Exploring the No-Action Baseline in NEPA Reviews

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Basic Terminology and Concepts

- No-Action/No-Build baseline
  - 40 CFR 1502.14(d): Agencies shall "include the alternative of no action" in the alternatives analysis of an EIS.
  - Proposed project will not be built.
  - Purpose is to compare the effects from taking no action with the effects of implementing the proposed project (serves as a baseline).

Basic Terminology and Concepts

Travel Demand Forecast

- Anticipated regional traffic patterns based on distribution of population and employment across the region.
- Prepared to support long-range transportation plans.
- Often used as inputs to project-level traffic forecasts

Traffic Forecast

- More detailed estimates of traffic characteristics
  - LOS = Level of Service
  - VMT = Vehicle Miles Traveled
  - VHT = Vehicle Hours Traveled
- Informs Purpose and Need Statement, Alternatives Analysis, and Effects Analysis (AQ & Noise)
- Often conducted early in project development

Basic Terminology and Concepts

- Land Use Forecast
  - Predicting changes in land development
  - Typically prepared by planning agencies to support long range transportation plans
  - Based on or closely coordinated with regional socio-economic forecasts
- Socioeconomic Forecast
  - Predicting population and employment across the region
  - Typically prepared by planning agencies

Basic Terminology and Concepts

- Land Use Effects
  - Typically occurs later in project development
  - Effects to land use as a result of building the project.
  - Can be direct (e.g., acquiring property), indirect, or cumulative
    - E.g., improved accessibility, attractive to development
- Induced Growth/Land Development
  - Development that may occur as a direct or indirect result of the project.
  - "If you build it, they will come."
  - Development patterns may be different (TOD, low density)
- Induced Travel Demand
  - Increase in traffic demand, change in patterns, in response to newly created capacity by the project.

Basic Terminology and Concepts

Build Forecast

- Land use and/or traffic effects that will occur if the project is built.
- May involve expected land use and traffic effects for the build conditions associated with *each alternative* in the design year.
- If phased implementation, may involve mid-year effect evaluation.

No-Build Forecast

- Land use and/or traffic effects that will occur if the project is not built.
- May involve mid-year no-build forecasts.

Where do we see these issues?

Case Study # 1: Long Planned Project in Rapidly Urbanizing Area

New 15-mile highway. The project has long been a "fiscally constrained" project in the regional transportation plan and local land use plans. Local land use agencies approved extensive new development in the project area consistent with the land use plans, but the land use approvals are not conditioned on completion of the highway.

Over 90% of the land in the project area is either already developed or has development rights that are vested under state law. The MPO's demographic projections for the regional transportation plan assume the growth reflected in the local land use plans. The MPO demographic projections are the same with and without the project.

The study area currently experiences significant congestion and traffic delays on the existing transportation network.

Case Study # 1: Ninth Circuit

- *The Laguna Greenbelt v. U.S. Dep't of Transportation*, 42 F.3d 517 (9th Cir. 1994)
- *Protecting Arizona's Resources and Children v. Federal Highway Administration*, ___ Fed.App'x ____ (9th Cir. 2017) 2017 U.S. App. LEXIS 24856

Case Study # 2: Determining What the Baseline SE Data Represents & How to Use It

- The project is a twenty-two mile limited access toll road radiating out from a urban center in an area with above average population growth.
- Regional socioeconomic data (population and employment figures) developed by the local Metropolitan Planning Organization (MPO) is available, as are future growth estimates provided by several local government organizations.
  - Traffic forecasting input to assess alternatives' ability to meet need and purpose.
  - Land use input to compare future indirect and cumulative impacts of alternatives.
- Does the data represent a build or no-build scenario?
  - MPO data shows future population and employment distributed across area.
  - MPO data shows future population and employment clustered at intervals.
- The MPO publishes new data between publication of the draft and final SEIS.

Case Study # 2: Fourth Circuit

- *Catawba Riverkeeper Foundation v. N.C. Department of Transportation,* No. 5:15-CV-29-D, 2015 WL 1179646 (E.D.N.C. Mar. 13, 2015)

- *Clean Air Carolina v. NCDOT, 2015 WL 5307464* (E.D.N.C. 2015)(unpublished)

  affirmed by

- *Clean Air Carolina v. NCDOT,* 651 Fed. Appx. 225 (4th Cir. 2016)(unpublished)

Case Study # 3a: Understanding & Disclosing Underlying Assumptions

Tier 1 Corridor EIS on rural edge of metropolitan area. MPO developed "policy-based" projections that assumes limited growth in project area. By contrast, "market-based" projections assumed much higher levels of growth in the project area.

The market-based projections were used to develop both the build and no-build forecasts, projections of future traffic in the study area, and in justifying the purpose & need.

Documentation in the record demonstrates that the no-build baseline was developed at least in part on the assumption that potential construction of the highway would connect several projects to one another and to the transportation network.

Case Study # 3a: N.D. Illinois

- *Openlands, Midewin Heritage Assn. v. U.S. DOT,* 2015 U.S. Dist. LEXIS 77508 (N.D. Ill.2015)

Case Study # 3b: Understanding & Disclosing Underlying Assumptions

ROD for 20-mile limited access bypass project relied on SE data developed by local MPO. Project staff asked MPO whether data represented build or no-build.

"TAZ socioeconomic forecasts for the No Build scenario did not include the Monroe Connector. MUMPO confirmed our assumption regarding the reasonableness of the 2030 TAZ forecasts for use as a No-Build basis."

Case Study # 3b: Fourth Circuit

NC Wildlife Federation v. NC Department of Transportation, 677 F.3d 596 (4th Cir. 2012)

What is important from a technical perspective?

Modeling

- Types of models that may be used
  - Travel demand models (CUBE, TransCAD, EMME)
  - Land use models (UrbanSim, spreadsheet-based)
  - Operational models (Synchro, Vissim, HCS)
- Coordination
  - MPO
  - Local planning departments
  - Stakeholders
- Time & cost
  - Build into project schedule

Modeling, cont.

- Modeling considerations
  - Study area boundaries
  - Data sources and when they are needed
  - TAZ structure and functional classifications included
  - Mode split
  - Socioeconomic data – population and employment
  - Projects to be included in baseline
- Methodology
  - Review and documentation
- Limitations

Other Considerations

- “Little NEPA” and NEPA Assignment states
- Air Quality Transportation Conformity requirements

What are some best practices or lessons learned?

Resources

- FHWA Instructions for Reviewing Travel and Land Use Forecasting Analysis in NEPA Documents and FAQs (February 2018), available at https://www.environment.fhwa.dot.gov/nepa/Travel_LandUse/forecasting_reviewer_guidance.aspx
- FHWA Interim Guidance on the Application of Travel and Land Use Forecasting in NEPA (March 2010), available at https://www.environment.fhwa.dot.gov/projdev/travel_landUse.asp
- 23 CFR Part 450, Appendix A
- NCHRP Report 716 http://www.trb.org/Publications/Blurbs/167055.aspx
- NCHRP Report 765

  http://www.trb.org/Publications/Blurbs/170900.aspx

Questions?

Thank You!

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Transportation Research Board
Summer 2018 Conference

The No Build Baseline Panel

Hypotheticals

Catawba Riverkeeper Found. v. N.C. DOT

United States District Court for the Eastern District of North Carolina, Western Division

March 13, 2015, Decided; March 13, 2015, Filed

No. 5:15-CV-29-D

Reporter
2015 U.S. Dist. LEXIS 31429 *; 2015 WL 1179646

CATAWBA RIVERKEEPER FOUNDATION, and CLEAN AIR CAROLINA, Plaintiffs, v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, et al., Defendants.

Subsequent History: Reconsideration denied by, Motion denied by *Catawba Riverkeeper Found. v. N.C. DOT, 2015 U.S. Dist. LEXIS 120631 (E.D.N.C., Sept. 10, 2015)*

Related proceeding at, Summary judgment granted by, Injunction denied by, Motion denied by, Dismissed by *Clean Air Carolina v. N.C. DOT, 2015 U.S. Dist. LEXIS 120634 (E.D.N.C., Sept. 10, 2015)*

Vacated by, Remanded by *Catawba Riverkeeper Found. v. N.C. DOT, 2016 U.S. App. LEXIS 22108 (4th Cir. N.C., Dec. 13, 2016)*

Prior History: *Catawba Riverkeeper Found. v. N.C. DOT, 2014 U.S. Dist. LEXIS 178813 (W.D.N.C., Dec. 30, 2014)*

Counsel: **[*1]** For Catawba Riverkeeper Foundation, Clean Air Carolina, Plaintiffs: Frank S. Holleman, III, Kimberley Hunter, LEAD ATTORNEYS, Kathleen W. Asquith, Southern Environmental Law Center, Chapel Hill, NC.

For NC Department of Transportation, Defendant: Scott T. Slusser, Eugene Conti, In his official capacity as Secretary of NCDOT, LEAD ATTORNEYS, NC Dept of Justice, Transportation Section, Raleigh, NC.

For Federal Highway Administration, John F. Sullivan, In his official capacity as Division Administrator of FHWA, Defendants: Jared S. Pettinato, LEAD ATTORNEY, U. S. Dept. of Justice, Washington, DC.

Judges: JAMES C. DEVER III, Chief United States District Judge.

Opinion by: JAMES C. DEVER III

Opinion

ORDER

On August 28, 2012, the Catawba Riverkeeper Foundation and Clean Air Carolina ("plaintiffs") filed a complaint in the United States District Court for the Western District of North Carolina against the North Carolina Department of Transportation ("NCDOT"), Eugene Conti, in his official capacity as Secretary of NCDOT, the Federal Highway Administration ("FHWA"), and John F. Sullivan, in his official capacity as Division Administrator of FHWA (collectively, "defendants"). Compl. [D.E. 1] 7.[1] Plaintiffs allege that defendants **[*2]** violated the National Environmental Policy Act ("NEPA"), codified at *42 U.S.C. § 4321 et seq.*, and the

[1] The court substitutes Secretary Anthony J. Tata (Secretary Conti's successor) as defendant. See *Fed. R. Civ. P. 25(d)*.

Administrative Procedure Act ("APA"), *5 U.S.C. §§ 701—06*, in connection with their decision to construct the Gaston East-West Connector Toll Highway, commonly referred to as the Garden Parkway, in Gaston County and Mecklenburg County, North Carolina. Id. 1, 8.

On April 11, 2013, plaintiffs moved for summary judgment [D.E. 33]. On May 23, 2013, the state and federal defendants moved for summary judgment [D.E. 38, 39]. On June 20, 2013, plaintiffs moved to supplement the administrative record with two documents [D.E. 40]. On November 10, 2014, plaintiffs again moved to supplement the administrative record with two additional documents or, in the alternative, for the court to take judicial notice of them [D.E. 52].

On December 31, 2014, after hearing oral arguments in the case, the United States District Court for the Western District of North Carolina transferred the case to this court. See [D.E. 57, 58]; *28 U.S.C. § 1404*. On February 23, 2015, this court ordered supplemental briefing to address a 2013 change in an authorizing state statute [D.E. 64]. **[*3]** As explained below, the court grants plaintiffs' motion for summary judgment and denies defendants' motion for summary judgment.

I.

This case concerns the planned construction of a 22-mile toll freeway in western North Carolina and whether defendants followed prescribed procedures in selecting the project as the preferred alternative. See Compl. 1; AR 42350. NCDOT began studying the Garden Parkway in 2001. AR 25876.[2] On July 24, 2002, at a project team meeting, defendants agreed that the "purpose of the proposed action is to improve east-west transportation mobility in the area around the City of Gastonia . . . and particularly to establish direct access between the rapidly growing area of southeast Gaston County and west Mecklenburg County." AR 2993. The participants formed the purpose from the "[n]eed to improve mobility, access and connectivity within southern Gaston County" and the "[n]eed to reduce congestion and improve traffic flow . . . in the project study area; improve high-speed, safe regional travel service . . . and generally improve safety . . . in the study area." Id.

In October 2002, the North Carolina **[*4]** state legislature created the North Carolina Turnpike Authority ("NCTA") and authorized the NCTA "to study, plan, develop, and undertake preliminary design work on up to nine Turnpike projects." AR 25876; *N.C. Gen. Stat. § 136-89.183(a)(2)* (2002) (amended 2006).[3]

Between 2002 and 2004, in addition to looking at possible new roads in Gaston and Mecklenburg counties, defendants "developed and evaluated" six "non-new location alternatives," or alternatives that did not require building a new roadway. AR 4681, 4684. These alternatives included a "No Build" alternative, mass transit, and improvements to existing roadways. AR 4684—94. At an August 17, 2004 meeting, defendants and representatives from other agencies (the "merger team") could not agree which, if any, non-new location alternatives should be studied further. AR 4723. At a **[*5]** September 14, 2004 meeting, the merger team likewise failed to achieve consensus on further study of any non-new location alternatives. AR 4733—38. On October 15, 2004, defendants outlined two "critical basic elements" to the project's purpose and need: (1) "improve east-west mobility and connectivity," and (2) "improve traffic flow on I-85 and US 29/74 (the only existing east-west corridors in the study area)." AR 4750, 4754. The merger team modeled regional travel demand in 2025 and concluded that

[2] Local municipalities have advocated for new infrastructure since 1991. See AR 5701.

[3] In 2006, the state legislature designated the "Gaston East-West Connector" as an authorized project. *N.C. Gen. Stat. § 136-89.183(a)(2)(b)* (2006). In 2013, the legislature repealed the NCTA's express authority to build the Garden Parkway, but the NCTA continues to have discretion to build turnpikes (including the Garden Parkway) that meet specified conditions. See *N.C. Gen. Stat.§ 136-89.183(a)(2)(b)* (2013); *2013 N.C. Sess. Laws 183 § 5.1*; [D.E. 68] 2-3; [D.E. 69] 2—5.

building a "new location freeway" would more effectively address the "critical basic elements" than improving existing roadways. AR 4756—57.

