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How Much Leeway Does a Lead Agency Have to Define an Appropriate Baseline for CEQA Review?

Several months ago, a court of appeal upheld a South Coast air district EIR for an oil refinery modernization project, concluding the district had discretion to use "near-peak" emissions, rather than average emissions, as the baseline for calculating the air pollution expected from the project. *Communities for a Better Environment v. South Coast Air Quality Management District*, 17 Cal. App. 5th 588 (2020). The court's decision, which seemingly



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modernization project EIR had used a baseline of 98th percentile "near-peak" refinery emissions for measuring the project's air quality impacts. Petitioner CBE claimed the district should have instead used the refinery's average emissions over the preceding two years, characterizing an average as the "normal" CEQA baseline. Applying the general rule that a court must uphold an agency's selection of a CEQA baseline if it is supported by substantial evidence, the court turned to the evidence. The district determined its baseline by examining two years of daily refinery emissions, excluding the worst two percent of days to avoid unrepresentative outliers, and then comparing emissions on the 98th percentile "near-peak" days to the refinery's peak emission days under the proposed project. The court upheld this approach, ruling both that a) the district could reasonably focus on near-peak emission days because those were most relevant to public health and b) the 98th percentile approach matched that used by U.S. EPA for nitrogen dioxide reporting and regulation. The court's opinion has been viewed as important for its application of recent case law on the leeway - and limits - inherent in a lead agency's discretion to identify baselines for CEQA review. Depublication of the opinion, however, reopens key questions about the scope of that discretion. This post was updated on September 9, 2020.

## Authors