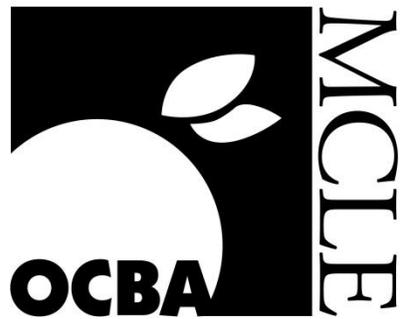

ORANGE COUNTY BAR ASSOCIATION

**ENVIRONMENTAL LAW
SECTION WEBINAR**

CEQA in the time of COVID



Friday, November 6, 2020



rincon

RINCON CONSULTANTS, INC.

Environmental Scientists | Planners | Engineers

Stradling
Attorneys at Law

CEQA in the Time of COVID

Orange County Bar Association

November 6, 2020

- Public input and participation
- Statute of limitations
- CEQA baseline
- AB 52 compliance
- Q&A



Oy, what a year!

- Global pandemic
- Projects continuing
- CEQA continuing
- Big changes





"I know nothing about the subject,
but I'm happy to give you my expert opinion."

- Purpose of CEQA
- How COVID changed everything
- Online input and participation

- Virtual Participation
- Each community pivoted in a different way
- How has this affected public participation?





- Hardcopies?
- Library?
- Planning counter?
- Is the internet accessible?

Certain CEQA notices are not required to be filed, posted, or publicly available in the office of the County Clerk, if all of the following alternative requirements are met:

- Post notice on lead or responsible agency website for same length of time required for physical posting;
- Submit notice to State Clearinghouse via CEQAnet; and
- Perform outreach to all interested parties (e.g. entities that have requested notice (CEQA Guidelines § 15087(a)).



- Authorizes public bodies to hold conference call or video meetings during the pandemic.
- Physical meeting location not required if meeting notice provides notice of the means by which members of the public can observe the meeting and comment.
- Public bodies must also advertise and implement a procedure for receiving and resolving reasonable Americans with Disabilities' (ADA) accommodation requests.

- Public review and comment periods have not changed.
- Public scoping meetings – use technology to maximize public participation.
- Hard copies will be mailed upon request rather than accessible to the public at a physical location.





- Judicial Council, Emergency Rule 9 – tolled CEQA statute of limitations until August 3, 2020.
- For Notices of Determination filed now, the 30-day statute of limitations applies.

- What comes next?! Who knows!!
- State Clearinghouse no longer accepts hard copies of CEQA documents.
- As of November 3, 2020, agencies must submit online to the CEQA Database.
- You need to register to submit online to the CEQA Database!



- “Baseline” normally consists of the physical environmental conditions as they exist “at the time environmental analysis is commenced” or when the Notice of Preparation is published. (CEQA Guidelines § 15125(a).)
- Goal in establishing baseline: “provide the most accurate and understandable picture practically possible” of the project’s impacts. (*Id.*)
- Baseline must be supported with “substantial evidence.” (*Id.*)

- If environmental conditions vary from year to year, it may be necessary to “consider conditions over a range of time periods.” (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 327-328.)
- Determination of baseline is a flexible process – lead agency has discretion to decide how the existing physical conditions “can most realistically be measured”. (*Id.* at 328.)
- Measurement method is subject to review for support by substantial evidence. (*Id.* at 328.)

- The question to ask in choosing baseline is: “Do we have a reason to omit the existing conditions analysis and substitute one based on future conditions?”
(Neighbors for Smart Rail v. Exposition Metro Line Construction Authority (2013) 57 Cal.4th 439, 457.)
- The answer is “yes” and baseline may be adjusted when:
 - Environmental conditions are rapidly changing leading up to project implementation. *(Id. at 452.)*
 - Existing conditions baseline would be “uninformative or misleading to decision makers and the public.” *(Id. at 453.)*

- An agency may base an existing conditions baseline on recent historical use levels if those levels are permitted to continue. (*North County Advocates v. City of Carlsbad* (2015) 241 Cal.App.4th 94, 103 (citing *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 337).)
- Where there was “fluctuating occupancy” over a range of time periods and there had been “actual historical operation of the space at full occupancy for more than 30 years,” court affirmed agency’s selection of a traffic baseline that assumed full occupancy. (*Id.* at 105-106.)

Selection of baseline cannot be based on a hypothetical or “conditions that were permissible pursuant to an existing plan or regulation but that were not being employed or that did not exist ‘on the ground’ at the time environmental review commenced.”

(Cherry Valley Pass Acres & Neighbors v. City of Beaumont (2010) 190 Cal.App.4th 316, 338.)

On March 4, 2020 the Governor proclaimed a State of Emergency in California as a result of the threat of Coronavirus 2019 (COVID-19). On March 16, 2020 the County Health Officer issued a Shelter at Home Order for the entire County, including the City. The threat of COVID-19, as well as the subsequent State and County proclamations and orders, have resulted in temporary changes to the existing economic and physical conditions in California and the County regionally. Temporary changes to existing environmental conditions may have reduced vehicle traffic and associated noise and pollutant emissions, and reduced electricity consumption. In addition, the timing and likelihood of cumulative development and regional buildout assumptions may be affected during or after the threat of COVID-19.

Using BIG DATA to help in many ways



- What is AB 52?
- Goals of Tribal Consultation
 - Avoidance or preservation in place of tribal cultural resources.
 - Avoid inadvertent discoveries.
 - Build working relationship with tribe(s).
 - Develop culturally appropriate mitigation measures.
- Prerequisites for AB 52 tribal consultation
 - Tribe must request notice of projects. (PRC § 21080.3.1(b)).

- Executive Order N-54-20 (now expired).
- Within 14 days of decision to undertake a project, lead agency must provide formal notice of project to tribe.
- Tribe has 30 days from receipt of notice to request consultation.
- Lead agency shall begin consultation within 30 days of receiving request for consultation.
- Environmental document cannot be certified or adopted until consultation has “concluded.” (PRC § 21082.3.)

- Socially distanced site visits
- Virtual tribal consultation



- Changes that may become permanent
- Changes that meet CEQA goals
- Changes that do not meet CEQA goals



- There is no case law on determining baseline during a global pandemic.
- Remember there is case law on determining baseline when conditions vary from year to year.
- The goal is to provide the “most accurate and understandable picture practically possible” of the project’s impacts.
- Document the evidence supporting your baseline measurements.
- Keep in mind that future conditions are speculative.

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