By July 2005, the merger team had eliminated all non-new location alternatives. AR 5708, 7209; cf. AR 5557. At a September 20, 2005 meeting, the merger team "narrowed down the 90 preliminary new location alternatives to 16 recommended Detailed Study Alternatives." AR 7215; see AR 5709. On October 15, 2008, defendants released a "Final Updated Purpose and Need Statement." AR 21729. The statement included slightly modified needs. Compare AR 21738 (noting the "[n]eed to improve traffic flow on the sections of I-85, US 29-74 and US 321 in the project study area **[*6]** and improve high-speed, safe, reliable regional travel service along the I-85 corridor"), with AR 2993 (noting the "[n]eed to reduce congestion and improve traffic flow on the sections of I-85, US 29-74 and US 321 in the project study area; improve high-speed, safe regional travel service along the US 29-74 intrastate corridor").

In April 2009, the NCTA published the NEPA-required Draft Environmental Impact Statement ("DEIS") analyzing the proposed Garden Parkway construction. AR 25819—26529. In the DEIS, defendants analyzed 12 new-location alternatives and the no-build alternative. AR 25848—49. As part of this analysis, defendants (1) forecasted traffic demand and distribution in the relevant area through 2030, and (2) created a qualitative Indirect and Cumulative Effects ("ICE") report, which is a "qualitative assessment of potential indirect and cumulative land use changes and environmental effects associated with" the alternatives. AR 25877—78, 26088—26109.

"Travel demand is a function of socioeconomic conditions such as residential densities, locations of jobs and services, and trip lengths and distributions for the various types of trip purposes." AR 25884. To forecast this travel demand, **[*7]** defendants relied on the socioeconomic data in the Metrolina Regional Model ("MRM"). Id. The MRM included socioeconomic forecasts by area metropolitan planning organizations ("MPOs") that assumed the construction of the Garden Parkway. See, e.g., AR 6173, 6191, 6203, 35797—98, 36144, 39660—62, 41541, 57849—51; [D.E. 32-10] 3.[4] Defendants used the socioeconomic forecasts to project transportation needs and then, based on these projected needs, defendants modeled the alternatives' respective road designs to determine traffic forecasts for each. See AR 53473—53605.

The qualitative ICE report reviewed the indirect and cumulative effect of the proposed project on the growth and land use, wildlife habitat, and water resources in the different geographic parts of the study area. AR 26088—26109. Defendants concluded that all of the new-location alternatives had high or moderate potential to improve mobility, access, and connectivity in Gaston and Mecklenburg counties. AR 26107. Defendants also concluded that all of the new-location alternatives had high or moderate potential to lead to accelerated growth and to contribute to changing land use in the Gaston and Mecklenburg counties. Id.

Defendants ultimately decided that the recommended alternative was Detailed Study Alternative 9 ("DSA 9"), a 21.9-mile project. AR 25850. Defendants opened a public-comment period that ended on July 17, 2009. AR 25820. Defendants received and responded to numerous comments from state and federal agencies and the public. See AR 41593—42249.

On August 3, 2010, at the request of other agencies

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[4] The MRM used a combination of a regional "top-down" approach and a local-area "bottom-up" approach. AR 57850. For the top-down approach, an expert "used national economic data and demographic data to develop regional and county-level population and employment projections." Id.; see AR 3909—4023 (Hammer report). For the bottom-up approach, local MPOs "relied on [Traffic Analysis Zone]-level calculations to estimate future population and employment." AR 57850. Defendants used the regional projections to refine the Traffic Analysis Zone-level ("TAZ-level") projections, and then the TAZ-level projections, including "specific adjustments **[*8]** to account for the proposed Garden Parkway project," were "incorporated into the MRM." AR 57850—51.

and the public, defendants published a quantitative ICE report, which outside consultants **[*9]** prepared. AR 39654—39747. The quantitative ICE report was, in part, designed to "provide a detailed analysis of the potential indirect land use, water resources and wildlife habitat impacts of the Preferred Alternative." AR 39659. To quantitatively estimate the land use change of the preferred alternative vis-a-vis the No Build alternative, defendants chose a "gravity model approach to estimate the No Build condition because the Build condition was reflected in the prevailing demographic forecasts." AR 39660 (emphasis added). Defendants used the MRM data, including the growth assumptions based on the Garden Parkway's construction, to create the Build forecast. See 39660—61. Then, holding that growth constant, defendants used the gravity model to redistribute the growth effects. AR 39660, 39662.[5] This redistribution "represents households and employment that would have located elsewhere in the Metrolina region under the No Build condition." AR 39662.

On these assumptions, the gravity model indicated that construction of the Garden Parkway would result in 3,700 additional households and 300 fewer jobs in the study area when compared to the No Build alternative. Id. The gravity model also predicted that, in the No Build condition, the absolute number of households and jobs would **[*11]** increase by 42,200 and 33,100, respectively, between 2005 and 2035 in the study area. Id.

On December 21, 2010, defendants published the Final Environmental Impact Statement ("FEIS"). AR 42264—42622. The FEIS reiterated the DEIS's conclusion that DSA 9, the Garden Parkway, was the preferred alternative. AR 42350, 42352—56. The FEIS also restated the quantitative ICE report's findings that building the Garden Parkway would result in an increase of 3,700 households and a decrease of 300 jobs when compared to the No Build scenario. AR 42427.

In April 2011, the Gaston County Chamber of Commerce published a report on the "Economic Impact of the Garden Parkway" (the "Connaughton Report"). See AR 44667—72, 50767. The Connaughton Report concluded that the Garden Parkway would result in an increase of 11,328 households and an additional 17,828 jobs in Gaston County. AR 50770; see AR 44671.

In February 2012, the FHWA issued the NEPA-required Record of Decision ("ROD"). AR 51676—51986. The ROD reflected defendants' final decision to identify the Garden Parkway as the "Selected Alternative." AR 51680. In making this decision, defendants "considered the information and analyses documented in the [DEIS], **[*12]** the [FEIS], this Record of Decision, and comments received from agencies and the public." Id. The Garden Parkway proposal included "four twelve-foot travel lanes, with a grassed median and paved inside and outside shoulders." AR 51686. Defendants anticipated an interim phase that would construct a two-lane roadway for approximately 6 miles of the eventual 21.9-mile project. AR 51781. The Garden Parkway "represent[ed] the best overall balanced minimization of all impacts analyzed" and was the "environmentally preferable alternative."

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[5] The gravity model redistributes growth at the level of individual Traffic Analysis Zones ("TAZs"). See AR 39675. Mathematically, the gravity model is defined as:

$$Growth_{(j)} = Growth_{(t)} * \left(\frac{V_{(j)} A_{(j)}}{\sum V_{(i)} A_{(i)}}\right),$$

where $Growth^{(j)}$ is household or employment growth in the TAZ "j," $Growth^{(t)}$, **[*10]** is total household or employment growth for the entire Metrolina model region, and V and A are functions of land use and attractiveness, and the relative accessibility of TAZ "j." AR 39678—79. $Growth^{(t)}$ is the same in the Build and No Build conditions. The accessibility index, $A^{(j)}$, also appears to be a function of data that assume construction of the Garden Parkway. See AR 39679 (explaining that the index is a function of employment in each TAZ and the travel time between TAZs, where the travel time was modeled on socioeconomic data assuming construction); State Defs.' Reply [D.E. 45] 12 ("'Travel time' between origins and destinations is an ingredient of the MRM .... ."). Thus, the gravity model explicitly assumes the same regional growth, spurred at least in part by construction of the Garden Parkway, in both the Build and No Build conditions. See AR 35802.

AR 51683.

On June 1, 2012, in light of *North Carolina Wildlife Federation v. North Carolina Department of Transportation, 677 F.3d 596 (4th Cir. 2012)*, plaintiffs asked defendants to prepare a supplemental EIS to address the methodology underlying its impact analysis for the proposed Garden Parkway. AR 58131. On August 14, 2012, plaintiffs again asked defendants to prepare a supplemental EIS. AR 58186—90. On August 31, 2012, defendants declined plaintiffs' request. AR 58198—99. On August 28, 2012, plaintiffs filed this action. See Compl. 29.

II.

Summary judgment is appropriate if the moving party demonstrates that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. The party seeking summary judgment must initially **[*13]** show an absence of genuine dispute of material facts or the absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. If a moving party meets its burden, the nonmoving party must "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (quotation and emphasis omitted). A genuine issue for trial exists if there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. "The mere existence of a scintilla of evidence in support of the plaintiff's position [is] insufficient." *Id. at 252*; see *Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985)* ("The nonmoving party, however, cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another."). Only factual disputes that might affect the outcome under substantive law properly preclude summary judgment. *Anderson, 477 U.S. at 248*. In reviewing the factual record, the court views the facts in the light most favorable to the nonmoving party and draws reasonable inferences in that party's favor. *Matsushita, 475 U.S. at 587*. "When cross-motions for summary judgment are before a court, the court examines each motion separately, employing the familiar standard under *Rule 56 of the Federal Rules of Civil Procedure*." *Desmond v. PNGI Charles Town Gaming, L.L.C., 630 F.3d 351, 354 (4th Cir. 2011)*.

"NEPA claims are subject to judicial review under the" APA. *N.C. Wildlife Fed'n, 677 F.3d at 601*. **[*14]** The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *5 U.S.C. § 706(2)(A)*; see *Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 763, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004)*; *N.C. Wildlife Fed'n, 677 F.3d at 601*. The court's inquiry into "whether there has been a clear error of judgment .... must be searching and careful, but the ultimate standard of review is a narrow one." *Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)* (quotations omitted); *N.C. Wildlife Fed'n, 677 F.3d at 601*; *Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 287 (4th Cir. 1999)*. This standard is "highly deferential" but "does not reduce judicial review to a rubber stamp of agency action." *Friends of Back Bay v. U.S. Army Corps of Eng'rs, 681 F.3d 581, 587 (4th Cir. 2012)* (quotations omitted). "A reviewing court must ensure that the agency has examined the relevant data and articulated a satisfactory explanation for its actions .... " *N.C. Wildlife Fed'n, 677 F.3d at 601* (quotation and alterations omitted).

NEPA requires agencies to follow "a set of action-forcing procedures that require that agencies take a hard look at environmental consequences and that provide for broad dissemination of relevant environmental information." *Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350, 109 S. Ct. 1835, 104 L. Ed. 2d 351 (1989)* (quotations and

citation omitted); see also *Defenders of Wildlife v. N.C. Dep't of Transp., 762 F.3d 374, 393 (4th Cir. 2014)*; *Friends of Back Bay, 681 F.3d at 587*; *N.C. Wildlife Fed'n, 677 F.3d at 601*. "NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson, 490 U.S. at 350*. Thus, "NEPA merely prohibits uninformed—rather than unwise—agency action." *Id. at 351*.

III.

Plaintiffs challenge the **[*15]** FEIS in four ways. First, they claim that defendants failed to adequately assess and disclose environmental impacts in the FEIS. Compl. ¶¶ 104—13. Second, they claim that defendants' alternatives analysis was improper. Id. ¶¶ 114—22. Third, they claim that defendants did not prepare the FEIS in good faith or properly respond to public comments. Id. ¶¶ 123—28. Fourth, they claim that defendants failed to produce a supplemental EIS in light of new information requiring such a production. Id. ¶¶ 129—33.

A.

The court considers plaintiffs' second claim first, as did plaintiffs in their memorandum. See [D.E. 33-1] 24. Plaintiffs argue that defendants violated NEPA and the APA by making improper assumptions about future growth in analyzing the No Build alternative in the FEIS. See Compl. ¶¶ 114—22. NEPA requires agencies contemplating "major Federal actions significantly affecting the quality of the human environment" to prepare an environmental impact statement. *42 U.S.C. § 4332(C)*; see *40 C.F.R. §§ 1502.3*, *1502.4*.[6] The EIS must "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the **[*16]** public." *40 C.F.R. § 1502.14*. This alternatives analysis "is the heart of the environmental impact statement." Id. The analysis must include direct and indirect effects of the alternatives. See *40 C.F.R. § 1502.16*. For agencies to define the range of alternatives, they must first "briefly specify the underlying purpose and need." *40 C.F.R. § 1502.13*. The agencies then must "[r]igorously explore and objectively evaluate all reasonable alternatives" to meet that purpose and need. *40 C.F.R. § 1502.14(a)*. Furthermore, agencies must "[i]nclude the alternative of no action" in the EIS whether or not it has been eliminated as a reasonable alternative. *40 C.F.R. § 1502.14(d)*; *N.C. Wildlife Fed'n, 677 F.3d at 602*.

