First District Holds CEQA Baseline For Chevron Marine Terminal Lease Renewal Includes Existing Conditions and Structures, Finds No CEQA or Public Trust Violation In Lands Commission's Alternatives Analysis

By Arthur F. Coon on February 9th, 2012

The CEQA "baseline" rules have received a lot of judicial attention in the last several years, and rightly so. The baseline or "environmental setting," is the fundamental "benchmark" from which a project's environmental impacts are measured. The baseline also determines the scope of the "reasonable range of [project] alternatives" required to be considered in an EIR, since "alternatives shall be limited to ones that avoid or substantially lessen any of the significant effects *of the project*." (14 Cal. Code Regs., § 15126.6(f), emph. added.) By definition, adverse environmental conditions *already existing* as part of the baseline are not significant impacts of the proposed project.

Discretionary permit, contract and lease *renewals* have always presented problematic baseline issues where existing conditions were never subject to CEQA review. The First District recently brought further clarity to the baseline setting rules in such contexts, as well as the public trust doctrine, in its published opinion in *Citizens for East Shore Parks v. California State Lands Commission (Chevron U.S.A., RPI*) (1/27/12 Opn. Mod. on den. rhg.) ___ Cal.App.4th ___. In affirming the trial court's judgment denying a writ of mandate, the Court upheld the State Lands Commission's approval of a 30-year lease renewal allowing Chevron U.S.A., Inc. to continue operating a marine terminal in San Francisco Bay waters near Chevron's Richmond refinery. Ships dock at the terminal to off-load crude oil to be processed at the privately-owned, on-shore refinery, and to load refined products, both through a pipeline system connecting the marine terminal to the refinery. The marine terminal and refinery had existed since 1902; Chevron's predecessor (Standard Oil) bought the refinery and began operating it and the terminal in 1905. Various modifications were made in the 1940's and 1970's to improve the terminal, and in the 2000's Chevron completed a major seismic upgrade and electrical system revamp.

In 1947, the Lands Commission granted Standard Oil a 50-year lease, which Chevron assumed in 1976, and which expired in 1997, after which Chevron operated the terminal on a holdover basis until – after a nearly 9-year CEQA review process – the Lands Commission approved the 30-year lease renewal and a related EIR in 2009. Plaintiffs sued challenging the renewal and EIR on CEQA and public trust grounds. They argued that the CEQA baseline used by the Commission – which included both the existing marine terminal structure and Chevron's existing operations there – was illegal and that, among other flaws, the EIR failed to consider the alternative of removing the causeway and burying the pipeline connecting the terminal and refinery. In affirming the trial court's judgment rejecting all of plaintiffs' arguments, the Court of Appeal clarified numerous significant principles drawn from the CEQA baseline jurisprudence:

- The Lands Commission correctly concluded the CEQA baseline should reflect both the marine terminal's physical structure and Chevron's current operational use because "the California Supreme Court has made it clear [that] the baseline for a CEQA analysis *must* reflect *current conditions* at the project site." (See *Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 320-322, 323, emph. added [setting forth "normal" rule that baseline must reflect "physical conditions existing at the time [the] environmental analysis" begins].)
- The "normal rule" applies "even when the actual [physical] conditions were in violation of current regulatory provisions." (*Id*. at 321, fn. 7; *see also, e.g., Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1452-1453 [CEQA baseline included illegal development at mining operation seeking

use permit]; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1280-1281 [holding use of CEQA baseline incorporating 30 years of unauthorized and illegal development was within County's discretion]; *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 371 [code violations in construction of existing playground "was not a CEQA consideration"].)

- Plaintiffs' "revisionist approach to the baseline" – i.e., that it must *exclude* existing physical conditions because the terminal predates CEQA and will otherwise escape "full environmental review" – was unsupported by the CEQA statutes, Guidelines or case law.
- The "normal rule" of baseline-setting is consistent with CEQA's categorical exemption for "existing facilities" – i.e., meaning those existing at the time of the agency's CEQA determination, not at the time CEQA was enacted (now several decades ago). (See *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, 1315. ["We presume that thousands of permits are renewed each year for the ongoing operation of regulated facilities, and we discern no legislative or regulatory directions to make each such renewal an occasion to examine past CEQA compliance …."].)
- The marine terminal lease renewal project EIR did not need to consider the alternative urged by plaintiffs – removing the causeway and burying the pipes – "since it was directed at an asserted impact [impediment of recreation] not identified [as a significant impact] in the EIR. Furthermore, given that the baseline properly reflected *existing* conditions, which included the causeway and pipelines supported thereby, the final EIR correctly concluded that the asserted impact on recreational uses was not a potential significant impact of the lease renewal project."
- The project description did not "chop up" the proposed project and misleadingly downplay the impacts of the whole project by omitting Chevron's onshore refinery operation, since that operation sits on private property and needed no approval from the Lands Commission to continue its operations.
- The Court further rejected plaintiffs' arguments based on the EIR's alleged failure to analyze the impacts of existing water discharges, or the impacts of existing structures, or to adequately respond to comments, as meritless in light of the Land Commission's properly-selected existing conditions baseline, and also in some instances as simply mischaracterizing the EIR's analysis.

In addition to the above CEQA baseline rules, the Court's opinion included a detailed and interesting discussion and analysis of the public trust doctrine's origins and purposes, leading it to reject plaintiffs' essentially duplicative arguments under that doctrine as well: "The plaintiffs have cited no case, and we are aware of none, that suggests that where no change is being made to a public trust use and there has been compliance with CEQA, the public trust doctrine imposes an additional impact analysis requirement and requires the consideration of additional project alternatives and mitigation measures in connection with other public trust uses."

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