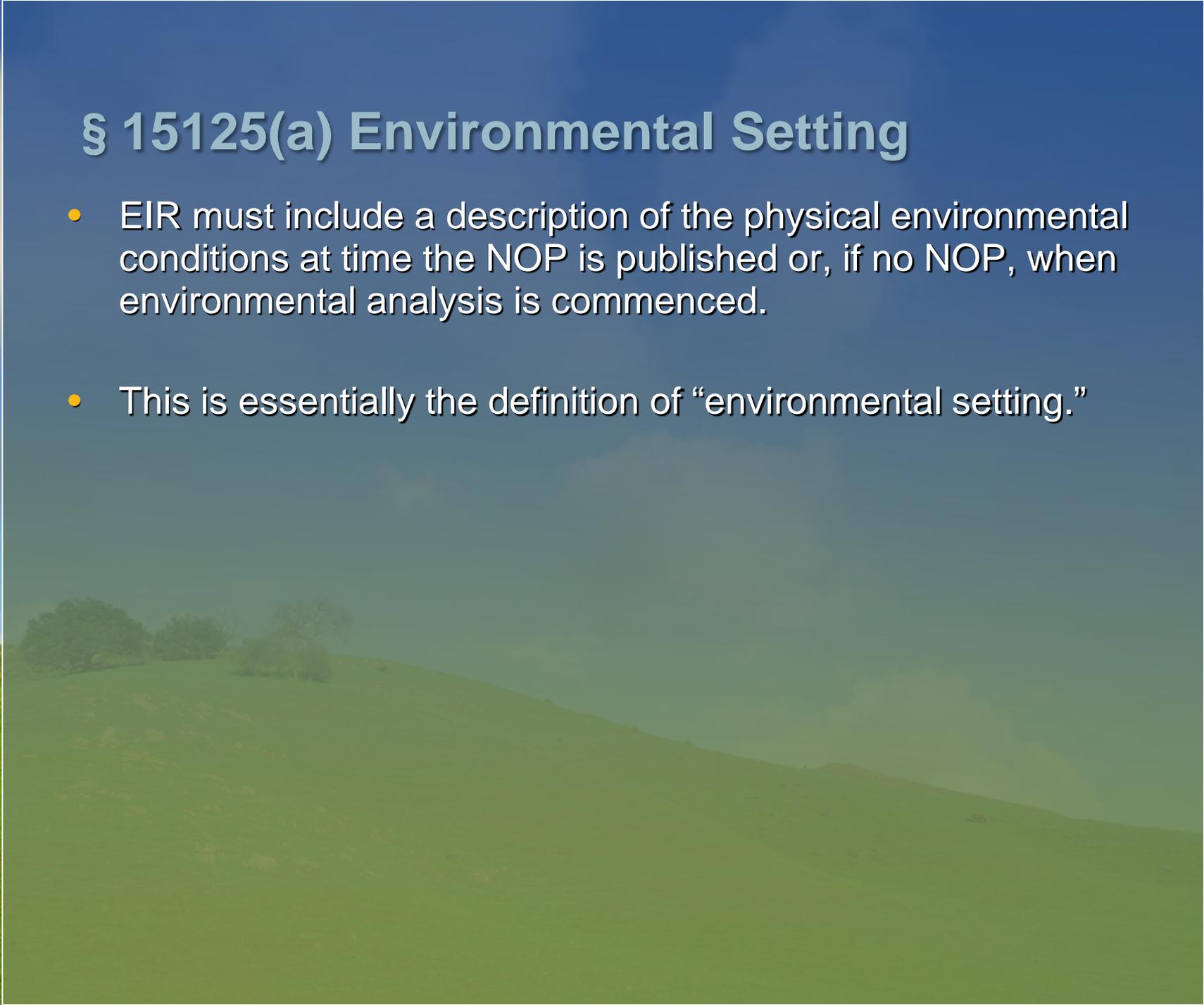
- Our definition: the time and conditions used as the point of comparison for determining the significance of a proposed project’s environmental effects
- No precise statutory or guidelines definition
- Key question: What timeframe and conditions constitute the appropriate baseline for evaluating a project?

# What Do CEQA and the Guidelines Say?

- Descriptions of “environmental setting” and baseline guidance are located in Guidelines § 15125(a)
- Initial study content requirements include “environmental setting” in Guidelines § 15063(d)(1).
- So...a baseline is needed for ISs, NDs, MNDs and EIRs
- Guidelines § 15126.6(e)(1) relates baseline to the no project alternative
- Special baseline rules for military base reuse EIR in Statute § 21083.8.1 and Guidelines § 15229

## § 15125(a) Environmental Setting

- EIR must include a description of the physical environmental conditions at time the NOP is published or, if no NOP, when environmental analysis is commenced.
- This is essentially the definition of “environmental setting.”