Plaintiffs contend that defendants used the same socioeconomic data for both the Build and No Build conditions in the quantitative ICE report and the FEIS and that the Fourth Circuit rejected this approach in *North Carolina Wildlife Federation, 677 F.3d at 601—05*. The administrative record shows that defendants used the same socioeconomic data in analyzing the traffic forecasts and direct and indirect effects of both alternatives and that these underlying data assumed the construction of the Garden Parkway. See, e.g., AR 6203 ("It is emphasized **[*17]** that the population and employment forecasts contained in the [MRM] directly relate to the traffic growth forecasted by the models. The Gaston East-West Connector ... [is] included in the model."); AR 35798 ("GUAMPO and MUMPO stated that the Gaston East-West Connector was considered in making the demographic forecasts for the model. .... [I]t was decided to use the projections as the No Build condition, even though some consideration of the project may be embedded in the Gaston and Mecklenburg County forecasts."); AR 36144 ("[NCTA is] concerned about the agencies buying into the theory that overall growth does not change with or without the project—it just redistributes. This is the same assumption used in the Monroe Connector project, but it was presented somewhat differently."); AR 39660 ("[C]oordination with MPOs and county planning departments led to the decision to use the gravity model approach to estimate the No Build condition because the Build

[6] The parties agree that the proposed Garden Parkway project constitutes a "major federal action" that requires an EIS.

condition was reflected in the prevailing demographic forecasts."); AR 39678—79 (explaining the gravity model); AR 57849 ("[L]ocal planners anticipated completion of the project when developing and allocating future population and employment for the MRM ... **[*18]** [and] then calculated the 'No-Build' condition using a gravity model analysis in which the project and its associated effect on population and employment were removed."). Indeed, defendants concede this point in an illustrative diagram. See [D.E. 39-4] 2 (noting that "socioeconomic data with the road" is used to create traffic models with and without the road). Thus, the court turns to whether, as a matter of law, defendants' use of the same underlying socioeconomic data to model the Build and No Build scenarios satisfies NEPA's procedural requirements.

In North Carolina Wildlife Federation, the Fourth Circuit confronted an almost-identical situation. There, the defendants, who are the same defendants in this case, "created the 'no-build' baseline using information from a local planning organization." *N.C. Wildlife Fed'n, 677 F.3d at 599*. The MPOs used the same top-down, bottom-up approach that is used in this case to generate growth projections throughout the study area. Id. The projections were based on a number of factors, including a TAZ's "time to employment," which was itself based off an "anticipated roadway network [that] included the proposed Monroe Connector." Id. The Fourth Circuit found that "although [defendants] **[*19]** used MUMPO's projections as the 'no build' baseline, part of MUMPO's data actually assumed construction of the Monroe Connector. By using MUMPO's data, ... the Agencies incorporated 'build' assumptions into the 'no build' baseline." *Id. at 599—600*. After noting that "the accuracy of the 'no build' baseline" was "a critical aspect of the NEPA process," the Fourth Circuit stated that "courts not infrequently find NEPA violations when an agency miscalculates the 'no build' baseline or when the baseline assumes the existence of a proposed project." *Id. at 603*.

The ultimate holding in North Carolina Wildlife Federation turned on a narrower question of disclosure. There, the defendants had "not only failed to disclose the assumptions underlying MUMPO's data, but provided the public with erroneous information." Id. Specifically, the defendants had repeatedly denied using "Build" assumptions in the "No Build" alternative, and the truth was only discovered or revealed during litigation. *Id. at 600, 602—03*. Despite the lack of disclosure, defendants argued that their decision should be accorded deference because of their experience, their consideration of public comments, and their "thorough analysis of the environmental impacts." **[*20]** *Id. at 603*. The Fourth Circuit rejected this argument and stated:

> In sum, although we need not and do not decide whether NEPA permits the Agencies to use MUMPO's data in this case, we do hold that by doing so without disclosing the data's underlying assumptions and by falsely responding to public concerns, the Agencies failed to take the required 'hard look' at environmental consequences.

Id. at 605 (quotation omitted, emphasis added).

The lack of disclosure that was dispositive in North Carolina Wildlife Federation does not exist in this case. Although plaintiffs complain that the description of the assumptions underlying the FEIS's conclusions changed through the editing process, see Pl.'s Mem. Supp. Mot. Summ. J. [D.E. 33-1] 45—46, such edits do not amount to a failure to disclose the key assumptions in creating the No Build baseline. See, e.g., *Webster v. U.S. Dep't of Agric., 685 F.3d 411, 425 (4th Cir. 2012)* (noting that, in considering which information to put in an EIS, agencies "face a delicate balancing act: they must include enough details about a proposed action to allow for the requisite hard look at its environmental effects without providing so much information that the EIS becomes self-defeating"). Deciding which details to include in the EIS is left **[*21]** to the agencies' discretion unless the agencies' exercise of discretion "prevented the

agency from taking a hard look at the action's environmental effects or the public from participating in the decisionmaking process." Id. Here, the quantitative ICE report and the FEIS disclosed the key assumption that projected growth remained the same in the Build and No Build conditions and that the same underlying socioeconomic data were used. See, e.g., AR 39660—61 (quantitative ICE report); AR 42427 (FEIS). During the public-comment process, plaintiffs raised the issue. AR 51803—04. Defendants responded and noted that "NCTA 'ran' the MRM without the project as an input for the 'no-build' traffic forecast." AR 51815—16 (emphasis added). Although plaintiffs may have preferred a more easily-digested description of the analysis, defendants did not fail to adequately disclose their assumptions.

Nonetheless, defendants violated NEPA and the APA by using the same set of socioeconomic data that assumed construction of the Garden Parkway to assess the environmental impacts of the Build and No Build alternatives. In North Carolina Wildlife Federation, the Fourth Circuit strongly suggested that assuming **[*22]** the construction of the proposed project when analyzing the No Build baseline was clear error. *677 F.3d at 603* ("Without accurate baseline data, an agency cannot carefully consider information about significant environment impacts ... resulting in an arbitrary and capricious decision." (quotation and alteration omitted)). In Friends of Back Bay, decided the month after North Carolina Wildlife Federation, the Fourth Circuit called a materially indistinguishable error an "obvious and fundamental blunder" and stated that "[a] material misapprehension of the baseline conditions existing in advance of an agency action can lay the groundwork for an arbitrary and capricious decision." *681 F.3d at 588*. Similarly, in *Friends of Yosemite Valley v. Kempthorne, 520 F.3d 1024 (9th Cir. 2008)*, the Ninth Circuit found a NEPA violation where the agency's supplemental EIS included a baseline alternative that "assumed the existence of the very plan being proposed." *Id. at 1026*. The Ninth Circuit found that assumption "logically untenable" despite "the deference owed to the agency's choice of a 'no-action' alternative." *Id. at 1038*. Simply put, defendants' fundamental assumption that the Garden Parkway would have no effect on overall growth in the Metrolina region, unsupported by any evidence showing complete saturation **[*23]** of the region, and their use of the gravity model to reallocate assumed growth in the No Build condition constitute clear error and violates NEPA and the APA.[7]

In opposition to this conclusion, defendants make two arguments. First, they argue that the Build data did not taint the No Build data. See Fed. Defs.' Mem. Supp. Mot. Summ. J. [D.E. 39-1] 38; State Defs.' Mem. Supp. Mot. Summ. J. [D.E. 38-1] 29 n.16 (claiming that defendants created different Build and No Build projections); Fed. Def.'s Reply [D.E. 47] 8 (asserting that plaintiff's argument "ignores the two separate sets of data that the agencies developed for comparison"). As support, they cite a single sentence from plaintiffs' submitted **[*24]** comments that they rip from its context. Compare Fed. Defs.' Mem. Supp. Mot. Summ. J. 25 ("Indeed, [plaintiffs] admitted that 'it is clear that the correct approach is the one employed in this FEIS, and not the approach currently being challenged in Monroe.'" (quoting AR 51803) (emphasis omitted)), with AR 51803 ("It is clear that the correct approach is the one employed in this FEIS, and not the approach currently being challenged... regarding the Monroe project. If the MRM assumes construction of the Gaston East-West Connector then it is correct to use that model to create a 'Build' scenario."

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[7] In *Laguna Greenbelt, Inc. v. United States Department of Transportation, 42 F.3d 517 (9th Cir. 1994)* (per curiam), the Ninth Circuit affirmed an agency's assumption that the proposed tollroad would not influence growth in the project area. The Ninth Circuit relied, however, upon an administrative record that showed that "98.5% of all land in the project's 'area of benefit' [wa]s already accounted for by either existing or committed land uses not contingent on construction of the corridor." *42 F.3d at 525*. The record her contains no evidence of such saturation. Thus, *Laguna* does not help defendants. See *N.C. Wildlife Fed'n, 677 F.3d at 603 n.2*.

(emphasis added)). Defendants' argument, however, contradicts the administrative record. Indeed, the administrative record establishes that the defendants' growth and impact projections in the No Build scenario explicitly relied on socioeconomic data that assumed construction of the Garden Parkway—the precise "taint" that the Fourth Circuit condemned in North Carolina Wildlife Federation. See, e.g., AR 36144 (email among defendants' employees noting concern "about the agencies buying into the theory that overall growth does not change with or without the project—it just redistributes. This **[*25]** is the same assumption used in the Monroe Connector project, but it was presented somewhat differently."). The court rejects defendants' attempt to distinguish North Carolina Wildlife Federation. See, e.g., Fed. Defs.' Mem. Supp. Mot. Summ. J. 25—26, 32. Defendants' use of the gravity model to redistribute geographically the assumed growth from the Build condition does not meaningfully distinguish this case from North Carolina Wildlife Federation and cannot redeem their analysis.

Second, defendants argue that the court should defer to their decision to use a single set of socioeconomic data for both the Build and No Build conditions. See id. 27—28; State Defs.' Mem. Supp. Mot. Summ. J 18—19, 26; State Defs.' Reply [D.E. 45] 10. In support, defendants cite *American Electric Power Company v. Connecticut, 131 S. Ct. 2527, 180 L. Ed. 2d 435 (2011)*, for the straightforward proposition that "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues." *131 S. Ct. at 2539—40*. The court may defer, for example, to the agencies' choice of specific methodologies for separately forecasting growth in Build and No Build scenarios. See *Hughes River, 165 F.3d at 289* ("Agencies are entitled to select their own methodology as long as that methodology is reasonable." (emphasis added)). When defendants **[*26]** use their discretion, however, to simply assume that the total regional growth will be equivalent in both scenarios rather than use their "scientific, economic, and technological resources" to independently predict future growth under both alternatives, they violate NEPA's statutory and regulatory requirements and the court's deference to their choice ceases.

In sum, defendants made an unsupported assumption that growth in the Metrolina region would remain constant regardless of whether the Garden Parkway was built. In so doing, they failed to take a "hard look" at the environmental impacts of the proposed Garden Parkway and violated NEPA and the APA by preparing an inadequate EIS. Accordingly, the court grants plaintiffs' motion for summary judgment and vacates the Record of Decision for the Garden Parkway project.[8]

B.

Plaintiffs also request injunctive relief. "[A] court should not automatically enjoin agency action whenever it finds a NEPA violation." *Nat'l Audubon Soc'y v. Dep't of the Navy, 422 F.3d 174, 202 (4th Cir. 2005)*. The court looks "to traditional principles **[*27]** of equity to determine what form of injunctive relief, if any, is appropriate to remedy a statutory violation." *Id. at 200*. "[T]he basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Weinberger v. Romero-Barcelo, 456 U.S. 305, 312, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982)*. "Where the harms of a particular injunctive remedy outweigh the benefits, a court may decline to adopt it." *Nat'l Audubon Soc'y, 422 F.3d at 201*; see *Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24—33, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)*.

Agencies may not take any action that would have an adverse environmental impact or limit the choice of reasonable alternatives until they issue a record of decision. See, e.g., *Nat'l Audubon Soc'y, 422*

[8] In light of this holding, the court need not address plaintiffs' other NEPA claims. See *N.C. Wildlife Fed'n, 677 F.3d at 605 n.5*. The court also dismisses as moot plaintiffs' motions to supplement the administrative record [D.E. 40, 52].

F.3d at 201; *40 C.F.R. § 1506.1(a)*. In light of the vacatur of defendants' Record of Decision and the current status of the project, see [D.E. 68] 2—3; [D.E. 69] 3—5, the court determines that no injunctive relief is necessary at this time. The court expects defendants to comply with all applicable regulations, including, should they choose to move forward with the project, the issuance of a supplemental EIS that corrects the above-discussed error by constructing an appropriate No Build scenario, with socioeconomic data that do not assume construction of the Garden Parkway, and also a new Record of Decision, before taking any action that would violate *section 1506.1*. Should defendants take actions inconsistent **[*28]** with this order, the court will reconsider whether to issue an injunction.

IV.

In sum, the court GRANTS plaintiffs' motion for summary judgment [D.E. 33] and DENIES defendants' motions for summary judgment [D.E. 38, 39]. The Record of Decision is VACATED. The court DISMISSES as moot plaintiffs' motions to supplement the administrative record [D.E. 40, 52].

SO ORDERED. This 13 day of March 2015.

/s/ James C. Dever

JAMES C. DEVER III

Chief United States District Judge

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Friends of Yosemite Valley v. Kempthorne

United States Court of Appeals for the Ninth Circuit

November 28, 2007, Argued and Submitted, Pasadena, California; March 27, 2008, Filed

No. 07-15124, No. 07-15791

Reporter
520 F.3d 1024 *; 2008 U.S. App. LEXIS 6292 **; 38 ELR 20072

FRIENDS OF YOSEMITE VALLEY; MARIPOSANS FOR ENVIRONMENTALLY RESPONSIBLE GROWTH ("MERG"), Plaintiffs-Appellees, v. DIRK KEMPTHORNE, in his official capacity as Secretary of the Interior; THE NATIONAL PARK SERVICE; JONATHAN B. JARVIS, in his official capacity as Regional Director of the Pacific West Region, National Park Service, Department of the Interior; MICHAEL J. TOLLEFSON, in his official capacity as Superintendent, Yosemite National Park, National Park Service, Department of the Interior, Defendants-Appellants. FRIENDS OF YOSEMITE VALLEY; MARIPOSANS FOR ENVIRONMENTALLY RESPONSIBLE GROWTH ("MERG"), Plaintiffs-Appellees, v. DIRK KEMPTHORNE, in his official capacity as Secretary of the Interior; THE NATIONAL PARK SERVICE; JONATHAN B. JARVIS, in his official capacity as Regional Director of the Pacific West Region, National Park Service, Department of the Interior; MICHAEL J. TOLLEFSON, in his official capacity as Superintendent, Yosemite National Park, National Park Service, Department of the Interior, Defendants-Appellants.

