



# Mineral Law

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## CEQA, Mining and Vested Rights. Looking Back on the California Supreme Court's Decision in *Communities for a Better Environment v. South Coast Air Quality Management District*.



By **Tom Henry** on March 17, 2011

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One year ago the California Supreme Court issued its decision in *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal. 4th 310. Since our blog wasn't up at the time I thought it would be a good idea to look back on that decision and how it impacts mine permitting issues in California.

The California Environmental Quality Act ("CEQA") is this state's equivalent of the National Environmental Policy Act ("NEPA"). CEQA requires administrative agencies to evaluate the environmental effects of discretionary decisions, such as issuing mining use permits. A projected project's impacts must be evaluated against a project "baseline," which is normally the existing site conditions at the time of the project application. Significant environmental effects identified during the CEQA review must then be mitigated to the extent feasible. The CEQA analysis is the most time consuming and costly part of obtaining an approval for a use permit. A CEQA evaluation may take years and hundreds of thousands of dollars to complete.

One difficult aspect of CEQA is how to determine proper the environmental baseline when the proposed site has existing, but as yet unused, entitlements. In other words, should the baseline be the unbuilt existing setting, or a hypothetical future setting taking into account the current entitlements.

This question is particularly important in the context of mining, when a mine may have a so-called "vested right to mine. In the mining context a mine with a vested right is typically described as one for which a use permit is not required because the mine was in operation prior to any zoning restrictions and prior to the effective date of

California's Surface Mining and Reclamation Act ("SMARA). These mines are "grandfathered" in and do not require use permits for certain types of future expansions.

When a mining operation needs a CEQA review for another permit (e.g., an expansion beyond that allowed under its vested right), the question comes up whether the baseline should be the existing setting or the mine on full build out under its vested right. Of course, the importance of using a baseline that shows more mining than presently exists at the site is that the CEQA analysis would then show less of an impact. Less mitigation would likely then be required.

The CBE case answers this question while creating others. The case arose when ConocoPhillips applied to modify and replace certain equipment at one of its refineries. The modifications required the refinery's existing boilers and cogeneration plant to operate at a higher average rate to produce additional steam. ConocoPhillips applied to the Air District for a permit to operate its proposed project. For its CEQA baseline, the Air District used the maximum permissible NOx emissions level for the equipment covered under the refinery's previously issued permit. Because the proposed project would not cause NOx emissions to exceed the previously permitted maximum, the Air District found that no significant impact would result. CBE argued that the environmental baseline for purposes of determining the significance of a project's physical impacts is the "realized physical conditions of the ground," rather than a level that a prior permit may hypothetically allow. CBE's argument was that although ConocoPhillips could conceivably operate its boilers such that the maximum NOx emission level was reached, it had not done so to date and, therefore, the baseline was something less than the permitted maximum. On the other hand, ConocoPhillips argued that using the actual daily NOx emissions as the baseline rather than the maximum permitted boiler NOx emissions would impair Conoco's vested rights under its existing boiler permits. In siding with CBE, the Supreme Court disagreed that the existing permits constituted a vested right. However, the Court further noted that even when a vested right was at issue the environmental baseline should still be the existing setting. The presence of such a right would not excuse the District from performing what the Supreme Court characterized as a "realistic CEQA analysis." In part, the Supreme Court noted that the purpose of CEQA is to fully inform the public as to the environmental effects of a project, and using hypothetical conditions as a baseline deprives the public of important information.

While certain exceptions apply, the general conclusion to take from the case is that even if a mining operation has a vested right to mine a much larger area, the applicant should use a baseline of the actual existing setting. The case also suggests, however, that the applicant may not be required to mitigate those impacts that would otherwise occur under the existing entitlements. While not spelled out by the Court, prior decisions under CEQA suggest that these potential mitigation measures could be considered legally infeasible. In any event, the case requires a carefully thought-out analysis for applications where mining vested rights are at issue.

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