# Relationship of Baseline to Existing Setting and the “No Project Alternative”

- § 15125(a): The environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.
- “Normally” provides opportunity to deviate from the environmental setting, if there is good reason to do so.
- If you deviate, support your reasoning for an “abnormal” baseline with substantial evidence.
- § 15126.6(e)(1): no project alternative analysis is not the baseline for determining significance, unless it is identical to the existing environmental setting

# Why “Normally” Was Included in § 15125?

- Idea was introduced in 1998 by practitioners as input to The Resources Agency during preliminary review of proposed guideline changes.
- Intent: to provide flexibility for unusual circumstances.
- Litigation issues that have arisen were not anticipated at the time.
- Court interpretation in *Sunnyvale* case: where the physical conditions existing exactly at the time of the NOP or start of environmental analysis “may not be representative of the generally existing conditions”.

# Examples of Allowable Deviation from Environmental Setting at the Time of NOP

- River systems use an historic record of weather (70-year record), because of wide annual fluctuations
- Average historic water use may be more representative than the actual year of NOP
- Infrastructure under construction at time of NOP with completion assured at or near time of project approval – use the post-completion condition.
- Abnormal, temporary environmental situation, e.g., traffic volumes depressed by temporary construction detour

# Most Common Baseline Questions

- Are unauthorized existing uses part of the baseline?
- Do prior illegal actions influence the baseline?
- Is baseline a policy choice by lead agency at the end?
- What is the influence of approved permits or water rights?
- What is the influence of adopted plans, zoning, or economic predictions?
- Should planned and approved infrastructure be in the baseline?

# Unauthorized Existing Uses Are Allowed to be Part of the Baseline

## *Kenneth F. Fat v. County of Sacramento (ND)*

- Small airport in continuous use since 1934.
- 1971 CUP approved by the County, expired in 1973 and not renewed.
- 1972 Caltrans Aeronautics Division airport permit issued, active continuously since
- Airport expanded without building permits.
- 1992 CLUP adopted with ND, not challenged.
- 1997 CUP application for airport use, cure for building permit issuance, and 24 new hangers.

# Unauthorized Existing Uses Are Allowed to be Part of the Baseline

## *Kenneth F. Fat (cont.)*

- ND adopted using existing “illegal” airport operations in 1997 as baseline.
- Fat argued that in absence of prior environmental review, baseline should be 1970, the date of CEQA enactment.
- Court held that 1997 baseline was supported by substantial evidence, citing 1992 CLUP ND that was not challenged and surrounding land use remained rural.

# Take-Home Messages

- Existing, unauthorized land use does not require rolling back the baseline.
- Facts are important. Here, they included long-term continuous use, despite lack of CUP. Also, other agency approvals of the use existed.
- Rolled back baselines are considered difficult to define, and a hypothetical comparison.

# Existing Conditions Are Not Rolled Back to Discount Prior Illegal Actions

## *Riverwatch v. County of San Diego (EIR)*

- Major use permit for rock quarry on Rosemary Mtn. Remove east slope of mtn.
- In the past, illegal sand mining removed riparian habitat and illegal discing occurred on floodplain of San Luis Rey River.
- Both were subject to enforcement actions by USACE.
- In comments, USFWS sought description of vegetation before illegal activity.



# Existing Conditions Are Not Rolled Back to Discount Prior Illegal Actions

## *Riverwatch (cont.)*

- Importantly, USACE did not raise objections to CEQA certification.
- Court felt early baseline would impose a burden of determining the “nature of the illegality” and could interfere with enforcement.
- CEQA is not to be used as enforcement for violation of other environmental laws
- Existing conditions deemed the proper baseline, despite prior illegal discing and habitat removal

# Take-Home Messages

- Prior illegal activity does not require rolling back the baseline
- Enforcement to rectify past illegal activity is not in the realm of CEQA.
- Important fact here: the enforcement agency, USACE, was pursuing the illegality and did participate in the CEQA process. This seemed to be enough for the court.

# Baseline is Not a Policy Choice To Be Made at the End of CEQA Review

## *Save Our Peninsula Committee v. Monterey County (EIR)*

- September Ranch, 891 acres in Carmel Valley, contained equestrian center and pasture land, on well water since 1930s.
- (Residents said pasture was not irrigated.)
- Proposed for 117 units, supported by well water, because surface water unavailable.
- Water supply was a known, key issue in Carmel Valley. DEIR: Any water use above baseline would be significant.