Prior History: [1]** Appeals from the United States District Court for the Eastern District of California. D.C. No. CV-00-06191-AWI, D.C. No. CV-00-06191-AWI/DLB. Anthony W. Ishii, District Judge, Presiding.

Friends of Yosemite Valley v. Scarlett, 439 F. Supp. 2d 1074, 2006 U.S. Dist. LEXIS 49228 (E.D. Cal., 2006)
Friends of Yosemite Valley v. Kempthorne, 464 F. Supp. 2d 993, 2006 U.S. Dist. LEXIS 80689 (E.D. Cal., 2006)

LexisNexis® Headnotes

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Environmental Law > Natural Resources & Public Lands > Wild & Scenic Rivers

HN1[] **Agency Rulemaking, Rule Application & Interpretation**

Within one year, the administering agency is required to establish detailed boundaries for the river and classify it (generally or by its various segments) as wild, scenic, or recreational, *16 U.S.C.S. §§ 1274(b)*; 1273(b); and (2) within three full fiscal years, the administering agency must prepare a comprehensive management plan (CMP) to provide for the protection of the river values, *16 U.S.C.S. § 1274(d)(1)*. The CMP shall address resource protection, development of lands and facilities, user capacities, and other management

practices necessary or desirable to achieve the Wild and Scenic River Act's purposes.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN2[] Summary Judgment Review, Standards of Review

An appellate court reviews a district court's grant of summary judgment de novo.

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Validity

HN3[] Judicial Review, Standards of Review

An appellate court reviews an agency's actions under federal law pursuant to the Administrative Procedures Act (APA), *5 U.S.C.S. §§ 701-706*. Under the APA, the appellate court may set aside a decision only if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. The determination whether an agency acted in an arbitrary and capricious manner rests on whether it articulated a rational connection between the facts found and the choice made. Courts must carefully review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors, and may not rubber-stamp administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Nevertheless, a court may not substitute our judgment for that of the agency but must simply ensure that the agency has adequately considered and disclosed the environmental impact of its actions, bearing in mind that federal law exists to ensure a process, not particular substantive results.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

HN4[] Environmental & Natural Resources, Environmental Impact Statements

An appellate court applies a rule of reason standard to review the adequacy of an agency's environmental impact statement (EIS), asking whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences. This standard involves a pragmatic judgment whether the EISs form, content and preparation foster both informed decision-making and informed public participation, and is essentially the same as review for abuse of discretion.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN5[] Reviewability of Lower Court Decisions, Preservation for Review

Arguments not raised by a party in its opening brief are deemed waived.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

HN6[] Agency Rulemaking, Rule Application & Interpretation

An agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action, and sufficient to permit a reasoned choice.

Counsel: Ronald J. Tenpas, Assistant Attorney

General, Environment & Natural Resources Division, U.S. Department of Justice, Washington, D.C., David C. Shilton, Charles R. Shockey, and Elizabeth A. Peterson, Attorneys, U.S. Department of Justice, Washington, D.C., Barbara Goodyear, Of Counsel, Field Solicitor, U.S. Department of the Interior, Oakland, California, for the defendants-appellants.

Julia A. Olson, Wild Earth Advocates, Eugene, Oregon, Sharon E. Duggan, Law Offices of Sharon E. Duggan, Oakland, California, for the plaintiffs-appellees.

Judges: Before: Alfred T. Goodwin, A. Wallace Tashima, and Kim McLane Wardlaw, Circuit Judges.

Opinion by: Wardlaw

Opinion

[*1026]

WARDLAW, Circuit Judge:

Twenty years after the Merced River, which lies in the heart of the Yosemite National Park, was designated a Wild and Scenic River, and seventeen years after the National Park Service ("NPS") was statutorily required to prepare a Comprehensive Management Plan ("CMP") for the Merced Wild and Scenic River, the question whether NPS has developed a valid CMP **[**2]** is again before us. In 2003, we found certain deficiencies in an earlier CMP--the 2000 CMP--and remanded to the district court. *See Friends of Yosemite Valley v. Norton, 348 F.3d 789 (9th Cir. 2003)* (*Yosemite I*). We clarified our opinion in *Friends of Yosemite Valley v. Norton, 366 F.3d 731 (9th Cir. 2004)* (*Yosemite II*). On July 19, 2006, the district court ruled on cross-motions for summary judgment. It concluded that NPS continues to violate certain provisions of the Wild and Scenic Rivers Act ("WSRA"), *16 U.S.C. §§ 1271-1287*, and the National Environmental Policy Act ("NEPA"), *42 U.S.C. § 4321-4375*, as well as our instructions in *Yosemite I* and *Yosemite II*. *Friends of Yosemite Valley v. Scarlett, 439 F. Supp. 2d 1074 (E.D. Cal. 2006)*.

Appellants Dirk Kempthorne, in his official capacity as Secretary of the Interior; the National Park Service; Jonathan Jarvis, in his official capacity as NPS Regional Director of the Pacific West Region; and Michael Tollefson, in his official capacity as Superintendent of Yosemite National Park (collectively, "NPS") argue that the district court erred in finding that (1) the Merced Wild and Scenic River--Revised Comprehensive Management Plan and Supplemental **[**3]** Environmental Impact Statement ("2005 Revised Plan") fails sufficiently to "address . . . user capacities" as required by *§ 1274(d) of the WSRA*; (2) the 2005 Revised Plan is deficient because it is not a wholly self-contained plan; and (3) the supplemental environmental impact statement ("SEIS") prepared for the 2005 Revised Plan violates NEPA.

We have jurisdiction under *28 U.S.C. § 1291* and affirm the district court. We hold that the 2005 Revised Plan does not describe an actual level of visitor use that will not adversely impact the Merced's Outstanding Remarkable Values ("ORVs") as required by *Yosemite I* and the WSRA, because the Visitor Experience and Resource Protection ("VERP") framework is reactionary and requires a response only after degradation has already occurred. Moreover, the interim limits are based on current capacity limits and NPS has not shown that such limits protect and enhance the Merced's ORVs. And, as we made clear in *Yosemite II*, we again conclude that the WSRA requires that the CMP be in the form of a single, comprehensive document, which addresses all the required elements, including both the "kinds" and "amounts" of use, and thus the 2005 Revised Plan is **[**4]** deficient because it addressed only the two components struck down in *Yosemite I* and was not a single, self-contained plan. Finally, we conclude that the SEIS violates NEPA because the "no-action" alternative assumed the existence of the very plan being proposed; the

three action alternatives--which are each **[*1027]** primarily based on the VERP framework--are unreasonably narrow; and for the first five years, the interim limits proposed by the three alternatives are essentially identical.

I.

A. The Wild and Scenic Rivers Act

The Wild and Scenic Rivers Act ("WSRA"), 16 U.S.C. §§ 1271-1287, was enacted in 1968 out of concern for the preservation of United States rivers, many of which had been subjected to overdevelopment and damming. *See* Kenny Seale, Note, *The Effect of the Wild and Scenic Rivers Act on Proposed Bridge Construction*, 7 Wis. Envtl. L.J. 225, 227-29 (2000). In its opening section, the WSRA explains that it is intended to codify Congress's policy determination

> that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved **[**5]** in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.

16 U.S.C. § 1271. As originally enacted, the WSRA named specific rivers or segments of rivers for inclusion in the Wild and Scenic River System ("WSRS"). *See id.* § 1274(a)(1)-(a)(8). The WSRA also sets forth a procedure for future designations to the WSRS. *See id.* § 1273(a). WSRS components are administered by the Secretary of the Interior (including any component administered by the Secretary of the Interior through NPS or the Fish and Wildlife Service) or, if the river falls within a national forest, the Secretary of Agriculture. *See id.* § 1281(c)-(d).

The WSRA framework designates rivers based on specific "outstandingly remarkable values" ("ORVs") which both justify the initial designation of a river as a WSRS component, *see id.* § 1271, and provide the benchmark for evaluating a proposed project affecting a designated river. While, under the WSRA, protecting and enhancing the designated ORVs is paramount, this goal may be compatible with other uses:

> [e]ach component of the [WSRS] shall be administered in such manner as to protect **[**6]** and enhance [those ORVs that] caused it to be included in [the WSRS] without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values[, with] primary emphasis . . . given to protecting its esthetic, scenic, historic, archeologic, and scientific features.

Id. § 1281(a). The WSRA further recognizes that "[m]anagement plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area." *Id.* To the extent that the WSRA conflicts with the Wilderness Act, *id.* § 1131-1136, or statutes administering the national park system and national wildlife system, the WSRA instructs that "the more restrictive provisions shall apply." *Id.* § 1281(b)-(c). The WSRA requires the administering agency to "take such action respecting management policies, regulations, contracts, [and] plans . . . as may be necessary to protect such rivers in accordance with" the WSRA, and "cooperate with the . . . Environmental Protection Agency and with the appropriate State water pollution control agencies for the purpose of eliminating or diminishing the pollution **[**7]** of waters of the river." *Id.* § 1283(a), (c).

Once a river is designated as part of the WSRS, the following statutory timetable applies: ***HN1***[↑] (1) within one year, the administering agency is required to "establish detailed **[*1028]** boundaries" for the river and classify it (generally or by its various segments) as "wild," "scenic," or

"recreational," *see id.* §§ 1274(b); 1273(b); and (2) within three full fiscal years, the administering agency must prepare a comprehensive management plan ("CMP") "to provide for the protection of the river values," *id.* § 1274(d)(1). "The [CMP] shall *address* resource protection, development of lands and facilities, *user capacities*, and other management practices necessary or desirable to achieve the [WSRA's] purposes," *id.* (emphasis added).

B. The Secretaries' Joint Guidelines

Because of inconsistencies caused by the WSRA's provision for administration by agencies under both the Department of Agriculture and the Department of the Interior, the President asked both Secretaries to jointly issue guidelines interpreting the WSRA. *See* National Wild and Scenic Rivers System; Final Revised Guidelines for Eligibility, Classification and Management of River Areas, 47 Fed. Reg. 39,454 (Sept. 7, 1982) **[**8]** (the "Secretarial Guidelines"). The Secretarial Guidelines interpret the management principles of § 1281(a) "as stating a nondegradation and enhancement policy for all designated river areas, regardless of classification." *Id.* at 39,458. The Secretarial Guidelines further explain that the WSRA requires the administering agency to manage each component so as to protect and enhance its ORVs, "while providing for public recreation and resource uses which do not adversely impact or degrade those values." *Id.* at 39,458-59. The Secretarial Guidelines also envision the use of varying strategies and implementations, depending on the segment's classification and ownership. *Id.* at 39,459.

Notably, the Secretarial Guidelines discuss "carrying capacity," a term that does not appear in the WSRA itself [1] and is defined as "[t]he quantity of recreation use which an area can sustain without adverse impact on the [ORVs] and freeflowing character of the river area, the quality of recreation experience, and public health and safety." *Id.* at 39,455. The Secretarial Guidelines contemplate that

> [s]tudies will be made during preparation of the management plan and periodically thereafter to determine the *quantity* ***[**9]*** *and mixture* of recreation and other public use which can be permitted without adverse impact on the resource values of the river area. Management of the river area can then be planned accordingly.

Id. at 39,459 (emphasis added). The Secretarial Guidelines also require that a component's management plan state

> the *kinds and amounts* of public use which the river area can sustain without impact to the values for which it was designated[,] and specific management measures which will be used to implement the management objectives for each of the various river segments and protect esthetic, scenic, historic, archeologic and scientific features.

Id. at 39,458 (emphasis added).

C. WSRA Designation of the Merced

In 1987, Congress designated segments of the Merced River as WSRS components, including sections flowing through the very popular Yosemite National Park, and its administrative site, El Portal. *See* Pub. L. No. 100-149, 101 Stat. 879 (Nov. 2, 1987) **[**10]** (codified at 16 U.S.C. § 1274(a)(62)(A)). In designating the **[*1029]** Merced as wild and scenic, Congress instructed that the establishment of WSRA boundaries for and classification of those parts of the Merced falling within Yosemite or El Portal would be accomplished through amendment of the 1980 general management plan ("GMP") for Yosemite National Park, and that such amendment "shall

[1] Congress added the current § 1274(d) to the WSRA in 1986. *See* Pub. L. No. 99-590, § 501(b)(3), 110 Stat. 3330, 3335 (1986). Thus the Secretarial Guidelines's use of "carrying capacity" predated the enactment of the "address . . . user capacities" language in § 1274(d).

assure that no development or use of park lands shall be undertaken that is inconsistent with the designation of such river segments." *16 U.S.C. § 1274(a)(62)(A)*.

Despite Congress's directive, NPS failed to issue the required CMP for the Merced in a timely manner, and was ordered to do so in earlier litigation. *See Sierra Club v. Babbitt, 69 F. Supp. 2d 1202, 1263 (E.D. Cal. 1999)* (ordering NPS to "prepare and adopt a valid [CMP] pursuant to *16 U.S.C. § 1274(d)* in regard to the Merced River as designated under the [WSRA] no later than twelve months after the entry of this decision"). The twelve-month timetable was based on NPS's representation that it could complete a CMP in that amount of time. After obtaining a one-month extension, NPS finally issued a CMP in mid-2000 (the "2000 CMP"), well past the statutory **[**11]** deadline.

D. *Yosemite I* and *II*

We have twice previously addressed the issues presented by this action. In 2003, we affirmed in part the Eastern District of California's findings of specific deficiencies in the 2000 CMP, and remanded for a correction of those deficiencies. *Yosemite I, 348 F.3d 789*. We clarified our opinion in 2004, and remanded for reconsideration of the motion for injunctive relief filed by Friends of Yosemite Valley and Mariposans for Environmentally Responsible Growth (collectively, "Friends") in light of the clarification. *Yosemite II, 366 F.3d 731*.

Looking to the WSRA requirement that the administering agency "prepare a [CMP] . . . . [that] shall address . . . user capacities" within three full fiscal years of a WSRS segment's designation, *16 U.S.C. § 1274(d)(1)*, we concluded, in *Yosemite I*, that NPS's method of addressing user capacities was problematic. *348 F.3d at 797*. The 2000 CMP's primary method of addressing user capacities was through a framework called Visitor Experience and Resource Protection ("VERP"). *Id. at 796*. "[T]he VERP framework focuses on the prescription and maintenance of selected 'desired conditions.' " *Id.* To maintain these "desired conditions," **[**12]** the VERP framework provides for "selecting and monitoring indicators and standards that reflect these desired conditions, and taking management action when the desired conditions are not being realized." *Id.* (internal citations omitted).

Analyzing the plain meaning of the terms within the phrase "address . . . user capacities" as well the Secretarial Guidelines, we interpreted the requirement to "address . . . user capacities" to mean that the CMP must include "*specific measurable limits on use* ." *Id. at 797* (emphasis added). "[T]he plain meaning of the phrase 'address . . . user capacities,' is simply that the CMP must *deal with or discuss the maximum number of people that can be received at a WSRS* ." *Id. at 796* (emphasis added). However, the plain meaning does not mandate "one particular approach to visitor capacity." *Id.*

Furthermore, the Secretarial Guidelines "interpret[ed] the WSRA to require the preparation of river '[m]anagement plans [that] state . . . the kinds and amounts of public use which the river area can sustain without impact to the [ORVs],' and to mandate ongoing studies to 'determine the quantity and mixture of recreation and other public use which can be permitted **[**13]** **[*1030]** without adverse impact on the resource values of the river area.' " *Id. at 797* (quoting *47 Fed. Reg. 39,454, 39,458-59)*. The Secretarial Guidelines, however, do not require one particular method of limiting user capacity. *Id.* They do not mandate, for example, a numerical cap on visitors. *Id.* ("[T]he Secretarial Guidelines do not specify that this obligation can be satisfied only by capping the number of visitors.").

We concluded that the VERP framework, as set out in the 2000 CMP, failed sufficiently to address user capacities because it did not adopt "quantitative measures sufficient to ensure its effectiveness as a current measure of user capacities." *Id.* Rather than establish specific indicators or standards to implement the VERP, the 2000 CMP provided

"examples" of indicators and standards. *Id. at 796*. By only providing illustrative standards, "the [2000] CMP fail[ed] to yield any actual measure of user capacities, whether by setting limits on the specific number of visitors, by monitoring and maintaining environmental and experiential criteria under the VERP framework, or through some other method." *Id.* This "fail [ure] to provide any concrete measure of use," we found, was inconsistent **[**14]** with our interpretation of the phrase "address . . . user capacities." *Id. at 797*.

We instructed that "[o]n remand, the NPS shall adopt specific limits on user capacity consistent with both the WSRA and the instruction of the Secretarial Guidelines that such limits describe *an actual level of visitor use that will not adversely impact the Merced's ORVs* ." *Id.* (emphasis added). Given that "NPS was supposed to have completed a CMP for the Merced River some twelve years ago," we indicated that we would expect temporary measures to be implemented as soon as practicable in order "to avoid environmental degradation pending the completion of [the] task." *Id. at 803-04*. In particular, we recognized that "[i]f the NPS is correct in projecting that it will need five years fully to implement the VERP, it may be able to comply with the user capacity mandate in the interim by implementing preliminary or temporary limits of some kind." *Id. at 797*.

As elucidated in *Yosemite II*, in *Yosemite I*, "we held that the entire Merced Wild and Scenic River [CMP] is invalid due to two deficiencies: (1) a failure to adequately address user capacities; and (2) the improper drawing of the Merced River's boundaries **[**15]** at El Portal." *Yosemite II, 366 F.3d at 731*. Because the district court had, on remand, misconstrued our holding in *Yosemite I*, we explained that "[w]hile we remanded to the district court to enter an appropriate order requiring the [NPS] to remedy these deficiencies in the CMP in a timely manner, *we did not otherwise uphold the [2000 CMP]* ." *Id.* (internal citations and quotation marks omitted; emphasis added). We concluded that, "[p]ursuant to our original Opinion [in *Yosemite I*], the [NPS] must prepare a new or revised CMP that adequately addresses user capacities and properly draws the river boundaries at El Portal." *Id.* In *Yosemite II*, we also "grant[ed] a temporary stay of proceedings and an injunction prohibiting NPS from implementing any and all projects developed in reliance upon the invalid CMP" pending the district court's consideration of the matter. *Id.*

E. District Court Decisions on Remand

On remand, on July 6, 2004, the district court ordered NPS to develop a "new or revised CMP" and to "comply with NEPA by issuing a supplemental EIS." The district court also enjoined certain projects pending completion of the new or revised CMP. After a series of public scoping meetings, **[**16]** a draft of a revised CMP and **[*1031]** SEIS was released for public review in January 2005. After approximately three months of public review, in June 2005, NPS issued its 2005 Revised Plan, a two-volume publication entitled, "Merced Wild and Scenic River--Revised Comprehensive Management Plan and Supplemental Environmental Impact Statement" ("2005 Revised Plan"). The Record of Decision ("ROD") for the revised CMP was signed on July 25, 2005, adopting Alternative 2 from the SEIS. The 2005 Revised Plan states, as follows:

> [t]his revised plan will *amend the existing* Merced River Plan to address the two deficiencies identified by the Court . . . . This Revised Merced River Plan *does not replace* the Merced River Plan adopted in 2000, but corrects the deficiencies in its management elements.

On November 11, 2005, Friends filed their complaint with the Eastern District of California, alleging five causes of actions against NPS. Friends challenged the 2005 Revised Plan under WSRA, NEPA, the Administrative Procedure Act ("APA"), and our prior orders. The district court, on July 19, 2006, granted in part and denied in part the parties'

crossmotions for summary judgment. *Friends of Yosemite Valley v. Scarlett, 439 F. Supp. 2d 1074, 1108-09 (E.D. Cal. 2006)*.

The **[**17]** district court held that NPS failed to comply with our order that "[o]n remand, the NPS shall adopt specific limits on user capacity . . . [that] describe an actual level of visitor use that will not adversely impact the Merced's ORVs." *Id . at 1098* (internal quotation marks omitted). According to the district court, "some sixteen years after [NPS] was required to create a [CMP] for the Merced River, [it] decide[d] that for approximately five years, it would like to experiment with implementing the VERP program as its primary means of addressing user capacity." *Id.* NPS also failed to commit to the use of the VERP program for the long run, stating that "whether VERP will become permanent after five years is not known at this time." *Id.* (internal quotation marks omitted). Rather, "[w]hat NPS has created in the VERP portion of the user capacity program in the 2005 Revised Plan is a tentative plan of uncertain duration which adopts temporary limits, which will apply for an unknown length of time." *Id. at 1100*. As stated by the district court, the agency "has left itself the option of deciding in five years to abandon its currently proposed method and proceed in an entirely different, as **[**18]** yet unidentified, manner. Under this scenario, there is no indication when, if ever, NPS will finally adopt a permanent primary method for addressing user capacity . . . ." *Id. at 1099*. Furthermore, despite providing for interim limits while NPS conducts field testing of the VERP indicators and standards, NPS's interim limits, which are set to apply for a period of 5 years, "are simply the current physical capacity of the facilities in Yosemite Valley." *Id.* The court also criticized VERP for being "reactive" in that it calls for management action only after environmental degradation has already occurred. *Id. at 1100*.

The district court further found that the 2005 Revised Plan was deficient because "NPS has violated [the] WSRA by failing to adopt a single, self-contained [CMP] for the Merced River." *Id. at 1094*. It found that "language from the Ninth Circuit indicates an intention that a single document be produced, covering everything." *Id.* The court stated that although NPS is free to "us[e] parts[,] even very large parts," of the 2000 CMP in developing "a whole new or revised plan," it has "proceeded from the [incorrect] assumption that the 2000 [CMP] still exists." *Id. at 1093*.

The **[**19]** district court also held that the SEIS prepared in conjunction with the 2005 Revised Plan did not comply with the **[*1032]** NEPA, *42 U.S.C. §§ 4321-4375*, because it provided no true "no-action" alternative and because it lacked the required reasonable range of alternatives. *Friends of Yosemite Valley, 439 F. Supp. 2d at 1105-07*; *see 40 C.F.R. § 1502.14(d)* (requiring "the alternative of no action"); *id. § 1502.14(a)* (requiring that the EIS "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated"). According to the district court, the SEIS improperly relied on elements of the 2000 CMP to describe the environmental baseline. *Friends of Yosemite Valley, 439 F. Supp. 2d at 1105*. The range of action alternatives was insufficient because each alternative is based on VERP, which the court had found inadequate to constitute the primary feature of a user capacity program as required by WSRA. *Id. at 1106-07*.

Next, on November 3, 2006, the district court issued an opinion and order enjoining significant aspects of nine projects in the Merced River corridor until **[**20]** NPS develops a valid CMP. *Friends of Yosemite Valley v. Kempthorne, 464 F. Supp. 2d 993 (E.D. Cal. 2006)*. NPS appealed the district court's November 3 decision on December 28, 2006. A stay pending the appeal of its injunction was granted on March 22, 2007 with respect to two of these projects. *Friends of Yosemite Valley v. Kempthorne, No. CV F 00-6191 AWI DLB, 2007 U.S. Dist. LEXIS 20378, 2007 WL 896154 (E.D. Cal. 2007)*. On March 28, 2007, the

district court issued an order approving the parties' stipulation regarding a completion date for a new CMP and EIS--on or before September 30, 2009. The district court also entered final judgment, which NPS appealed on April 24, 2007. NPS's appeals from the district court's decisions are consolidated in the present case.

II.

HN2[] We review a district court's grant of summary judgment de novo. *Alaska Ctr. for the Env't v. U.S. Forest Serv., 189 F.3d 851, 857 (9th Cir. 1999)* (citing *Sierra Club v. Babbitt, 65 F.3d 1502, 1507 (9th Cir. 1995))*.

HN3[] We review NPS's actions under the WSRA and NEPA pursuant to the APA, *5 U.S.C. §§ 701-706*. Under the APA, we may set aside a decision "'only if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" **[**21]** *Yosemite I, 348 F.3d at 793* (quoting *Hells Canyon Alliance v. U.S. Forest Serv., 227 F.3d 1170, 1176-77 (9th Cir. 2000))*. As discussed in *Yosemite I*,

> [t]he determination whether the NPS acted in an arbitrary and capricious manner rests on whether it "articulated a rational connection between the facts found and the choice made." *Pub. Citizen v. DOT, 316 F.3d 1002, 1020 (9th Cir. 2003)*. "[C]ourts must carefully review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors, and may not rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute . . . ." *Id.* Nevertheless, we "may not substitute [our] judgment for that of the agency [but] must simply ensure that the agency has adequately considered and disclosed the environmental impact of its actions, bearing in mind that NEPA exists to ensure a process, not particular substantive results." *Hells Canyon, 227 F.3d at 1177*.

Yosemite I, 348 F.3d at 793. Also,

> HN4[] [w]e apply a "rule of reason" standard to review the adequacy of an agency's EIS, asking whether an EIS contains a reasonably thorough discussion **[**22]** of the significant aspects of the probable environmental **[*1033]** consequences. This standard involves a pragmatic judgment whether the EISs form, content and preparation foster both informed decision-making and informed public participation, and is essentially the same as review for abuse of discretion.

Id. at 800 n.2 (internal citations and quotation marks omitted).

III.

Preliminarily, although NPS appealed the interlocutory injunction, it did not address the issue of the injunction in either its opening or reply brief. HN5[] Arguments not raised by a party in its opening brief are deemed waived. *E.g.* ,*Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999)*; *Miller v. Fairchild Indus., Inc., 797 F.2d 727, 738 (9th Cir. 1986)* (concluding that we "will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief"). Thus, we do not consider the merits of the interlocutory injunction, but only the district court's rulings on the cross-motions for summary judgment.

A. Addressing User Capacities [2]

[2] While we have not required that NPS set a numerical cap on visitors but rather that it "deal with or discuss the maximum number of people that can be received **[**23]** at" the Merced, ***Yosemite I, 348 F.3d at 796***, as counsel for Friends alluded to at oral argument, numerical limits on visitor use is commonly used by agencies in order to protect our natural environment. *See, e.g.*, *U.S. Air Tour Ass'n v. FAA, 353 U.S. App. D.C. 213, 298 F.3d 997, 1011-12 (D.C. Cir. 2002)* (allowing numerical cap on the number of commercial air tours over the Grand Canyon and noting that "[l]imiting the number of visitors at a given time in a national park is a standard measure used to protect park resources"); *Friends of the Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115, 1128-29 (8th Cir. 1999)*

The 2005 Revised Plan, pursuant to the ROD, adopts VERP as its primary method of addressing user capacity. NPS argues that the district court erred in finding that the 2005 Revised Plan did not remedy the deficiency we found in the user capacity component of the 2000 CMP. According to NPS, sufficiently specific measurable limits on use can be found in (1) the Wilderness Trailhead Quota System; the Superintendent's Compendium limits; (2) the new VERP indicators and **[**24]** standards; and (3) the interim limits imposed by the User Capacity Management Program.