# Baseline is Not a Policy Choice To Be Made at the End of CEQA Review

## *Save Our Peninsula Committee (cont.)*

- Board of Supervisors given three choices: 43 AF last 2 years; 51 AF last 3 years; or 30 AF last 7 years.
- BOS “selected” 51 AF after DEIR review and approved 109 units.
- BOS decided based on policy, not substantial evidence.
- Water pumped for irrigation from 1997 – 1999 (after the 1997 project application) was higher than 6 prior years, based on data.
- Residents commented that pasture was not irrigated prior to that, and no data existed to show prior irrigation pumping.

# Baseline is Not a Policy Choice To Be Made at the End of CEQA Review

## *Save Our Peninsula Committee (cont.)*

- Court said (suspiciously perhaps) it was in applicant's interest to elevate water production figures.
- Post-application data was not credible, not substantial evidence, so BOS abused its discretion by using it.
- Court concluded EIR choices were not supported by analysis, just raw (and suspect) data. BOS choice was arbitrary
- Selecting baseline at the end of process deprived public of meaningful chance to review

# Take-Home Messages

- Baseline should be what is supported by evidence and analysis, identified early, and presented in the DEIR, so public can review it
- While weighing competing evidence is an appropriate lead agency role, choice of baseline is not merely a policy decision without substantial evidence backing it
- Evidence about baseline developed after a project application may “be regarded with some caution,” if it doesn’t represent pre-project conditions

# Approved Permit May Define the Baseline Only Under Certain Conditions

## *Fairview Neighbors v. County of Ventura (EIR)*

- Project site mined since 1948, operating under 1976 CUP approved with an EIR that was not challenged.
- CUP allowed up to 1,800,000 tons, which generated up to 810 daily truck trips.
- 1993 proposal to expand mine boundaries.
- Action modified an existing project that was already subject to CEQA review.

# Approved Permit May Define the Baseline Only Under Certain Conditions

## *Fairview Neighbors (cont.)*

- EIR used permitted operation with up to 810 daily truck trips as the baseline.
- Opponents asserted baseline should be existing traffic without the mine.
- In 1989, mine operation reached 837 daily truck trips.
- Court said full capacity pursuant to CUP entitlement was appropriate.
- To use actual traffic counts in one year would be “misleading and illusory” under the facts.

# Approved Permit May Define the Baseline Only Under Certain Conditions

## *Communities for a Better Environment (CBE) v. SCAQMD (ND)*

- ConocoPhillips proposed Ultra Low Sulfur Diesel Fuel Project, a new industrial process at an existing refinery
- Required adding new and replacing equipment and increasing use of existing cogen plant and four boilers for process heat.
- SCAQMD threshold for NO<sub>x</sub> was 55 lb. per day. ND estimated 201 to 420 lb. per day increase compared to current operation.
- SCAQMD determined less than significant because permit for existing boilers allowed higher emissions and permit level was the baseline, rather than existing conditions.

# Approved Permit May Define the Baseline Only Under Certain Conditions

## *CBE (cont.)*

- If all four boilers ran at max, they would emit less than permitted. History showed max operation of all four together had not occurred and was unrealistic.
- Court deemed ND baseline as “mere hypothetical conditions allowed under permits”, not supported by substantial evidence
- “Permits give no vested right to pollute.” (Court felt the baseline disguised significant air pollution impact.)
- Court directed SCAQMD to use “physical conditions actually existing at the time of the analysis” or “realized physical conditions on the ground”, rather than “hypothetical conditions”

# Vested Water Right at Time of NOP May Define Baseline (With Supporting Facts)

## *Cherry Valley Pass Acres v. City of Beaumont (EIR)*

- City certified EIR and approved specific plan authorizing 560 units on 200-acre site formerly used as egg farm.
- Water supply assessment assumed “baseline” water usage at site was equivalent to landowner’s adjudicated right to pump 1,484 acre-feet per year (afy) of groundwater.
- Actual water use following closure of egg farm: 50 afy.
- Selection of 1,484 afy baseline was within city’s discretion in light of adjudication (court-settled) water right, which existed at time of NOP. 1997 – 2001 average was close to water right (1,340 afy)
- Adjudicated amount was, therefore, not a “hypothetical” baseline. (Also, project water use predicted to be 531 afy, much less than historical use as egg farm.)