1. Wilderness Trailhead Quota System and Superintendent's Compendium

The district court properly concluded that neither the Wilderness Trailhead Quota System nor the Superintendent's Compendium [3] are "persuasive as to whether the 2005 Revised Plan adequately addresses user capacities." *Friends of Yosemite, 439 F. Supp. 2d at 1096*. Although they are steps in the right direction, both these methods for addressing user capacity "predate the 2000 [CMP] and were relied upon by [NPS] in support of that plan" to no avail. *Id.*

2. VERP

The district court correctly found that VERP does not properly address user capacities because, by not requiring a response to environmental degradation until **[*1034]** after it already occurs, it is reactive and thereby violates *16 U.S.C. § 1281(a)* and the Secretarial Guidelines, *47 Fed. Reg. at 39,458-59*, interpreting the management principles of *§ 1281(a)*.

NPS argues that the district court based its holding on a legally incorrect view that the WSRA does not allow reliance on a program that monitors particular indicators, such as VERP, because such a program is, by definition, "reactive." According to NPS, that ruling is contrary to our holding in *Yosemite I*, where we held that NPS could address user capacities with a VERP framework that monitors and maintains environmental and experiential criteria. *See Yosemite I, 348 F.3d at 796-97*. NPS further contends that the district court's ruling incorrectly requires NPS to set specific limits on the number of visitors, even though we stated in *Yosemite I* that a numerical cap is not required. NPS misreads the district court's analysis, and its argument is therefore flawed. The reason the district court found that the revised VERP was reactionary **[**26]** was not because a framework that monitors and maintains is inherently reactive and thus can never be proactive. Rather, the revised VERP at issue was found to be reactionary, and thus responsive after-the-fact to already occurring degradation, because it does not "'describe an actual level of visitor use that will not adversely impact the Merced's ORVs.'" *See Friends of Yosemite, 439 F. Supp. 2d at 1098-1100* (quoting *Yosemite I, 348 F.3d at 797*).

NPS next argues the district court incorrectly stated that the VERP as set out in the 2005 Revised Plan "is not oriented towards preventing degradation." It contends that the indicators and standards established in VERP trigger action *prior to* degradation of ORVs. In support, NPS asserts that (1) the indicators and standards are set conservatively so that, although management may not act before the indicators and standards are exceeded, action will be taken before there is degradation; (2) the text of the 2005 Revised Plan provides that "[i]ndicators, which are measurable

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(upholding the U.S. Forest Service's EIS where nine out of ten alternatives placed limits on visitor use at or below current levels).

[3] The Wilderness Trailhead Quota System imposes limits on the number of overnight users allowed within the wilderness segments of the river, which comprise 51 of the 81 miles of the Merced under NPS management. It has been in place since the 1970s. The Superintendent's Compendium limits the time and location of specific activities, or imposes limits on the number of people allowed to engage in specific activities. For example it includes limits on overnight group size, day use group size, stock animals per group, stock animal travel areas and areas of non-motorized water craft use and fishing. **[**25]**

variables, are determined first; standards quantifiably define the acceptable conditions (*i.e.*, measured values) for each indicator. . . . [which] are *set at a level that* ***[**27]*** *will protect and enhance* the Merced River's [ORVs]" (emphasis added); (3) NPS does not choose a particular indicator unless that indicator is "[a]ble to provide an early warning for resource degradation"; (4) management action may occur before a standard is exceeded because "[t]he process of monitoring and its relationship to management actions can be likened to a traffic signal . . . . A *yellow-light* condition occurs when monitoring shows that conditions are approaching the standard. This early warning sign may call for implementing proactive management actions to protect and enhance the [ORVs]"; and (5) the district court's conclusion is at odds with this panel's decision in *Yosemite I*.

That an indicator *may be able* to provide an early warning, does not mean that it does in practice. A standard must be chosen that does in fact trigger management action before degradation occurs. Also, that an early warning sign *may* call for the implementation of proactive management does not provide much assurance that such implementation will occur. Despite NPS's statements to the contrary, in *Yosemite I*, we did not foreclose a later finding by the district court that the VERP system remains problematic **[**28]** even if VERP does not rely on examples instead of actual indicators and standards. Currently, VERP *requires* management action only when degradation has already occurred, and it is therefore legally deficient. [4]

[4] Although this does not alter our conclusion, NPS is correct that the district court erred to the extent that it interpreted the WSRA to require that a method adopted for addressing user capacity be permanent. An appropriate method must be in place. But, just as NPS has discretion in choosing a particular method of addressing user capacities, NPS has the discretion to make improvements to its method, or switch to a new method, based on new scientific evidence. *See* ***Yosemite I, 348 F.3d at 796-97***. Furthermore, the very nature of VERP, which we concluded in ***Yosemite I*** could be an acceptable method of addressing user capacities if implemented properly, is fluid in that it is an iterative process that improves and adjusts with time. *See also* Westlands Water Dist. v. U.S. Dep't of Interior, 376 F.3d 853, 869-70 (9th Cir. 2004); Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944, 965 (9th Cir. 2003). NPS admits, nevertheless, that it has chosen VERP as its primary method of dealing **[**29]** with user capacity issues for the foreseeable future and takes issue with the district court's proper characterization of VERP as "tentative."

[*1035] 3. Interim Limits

The district court properly concluded that the interim limits "do not describe an actual level of visitor use that will not adversely impact the Merced's ORVs." Friends of Yosemite, 439 F. Supp. 2d at 1099-1100. The 2005 Revised Plan adopted interim limits for a five-year period to restrict the kinds and amounts of visitor use in the Merced River corridor while the VERP program is being tested. These interim limits include caps on overnight lodging, campsites, day-visitor parking, bus parking spaces and employee housing units. Buses are limited to 92 per day in the Yosemite Valley segment, which according to NPS, is consistent with the number of buses that entered the Yosemite Valley at peak periods such as in the mid-1990s. Day-visitor parking spaces, bus parking spaces, and overnight lodging facilities are set at existing levels. The number of campsites in Yosemite Valley would be allowed to increase slightly during the interim period by 163 sites for an interim limit of 638 sites, a level which, as NPS states, falls below **[**30]** both the number of campsites in the Yosemite Valley prior to the 1997 flood and when the Merced River was designated Wild and Scenic in 1987. Some of the limits, while at existing capacity limits, are below facility levels that existed in 1980, before the Merced River was designated under the WSRA.

According to NPS, its choice of interim limits is not arbitrary or capricious. NPS argues that "[i]f the status of the Merced River's ORVs was sufficient for eligibility in 1987 when Yosemite Valley had more parking spaces, rooms and campsites than at present, it would be improper to simply assume that the lower facility levels permitted under the 2005 [Revised Plan] will 'degrade' the ORVs." Furthermore, NPS argues that its decision is

consistent with § 1281(a) of the WSRA because it does not "limit[ ] other uses that do not substantially interfere with public use and enjoyment of" the Merced's ORVs. 16 U.S.C. § 1281(a).

There is no authority for a presumption that holding facility levels to those in existence in 1987, when the Merced was designated under the WSRA, is protective of ORVs or satisfies the user capacity component of the required CMP. *See* Friends of Yosemite, 439 F. Supp. 2d at 1099-1100. **[**31]** NPS has a responsibility under the "protect and enhance" requirement of the WSRA to address both past and ongoing degradation. Setting interim limits to current capacity limits does not address the problem of past degradation. [5] Moreover, **[*1036]** nowhere has NPS shown how its interim limits place "primary emphasis" on the protection of the Merced River's "esthetic, scenic, historic, archeologic, and scientific features" as required by § 1281(a). And although the WSRA does not preclude basing user capacity limits on current capacity limits, NPS's decision to base many of its interim limits on current capacity limits was not "founded on a reasoned evaluation of the relevant factors." *See Yosemite I, 348 F.3d at 793* (internal quotation marks omitted). Nor has NPS "articulated a rational connection between the facts found and the choice made." *See id* . [6]

B. Requirement of a Single, Self-contained Plan

The district court did not err by faulting NPS for assuming that the 2000 CMP still existed and finding that the 2005 Revised Plan was deficient because, focusing only on the elements that were explicitly struck down in *Yosemite I*, it was not a single, self-contained plan. *See* Friends of Yosemite, 439 F. Supp. 2d at 1093-94. The WSRA requires a single, comprehensive plan that collectively addresses all the elements of the plan--both the "kinds" and "amounts" of permitted use--in an integrated manner. As Friends argue, NPS has simply tacked onto the 2000 CMP ten indicators and standards for the purposes of limiting the "amounts" of use, but has failed simultaneously to address the appropriate "kinds" of use. Moreover, before the district court, NPS, in a futile effort to correct this problem, attempted to rely on a December 2005 "Presentation Plan" which, according to NPS, combines all **[**34]** elements from the 2000 CMP and the 2005 Revised Plan that comprise the management plan for the Merced as administered by NPS. The district court properly rejected any such reliance because it was created after the approval of the 2005 Revised Plan, was not presented for public review as the revised plan and contradicted the 2005 Revised Plan which states that it is "the" final revised CMP. *See* id. at 1094 n.2.

In Yosemite II, we clarified that in *Yosemite I*, "we held . . . the entire Merced Wild and Scenic River [CMP] . . . invalid" and that "we did not otherwise

[5] To illustrate the level of degradation already experienced in the Merced and maintained under the regime of interim limits proposed by NPS, we need look no further than the dozens of facilities and services operating within the river corridor, including but not limited to, the many swimming pools, tennis courts, mountain sports shops, restaurants, **[**32]** cafeterias, bars, snack stands and other food and beverage services, gift shops, general merchandise stores, an ice-skating rink, an amphitheater, a specialty gift shop, a camp store, an art activity center, rental facilities for bicycles and rafts, skis and other equipment, a golf course and a dining hall accommodating 70 people. Although recreation is an ORV that must be protected and enhanced, *see* 16 U.S.C. § 1271, to be included as an ORV, according to NPS itself, a value must be (1) river-related or river dependant, and (2) rare, unique, or exemplary in a regional or national context. The multitude of facilities and services provided at the Merced certainly do not meet the mandatory criteria for inclusion as an ORV. NPS does not explain how maintaining such a status quo in the interim would protect or enhance the river's unique values as required under the WRSA.

[6] Our decision in High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630 (9th Cir. 2004), highlighted some of the problems with simply maintaining use at current levels. In examining compliance with the Wilderness Act, we stated that "[a]t best, when the Forest Service simply continued preexisting permit levels, it failed to **[**33]** balance the impact that that level of commercial activity was having on the wilderness character of the land. At worst, the Forest Service elevated recreational activity over the long-term preservation of the wilderness character of the land." Id. at 647.

uphold the [2000 CMP]." *Yosemite II, 366 F.3d at 731* (internal quotation marks omitted). We thus concluded that, "[NPS] must prepare a new or revised CMP." *Id.* Contrary to NPS's assertion, in *Yosemite II*, we indicated that a single document covering all required elements must be produced. This does not mean that NPS is required to start from scratch with respect to each element of the 2000 CMP that was not explicitly found deficient or that it cannot incorporate parts of the 2000 CMP in preparing its new or revised plan. But, it is **[*1037]** required to prepare a single plan, not issue supplemental volumes that simply crossreference **[**35]** thousands of pages of material from the 2000 CMP.

The Secretarial Guidelines mandate such an interpretation of the WSRA, stating that the WSRA requires that a river's comprehensive management plan state both "the *kinds and amounts* of public use which the river area can sustain without impact to the values for which it was designated." *47 Fed. Reg. at 39,458*. NPS cannot, thus, address the "amounts" of use without also addressing the "kinds" of use. The two are inseparable. Further support comes from the plain meaning of "comprehensive," which, according to the Oxford English Dictionary, is "having the attribute of comprising or including much; of large content or scope."

NPS cites to *Federal Power Commission v. Idaho Power Co., 344 U.S. 17, 20, 73 S. Ct. 85, 97 L. Ed. 15 (1952)*, for the proposition that the district court's holding conflicts with principles of judicial review. In *Idaho Power*, the Supreme Court stated "that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *Id.* There, the D.C. Circuit had entered a judgment and remanded the case to the agency for entry of an order in accordance with its opinion. **[**36]** *Id. at 19*. However, in response to a motion to clarify the judgment, the appellate court entered a new judgment and itself undertook to modify the agency's order. *Id. at 20* ("[T]he Court of Appeals entered a new judgment, stating that the order of the [agency] 'be, and it is hereby, modified by striking therefrom paragraph (F) thereof, and that the order of the [agency] herein as thus modified be, and it is hereby, affirmed.' "). When we required NPS to prepare a revised or new CMP, we did not commit the same error as the D.C. Circuit--we did not assume the responsibility of revising the 2000 CMP itself, but rather remanded to the agency. The same holds true for the district court with respect to its decision on the crossmotions for summary judgment. Thus, NPS's argument is without merit.

C. The SEIS

The supplemental environmental impact statement ("SEIS") published as part of the 2005 Revised Plan examined four alternatives. Alternative 1 is the "no-action" alternative. It would have managed the river corridor under the 2000 CMP, but without the 2000 version of VERP. The three action alternatives each includes the revised version of VERP. Alternative 2, which the ROD adopted, includes **[**37]** the interim limits of the User Capacity Management Program which are based on the most part on current facility limits. Alternative 3 would have included all components of Alternative 2, but would have added a maximum daily visitor limit for each river segment, a maximum annual visitation limit of 5.32 million for the entire river corridor and a daily limit on the number of day hikers to Half Dome. The 5.32 million limit is higher than the highest level of visitation ever in Yosemite, which was 4.19 million in 1996. Alternative 4 would have again included all components of Alternative 2, but would have also established maximum use levels within each management zone, based on capacity factors for the average number of people per unit area, and would have imposed a maximum annual visitation limit of 3.27 million, which equals the parkwide visitation level in 1987.

1. "No-action" Alternative

The district court correctly ruled that the SEIS did not set forth a true "no-action" alternative because the SEIS assumes, **[*1038]** as the baseline, the existence of the 2000 CMP, which we previously found invalid. Such an assumption is logically untenable. The baseline alternative should not have "assume[d] **[**38]** the existence of the very plan being proposed." *Friends of Yosemite Valley, 439 F. Supp. 2d at 1105*. This is so even given the deference owed to the agency's choice of a "no-action" alternative and the ongoing nature of agency management.

The "no-action" alternative should have included the elements from the 1980 GMP, the Wilderness Plan and other instruments such as the Superintendent's Compendium. However, including the 2000 CMP--even those elements of the CMP that we did not explicitly strike down--in the baseline predetermines user capacity based on a plan that was held invalid. As the district court stated,

> because the Ninth Circuit held the 2000 [CMP] to be illegal, NPS cannot properly include elements from that plan in the no action alternative as the status quo. . . . [A]t the time NPS was creating the no action alternative for the 2005 Revised Plan, the Ninth Circuit had explicitly held the entire 2000 [CMP] to be invalid, and *no comprehensive management plan for the Merced River existed*. The elements from the 2000 [CMP] which NPS includes as the status quo had to be implemented, if at all, in the 2005 Revised Plan. It was thus improper for NPS to refer to those elements as **[**39]** part of the status quo at the time the no action alternative was presented to the public. A no action alternative in an EIS is meaningless if it assumes the existence of the very plan being proposed.

Id. Thus, NPS's "no-action" alternative is invalid under NEPA.

2. Range of Action Alternatives

The district court correctly found that the SEIS lacked a reasonable range of action alternatives, and was thus unreasonably narrow, in violation of NEPA. The three action alternatives each included the revised version of VERP as the primary mechanism for dealing with user capacity, with a five year interim period while VERP is tested. Because the district court based its decision on the fact that each alternative relied on the revised VERP and because it is incorrect in its assessment of VERP, NPS argues that the court had no legitimate basis for finding that the SEIS lacked a reasonable range of action alternatives.

The action alternatives are the "heart" of an EIS. *40 C.F.R. § 1502.14*. "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate. ***HN6***[⬆] An agency must look at every reasonable alternative, with the range dictated by the nature and scope of **[**40]** the proposed action, and sufficient to permit a reasoned choice." *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison, 67 F.3d 723, 729 (9th Cir. 1995)* (internal citations and quotation marks omitted). Applying the "rule of reason" standard, we find that the range of action alternatives is unreasonably narrow because the alternatives are virtually indistinguishable from each other.

First, each of the three action alternatives is primarily based on the VERP program which does not adequately address user capacity. Moreover, despite the supposed alternatives it proposed, NPS itself was aware that compliance with NEPA would require consideration of different means for addressing user capacity other than just VERP. For example, an NPS attorney advised that "VERP not be the only User Capacity framework analyzed in the Plan." As indicated in meeting notes, NPS recognized that "VERP is just a set of words . . . and [the public is] expecting us to look at other [user capacity] systems **[*1039]** and they care about transparency." Perhaps most critically, NPS realized the "need for a reasonable range of user capacity alternatives *because the original EIS did*

not look at alternatives for implementing ***[**41]*** *carrying capacity*." (emphasis added).

Second, for the first five years, the interim limits proposed by the three alternatives are essentially identical. As indicated in NPS's meeting notes, "[a]ll alternatives start with levels of use consistent with current use levels." *See also* *Friends of Yosemite, 439 F. Supp. 2d at 1099* ("These 'limits,' however, are simply the current physical capacity of the facilities in Yosemite Valley . . . ."). Although Alternatives 3 and 4 also include maximum use levels and annual visitation limits, the action alternatives were not varied enough to allow for a real, informed choice. *See Yosemite I, 348 F.3d at 800 n.2*.

IV.

For the reasons stated, we conclude that the 2005 Revised Plan does not describe an actual level of visitor use that will not adversely impact the Merced's ORVs as required by *Yosemite I* and the WSRA. We further conclude that the WSRA requires that the CMP be in the form of a single comprehensive document, dealing with all the required elements, including both the "kinds" and "amounts" of use, and that, therefore, the 2005 Revised Plan is deficient because it only dealt with the two components that were struck down in *Yosemite I* and was **[**42]** not a single, self-contained plan. Finally, we conclude that the SEIS violates NEPA in both its "noaction" and action alternatives. We remand to the district court for further action consistent with this opinion.

In No. 07-15124, the government's appeal from the interlocutory injunction is **DISMISSED**. In No. 07-15791, the judgment of the district court is **AFFIRMED**.

John R. Lawson Rock & Oil, Inc. v. State Air Resources Bd.

Court of Appeal of California, Fifth Appellate District

January 31, 2018, Opinion Filed

F074003

Reporter

20 Cal. App. 5th 77 *; 230 Cal. Rptr. 3d 1 **; 2018 Cal. App. LEXIS 85 ***; 2018 WL 636063

JOHN R. LAWSON ROCK & OIL, INC., et al., Plaintiffs and Respondents, v. STATE AIR RESOURCES BOARD et al., Defendants and Appellants.

Prior History: [*1]** APPEAL from a judgment of the Superior Court of Fresno County, No. 14CECG01494, Mark Wood Snauffer, Judge.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Air Quality > Environmental Law > Air Quality

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN1[] **Environmental & Natural Resources, Air Quality**

The State Air Resources Board is not subject to the full scope of the California Environmental Quality Act (CEQA). Rather, it utilizes its own regulatory program when adopting or amending standards for the protection of ambient air quality. This process is permitted under the law as a certified regulatory program. *Pub. Resources Code, § 21080.5*; Cal. Code Regs., tit. 14, §§ 15250-15252. Such programs are exempt from certain procedural aspects of CEQA because they involve the same consideration of environmental issues as is provided by use of environmental impact reports and negative declarations. Certification of a program is effectively a determination that the agency's regulatory program includes procedures for environmental review that are the functional equivalent of CEQA. The practical effect of this exemption is that a state agency acting under a certified regulatory program need not comply with the requirements for preparing initial studies, negative declarations or environmental impact reports. The agency's actions, however, remain subject to other provisions of CEQA.

Business & Corporate Compliance > ... > Air Quality > Environmental Law > Air Quality

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN2[] **Environmental & Natural Resources, Air Quality**

The State Air Resources Board's regulatory program is contained in Cal. Code Regs., tit. 17, §§ 60005, 60006, and 60007. These provisions require the preparation of a staff report at least 45 days before the public hearing on a proposed regulation, which report is required to be available for public review and comment. Cal. Code Regs., tit. 17, § 60005, subd. (a). It is the Board's policy to prepare staff reports in a manner consistent with the environmental protection purposes of the Board's regulatory program and with the goals and policies of the California Environmental Quality Act (CEQA). Cal. Code Regs., tit. 17, § 60005, subd. (b). The provisions of the regulatory program also address environmental alternatives and responses to comments to the environmental assessment. Cal. Code Regs., tit. 17, §§ 60006, 60007. Although the Board follows slightly different procedures, courts analyze the Board's conduct for compliance with CEQA's policies and legal mandates.

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN3[] Assessment & Information Access, Environmental Assessments

In reviewing an agency's compliance with the California Environmental Quality Act during the course of its legislative or quasi-legislative actions, a trial court's inquiry during a mandamus proceeding shall extend only to whether there was a prejudicial abuse of discretion, which is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. Pub. Resources Code, § 21168.5. An appellate court applies the same standard when reviewing a substitute environmental document for a certified regulatory program.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN4[] Environmental & Natural Resources, Environmental Impact Statements

In evaluating an environmental impact report (EIR) or substitute environmental document for California Environmental Quality Act (CEQA) compliance, a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts. When the claim is predominantly one of procedure, courts conduct an independent review of the agency's action, but when a challenge is made to a factual finding of the agency, courts will review the record to determine whether the finding is supported by substantial evidence. When the informational requirements of CEQA have not been met, an agency has failed to proceed in a manner required by law and has therefore abused its discretion. In assessing such a claim, courts apply an independent or de novo standard of review to the agency's action. On appeal, an appellate court reviews the agency's action rather than the trial court's ruling, applying the same standard as the trial court. The appellate court therefore resolves the substantive CEQA issues by independently determining whether the administrative record demonstrates any legal error by the agency and whether it contains substantial evidence to support

the agency's factual determinations.

Business & Corporate Compliance > ... > Air Quality > Environmental Law > Air Quality

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN5[] Environmental & Natural Resources, Air Quality

Although the State Air Resources Board is not subject to the full extent of California Environmental Quality Act (CEQA) regulations when utilizing its certified regulatory program, it is subject to various CEQA principles relevant to its regulatory actions. One of these principles is the expectation that CEQA documents, and by extension CEQA compliant documents like the Board's staff report, be considered before project approval. Public agencies must not undertake actions concerning the proposed public project that would have a significant adverse effect or limit the choice of alternatives or mitigation measures, before completion of CEQA compliance. Cal. Code Regs., tit. 14, § 15004, subd. (b). The Board is subject to this same timing requirement.

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN6[] Assessment & Information Access, Environmental Assessments

A project is a broad concept under the California Environmental Quality Act (CEQA) that asks whether certain entities' activities may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. This means that agency action approving or opening the way for a future development can be part of a project and can trigger CEQA even if the action takes place prior to planning or approval of all the specific features of the planned development. This opening the way can trigger CEQA where it constitutes an approval.

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN7[] Assessment & Information Access, Environmental Assessments

The modification of current regulations may constitute a project under the California Environmental Quality Act.

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN8[] Assessment & Information Access, Environmental Assessments

An approval under the California Environmental Quality Act is the decision by a public agency that commits the agency to a definite course of action in regard to a project intended to be carried out by any person. Cal. Code Regs., tit. 14, § 15352, subd. (a). Generally speaking, an agency acts to approve a proposed course of action when it makes its earliest

firm commitment to it, not when the final or last discretionary approval is made. Approvals under the Act, therefore, are not dependent on final action by the lead agency, but by conduct detrimental to further fair environmental analysis.

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN9[] **Assessment & Information Access, Environmental Assessments**

Approval under the California Environmental Quality Act cannot be equated with an agency's mere interest in, or inclination to support, a project, no matter how well defined. The proper test for determining whether a project has been prematurely approved is whether the agency has taken any action that significantly furthered a project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of the California Environmental Quality Act review of that public project, including the alternative of not going forward with the project. Reviewing courts are instructed to look not only to the terms of the agreement but to the surrounding circumstances when making this determination. These principles equally apply to public regulatory action. While the facts shedding light on the agency's rule-making process will be different from those arising when an agency approves a development agreement, such differences are immaterial to the core issue whether the agency has taken any steps foreclosing alternatives, including that of not going forward, or has otherwise created bureaucratic or financial momentum sufficient to incentivize ignoring environmental concerns.

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN10[] **Assessment & Information Access, Environmental Assessments**

A decision to devote available facilities and personnel to selected areas and to abstain from active pursuit of others is a policy or planning decision at a relatively high internal level. To ignore the impact of such a high level policy decision in analyzing approval under the California Environmental Quality Act (CEQA) would directly contradict the California Supreme Court's guidance to review not only the specific actions taken but also the surrounding circumstances when considering approval of a project. Whether such additional circumstances have any independent impact on the environment or otherwise constitute a project is a true red herring. The sole question under the law is whether some action constituted approval of a CEQA project.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

Environmental Law > Administrative Proceedings & Litigation > Remedies

HN11[] **Natural Resources & Public Lands, National Environmental Policy Act**

Directing an agency to void its approval of the project is a typical remedy for a California Environmental Quality Act violation.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

Environmental Law > Administrative Proceedings & Litigation > Remedies

HN12[] Natural Resources & Public Lands, National Environmental Policy Act

Pub. Resources Code, § 21168.9, controls the court's authority when crafting a remedy for California Environmental Quality Act (CEQA) violations. Under this statute, upon finding a CEQA violation, a court should enter an order that includes (1) a mandate that the decision be voided in whole or in part, and/or (2) a mandate that the agency take specific action as may be necessary to bring the decision into compliance with CEQA. However, § 21168.9, subd. (c), provides in part that nothing therein authorizes a court to direct any public agency to exercise its discretion in any particular way. Thus, where no discretion remains for the agency, courts have properly instructed them to prepare an environmental impact report when required. However, where the agency retains discretion on how to proceed under CEQA despite its previous violations, it may exercise that discretion on remand. Thus, courts can order an environmental impact report only where, under the circumstances of that case, the agency lacks discretion to proceed in a different fashion.

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN13[] Assessment & Information Access, Environmental Assessments

The baseline determination is an important component of the California Environmental Quality Act (CEQA) process, as it sets the criterion by which the agency determines whether the proposed project has a substantial adverse effect on the environment. An appellate court reviews de novo whether an agency has chosen to rely upon a standard that is consistent with CEQA. Once that standard is set, an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence.

Environmental Law > Assessment & Information Access > Environmental Assessments

HN14[] Assessment & Information Access, Environmental Assessments

An agency should normally adopt as a baseline the physical environmental conditions in the vicinity of the project, as they exist at the time the environmental analysis is commenced. Cal. Code Regs., tit. 14, § 15125.

Environmental Law > Assessment & Information Access > Environmental Assessments

HN15[] Assessment & Information Access, Environmental Assessments

The impacts of a proposed project are ordinarily to be compared to the actual environmental conditions existing at the time of the California Environmental Quality Act analysis, rather than to allowable conditions defined by a plan or regulatory framework.