## Take-Home Messages

- Entitled, permitted capacity may define the baseline, if for a modified project with prior CEQA review. But facts must support, including history of reaching the limit.
- In *Fairview Neighbors*, court recognized special character of mining where “operation fluctuates considerably based on demand.” Capacity was reached.
- In *CBE*, project was a new process. Permit limits were merely “hypothetical”. Capacity not realistically reached. Use actual existing physical conditions as baseline.
- In *Cherry Valley*, water right at time of NOP was OK. Historic use approximated the water right level.

# Approved Plan Conditions Do Not Define the Baseline

## *Environmental Planning and Information Council (EPIC) v. County of El Dorado County (EIR)*

- 1969 General Plan adopted with population capacity of 63,000 for Camino-Fruitridge area and 70,000 for Greenstone.
- Proposed GP amendment would reduce planned population capacity to 22,000 (Camino-Fruitridge) and 5,800 (Greenstone).
- Existing population was 3,800 (Camino-Fruitridge) and 400 (Greenstone).

# Approved Plan Conditions Do Not Define the Baseline

## *EPIC (cont.)*

- EIR compared the proposed amendments to the existing General Plan to determine significant impacts (future plan-to-plan comparison).
- EIR pointed to reduced planned population as reasoning of environmental benefit, lack of significant impact.
- Court said this conclusion was illusory, because substantial growth over existing population would occur.
- EIRs “failed as informative documents.”

# Existing Zoning and Zoned Density Do Not Define the Baseline

## *City of Carmel-by-the-Sea v. County of Monterey (ND)*

- Mission Ranch, 21-acre resort with 13 cottages, 7-room motel, 6-room inn, zoned R-1 (inconsistent with existing use).
- Existing land use plan allowed clustered residential use, outside of wetlands, up to 75 du.
- Proposed rezoning to R-3-S for clustered residential and O for open wetland area; ultimate density maximum would be 65 du.
- County argued the rezoning did not sanction expanded use because allowable density would decrease from 75 to 65 du.
- Similar to EPIC, Court said comparison with approved density, rather than existing conditions, conflicts with CEQA.

# An Economically Expected Future Does Not Define the Baseline

## *Wal-Mart Stores, Inc. v. City of Turlock (NOE)*

- City of Turlock adopted an ordinance which banned discount superstores. (A 100,000 square foot store that includes a full-service grocery department.)
- Wal-Mart argued that future conditions would be worse because multi-tenant uses would replace the big box retail.
- Court found that Wal-Mart failed to compare future conditions against the existing baseline.
- Instead, Wal-Mart improperly compared one future condition (Wal-Mart's super store) with another (Multi-Tenant Retail).

# An Economically Expected Future Does Not Define the Baseline

## *Wal-Mart Stores, Inc. (cont.)*

- Court ruled that the existing physical conditions must be compared to the physical conditions that are predicted to occur because of a project.
- Court used the idea of photographic “snapshots” at the time when the environmental review begins and then an array of snapshots to create a picture of the reasonably foreseeable future. The baseline “snapshots” are compared to the array of future “snapshots.”

# Take-Home Messages

- Baseline is not defined by the outcome of an existing, adopted plan, zoned density, or predicted economic future.
- Comparing plan-to-plan, project-to-zoning buildout, or alternative economic futures are improper for determining significance.
- Must compare the outcome of a proposed plan or project with existing conditions physical conditions.
- (The other comparison may be appropriate for discussion of the no-project alternative.)

# Post-Approval Scenario with Predicted Traffic Conditions Is Not a Proper Baseline

## *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council (EIR)*

- EIR for a proposed transportation project including the construction of a bridge.
- Traffic conditions for 2020 used as the baseline in the traffic analysis. Project was not to be completed until then.
- 2020 traffic estimate based on buildout under general plan along with the development of numerous roadway improvements planned for completion by 2020.
- Court criticized City choice of a baseline more than a decade after project approval.

# Post-Approval Scenario with Predicted Traffic Conditions Is Not a Proper Baseline

## *Sunnyvale West Neighborhood Assn. (cont.)*

- “By using future traffic conditions as its ‘baseline,’ [the City] did not adequately explain to an engaged public how the proposed project was expected to change the present conditions.”
- “Predicted conditions at the expected date of approval” may be allowed where environment is changing quickly for reasonably foreseeable factors unrelated to the project, but...
- “Normally” does not give lead agency “carte blanche” to select a future, post-approval condition, even if it acts reasonably with substantial evidence, i.e., court said baseline definition is a matter of law, not open to complete lead agency discretion.
- NOTE: Requests to de-publish were submitted and denied.

# Post-Approval Scenario with Predicted Traffic Conditions Is Not a Proper Baseline

- Caltrans Memo on “Policy Implications of *Sunnyvale*”
  - Circulated July 28, 2011
  - Department does not advocate modeling “existing plus project” conditions
  - Department recommends taking the difference of the future build versus future no build, as a measure of the project’s impacts, and then compare that back to the baseline (existing conditions)

# Take Home Messages

- This typical approach to traffic analysis needs to be modified to be defensible
- A distant future baseline, well after project approval, should not be used to define significant project impacts, (but still can be a comparison presented under cumulative analysis).
- Considering future, reasonably foreseeable projects or rapidly changing environmental conditions existing at the time of approval may be permissible

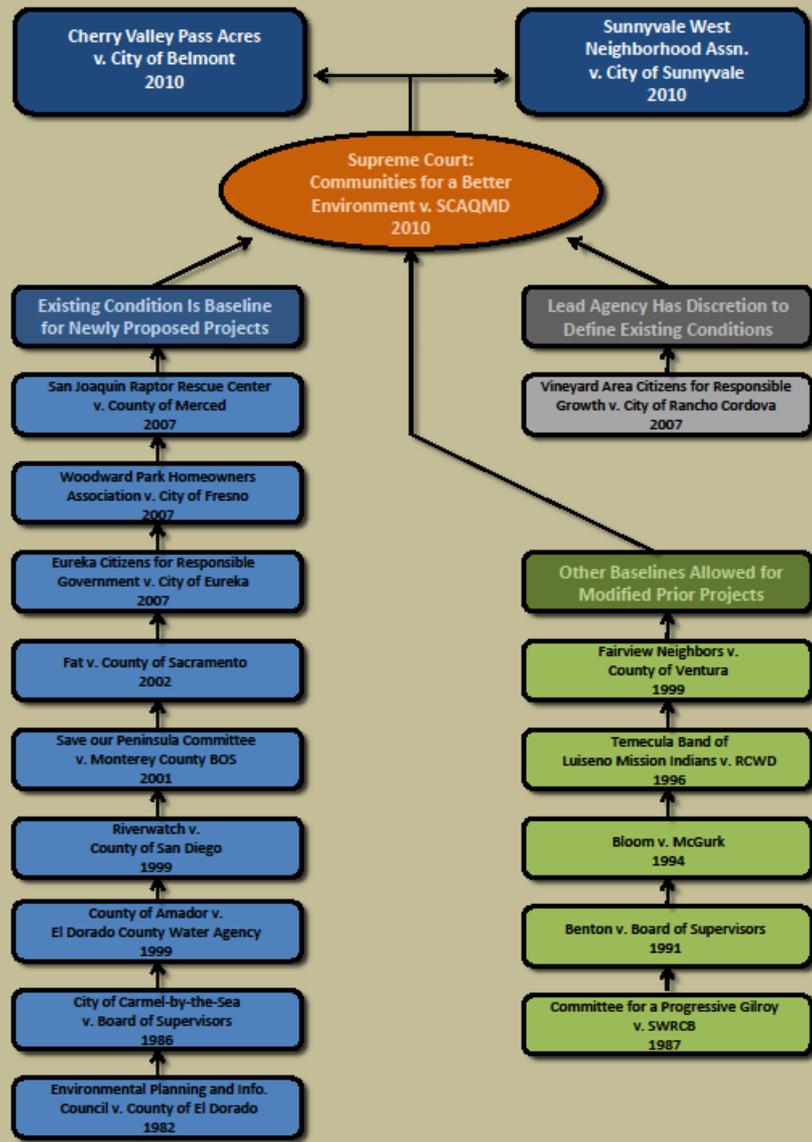
# Summary of Key Baseline Practice Pointers

- For a new project, courts have required that the baseline reflect actual existing physical conditions at the start of environmental review.
- Permit limits may be allowable as baseline only in very select situations, e.g., where an action modifies a prior project that had CEQA review and the facts support it (i.e., reaching the limit is not hypothetical).
- Court-settled water rights at the time of NOP may OK.
- Existing conditions in a baseline are not changed by illegal past activities and unauthorized land uses.

## Summary (cont.)

- Comparison of a proposed project or plan to what might hypothetically happen under an adopted plan or zoning designation, i.e., a plan-to-plan comparison, is not adequate for defining significance of project impacts.
- Determine the baseline early in the review, using facts of the project and setting, and disclose during public review, not afterwards.
- Degree of lead agency discretion about how to define existing conditions that constitute the CEQA baseline is in question: a matter of law or subject to more discretion as long as baseline is backed by substantial evidence.

# History of CEQA Baseline Cases





**Thank You**