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN16[] Assessment & Information Access, Environmental Assessments

The California Environmental Quality Act is not meant to stand as a barrier to appropriate modifications to environmental regulations, whether they tighten or loosen existing regulations, provided the lead agency properly informs the public of the effects of those modifications and no significant environmental impact will arise.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN17[] Environmental & Natural Resources, Environmental Impact Statements

The California Environmental Quality Act (CEQA) excuses the preparation of an environmental impact report and allows the use of a negative declaration when an initial study shows that there is no substantial evidence that the project may have a significant effect on the environment. Thus, one of the critical first steps in CEQA is to determine whether the project may have a significant effect on the environment. *Pub. Resources Code, § 21082.2, subd. (d)*.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Assessment & Information Access > Environmental Assessments

HN18[] Environmental & Natural Resources, Environmental Impact Statements

If there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment, the agency shall prepare a draft environmental impact report (EIR). *Cal. Code Regs., tit. 14, § 15064, subd. (a)*. An ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting. *§ 15064, subd. (b)*. With respect to greenhouse gases, lead agencies should consider the following factors, among others, when assessing the significance of impacts from greenhouse gas emissions on the environment: (1) the extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting; (2) whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project; and (3) the extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions. If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding compliance with the adopted regulations or requirements, an EIR must be prepared for the project. *Cal. Code Regs., tit. 14, § 15064.4, subd. (b)*.

Environmental Law > Assessment & Information Access > Environmental Assessments

HN19[] Assessment & Information Access, Environmental Assessments

Agencies are encouraged to develop thresholds of significance to use in determining whether a project has significant environmental effects. A threshold

of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant. *Cal. Code Regs., tit. 14, § 15064.7, subd. (a)*.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Assessment & Information Access > Environmental Assessments

HN20 **Environmental & Natural Resources, Environmental Impact Statements**

Despite the encouragement to develop thresholds of significance and to consider environmental impacts against certain standards, such comparisons cannot be used to determine automatically whether a given effect will or will not be significant. In each instance, notwithstanding compliance with a pertinent threshold of significance, the agency must still consider any fair argument that a certain environmental effect may be significant. A lead agency cannot avoid finding a potentially significant effect on the environment by rotely applying standards of significance that do not address that potential effect. Thus, if one can point to substantial evidence in the record that a project might constitute a significant effect on the environment notwithstanding the agency's applied standard of significance, then the agency cannot avoid its obligation to prepare an environmental impact report by rotely relying on its standard.

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN21 **Assessment & Information Access, Environmental Assessments**

In reviewing an agency's decision to adopt a negative declaration, courts utilize the same fair argument test applied by the agency. The fair argument standard is met if the agency's initial study of the project produces substantial evidence supporting a fair argument that the proposed project may have a significant adverse effect on the environment. The fair argument standard is a low threshold. An appellate court reviews this issue independently.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Administrative Law > Agency Rulemaking > State Proceedings

Administrative Law > Agency Rulemaking > Notice & Comment Requirements

HN22 **Agency Rulemaking, Formal Rulemaking**

California's Administrative Procedures Act provides a procedural vehicle to review proposed regulations or modifications thereto in order to advance meaningful public participation in the adoption of administrative regulations by state agencies and create an administrative record assuring effective judicial review. The Act establishes basic minimal procedural requirements for rulemaking in California. Pursuant to those procedural requirements, agencies must, among other things, (1) give the public notice of the proposed regulatory action, (2) issue a complete text of the proposed regulation with a statement of reasons for it, (3) give interested parties an opportunity to comment on the proposed regulation, (4) respond in writing to public

comments, and (5) maintain a file as the record for the rulemaking proceeding.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Administrative Law > Agency Rulemaking > State Proceedings

Administrative Law > Agency Rulemaking > Notice & Comment Requirements

HN23[] Agency Rulemaking, Formal Rulemaking

As part of the initial disclosures required under step two for rulemaking in California under California's Administrative Procedures Act, a rulemaking agency must include facts, evidence, documents, testimony, or other evidence on which the agency relies to support an initial determination that the action will not have a significant adverse economic impact on business. The agency's initial statement is followed by a public comment period, after which, if the agency decides to enact the regulation, it must prepare a final statement of reasons for adopting the proposed rule, which must include an update of the information contained in the initial statement of reasons. This final statement must also include a summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This aspect of the procedures is referred to as the economic impact assessment requirement.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Administrative Law > Agency Rulemaking > State Proceedings

Administrative Law > Agency Rulemaking > Notice & Comment Requirements

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Validity

HN24[] Agency Rulemaking, Formal Rulemaking

An agency's initial determination that the proposed regulatory action will not have a significant adverse economic impact on business need not be conclusive, and the qualifying adjective "significant" indicates that the agency need not assess or declare all adverse economic impacts anticipated. Similarly, an agency's initial determination of economic impact need not exhaustively examine the subject or involve extensive data collection. The agency is required only to make an initial showing that there was some factual basis for its decision. A regulation will not be invalidated simply because of disagreement over the strict accuracy of cost estimates on which the agency relied to support its initial determination. Once the initial assessment is complete, affected parties may comment on the agency's initial determination and supply additional information relevant to the issue. The agency must respond to the public comments and either change its proposal in response to the comments or explain why it has not.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Administrative Law > Judicial Review > Reviewability > Questions of Law

HN25[] Standards of Review, De Novo

Standard of Review

An appellate court reviews an agency's initial determination to determine that the agency has substantially complied with its obligations, and whether it is supported by some substantial evidence. Interpreting the relevant statutes to determine whether the agency has substantially complied with its obligations is a question of law to which an appellate court applies an independent standard of review.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Administrative Law > Agency Rulemaking > State Proceedings

HN26[] **Agency Rulemaking, Formal Rulemaking**

Under the California Administrative Procedures Act's economic analysis requirements, the relevant agency must consider whether the regulation will have a significant statewide adverse economic impact directly affecting business. Nothing in the language of *Gov. Code, §§ 11346.5*, *11346.3*, suggests the economic interests relevant to the Act analysis are solely inter-state interests. *Section 11346.5* broadly requires consideration of significant, statewide adverse economic impacts directly affecting business. *§ 11346.5, subd. (a)(8)*. While it then references inter-state impacts, it does so by adding them to the required analysis rather than limiting the analytical scope. Likewise, *§ 11346.3* requires an analysis of several factors that are broadly drafted in a manner which does not suggest solely inter-state impacts, such as the creation of new businesses or the elimination of existing businesses within the state, and the competitive advantages or disadvantages for businesses currently doing business within the state. *§ 11346.3, subd. (c)(1)*.

Headnotes/Syllabus

Summary

[*77] CALIFORNIA OFFICIAL REPORTS SUMMARY

Plaintiffs, a fleet operator and a related interest group, filed a writ petition against the State Air Resources Board and its executive officer, alleging that modifications adopted by the board in 2014 to a set of regulations known as the "Truck and Bus Regulation" were improper under both the *California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.)* and *California's Administrative Procedure Act (APA; Gov. Code, § 11340 et seq.)*. The modifications extended certain deadlines for small fleet operators to comply with the regulations. The trial court ultimately ruled in plaintiffs' favor on both claims. (Superior Court of Fresno County, No. 14CECG01494, Mark Wood Snauffer, Judge.)

The Court of Appeal affirmed the judgment. The court found that the board's issuance of a public regulatory advisory stating that fleet operators could take advantage of the proposed regulatory modifications before they were enacted, and would not be subject to enforcement actions or penalties if those modifications were not enacted, was sufficient conduct to constitute approval of those regulations under *CEQA*. Because the required environmental review was incomplete at the time of the *CEQA* project approval, the board violated *CEQA*'s timing requirement. Although the board's early approval required that the court void approval of the contested modifications, the board could continue to pursue those or similar modifications. The board selected an appropriate baseline. Although the board properly determined there would be no substantial impact on the environment under the significance standards it chose to apply, a fair argument existed that the project would impact the environment in the short term. The board's failure to acknowledge and act upon that fair argument violated *CEQA*. Furthermore, the board could not rotely apply standards of significance that did not address that potential effect once evidence of the risk had been identified. Accordingly, the

board abused its discretion in issuing the functional equivalent of a negative declaration. The court concluded that the board's conduct violated the *APA*. The board was not permitted under the statutory scheme to ignore evidence of impacts to specific segments of businesses already doing business **[*78]** in California from benefits to other in-state businesses when proceeding under the *APA*. If the board's proposed regulatory amendments placed the state's thumb on the scale for one group of in-state businesses over another, it needed to consider that impact. In failing to properly respond to the comments regarding intrastate competition issues, the board failed to abide by its obligations under the *APA* in either form or substance. (Opinion by Detjen, J., with Levy, Acting P. J., and Poochigian, J., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[⬇] **(1)**

Pollution and Conservation Laws § 1.6—California Environmental Quality Act—State Air Resources Board—Certified Regulatory Program.

The State Air Resources Board is not subject to the full scope of the *California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.)*. Rather, it utilizes its own regulatory program when adopting or amending standards for the protection of ambient air quality. This process is permitted under the law as a certified regulatory program (*Pub. Resources Code, § 21080.5*; *Cal. Code Regs., tit. 14, §§ 15250–15252*). Such programs are exempt from certain procedural aspects of *CEQA* because they involve the same consideration of environmental issues as is provided by use of environmental impact reports and negative declarations. Certification of a program is effectively a determination that the agency's regulatory program includes procedures for environmental review that are the functional equivalent of *CEQA*. The practical effect of this exemption is that a state agency acting under a certified regulatory program need not comply with the requirements for preparing initial studies, negative declarations or environmental impact reports. The agency's actions, however, remain subject to other provisions of *CEQA*.

CA(2)[⬇] **(2)**

Pollution and Conservation Laws § 4—State Air Resources Board—Proposed Regulations—Procedure—California Environmental Quality Act Compliance.

The State Air Resources Board's regulatory program is contained in *Cal. Code Regs., tit. 17, §§ 60005*, *60006*, and *60007*. These provisions require the preparation of a staff report at least 45 days before the public hearing on a proposed regulation, which report is required to be available for public review and comment (*Cal. Code Regs., tit. 17, § 60005, subd. (a)*). It is the board's policy to prepare staff reports in a manner consistent with the environmental protection purposes of the board's regulatory program and with the goals and policies of the *California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.)* (*Cal. Code Regs., tit. 17, § 60005, subd. (b)*). The **[*79]** provisions of the regulatory program also address environmental alternatives and responses to comments to the environmental assessment (*Cal. Code Regs., tit. 17, §§ 60006*, *60007*). Although the board follows slightly different procedures, courts analyze the board's conduct for compliance with *CEQA*'s policies and legal mandates.

CA(3)[⬇] **(3)**

Pollution and Conservation Laws § 1.6—California Environmental Quality Act—State Air Resources Board—Regulatory Actions—Environmental Documents—Timing Requirement.

Although the State Air Resources Board is not subject to the full extent of California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.) regulations when utilizing its certified regulatory program, it is subject to various CEQA principles relevant to its regulatory actions. One of these principles is the expectation that CEQA documents, and by extension CEQA compliant documents like the board's staff report, be considered before project approval. Public agencies must not undertake actions concerning the proposed public project that would have a significant adverse effect or limit the choice of alternatives or mitigation measures, before completion of CEQA compliance (Cal. Code Regs., tit. 14, § 15004, subd. (b)). The board is subject to this same timing requirement.

CA(4)[] **(4)**

Pollution and Conservation Laws § 1.6—California Environmental Quality Act—State Air Resources Board—Regulatory Advisory—Timing Requirement—Project Approval.

The State Air Resources Board's issuance of a regulatory advisory concerning its plans to modify a set of regulations first adopted in 2008, known as the "Truck and Bus Regulation," constituted the approval of a project under the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.). Contrary to the framework of the board's arguments, the project was not the advisory, but the proposed regulatory modifications. The board's issuance of a public regulatory advisory stating that fleet operators could take advantage of the proposed regulatory modifications before they were enacted, and would not be subject to enforcement actions or penalties if those modifications were not enacted, was sufficient conduct to constitute approval of those regulations under CEQA. As the required environmental review was incomplete at the time of the CEQA project approval, the board violated CEQA's timing requirement.

[Manaster & Selmi, Cal. Environmental Law & Land Use Practice (2017) ch. 21, § 21.03.]

CA(5)[] **(5)**

Pollution and Conservation Laws § 1.6—California Environmental Quality Act—Project.

A project is a broad concept under the **[*80]** California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.) that asks whether certain entities' activities may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. This means that agency action approving or opening the way for a future development can be part of a project and can trigger CEQA even if the action takes place prior to planning or approval of all the specific features of the planned development. This opening the way can trigger CEQA where it constitutes an approval.

CA(6)[] **(6)**

Pollution and Conservation Laws § 1.6—California Environmental Quality Act—Project.

The modification of current regulations may constitute a project under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.).

CA(7)[] **(7)**

Pollution and Conservation Laws § 1.6—California Environmental Quality Act—Project—Approval.

An approval under the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.) is the decision by a public agency that commits the agency to a definite course of action in regard to a project intended to be carried out by any person (Cal. Code Regs., tit. 14, § 15352, subd. (a)). Generally speaking, an agency acts to approve

a proposed course of action when it makes its earliest firm commitment to it, not when the final or last discretionary approval is made. Approvals under the CEQA, therefore, are not dependent on final action by the lead agency, but by conduct detrimental to further fair environmental analysis.

CA(8) **(8)**

Pollution and Conservation Laws § 1.6—California Environmental Quality Act—Project—Approval—Premature—Public Regulatory Action.

Approval under the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.) cannot be equated with an agency's mere interest in, or inclination to support, a project, no matter how well defined. The proper test for determining whether a project has been prematurely approved is whether the agency has taken any action that significantly furthered a project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of the CEQA review of that public project, including the alternative of not going forward with the project. These principles equally apply to public regulatory action. While the facts shedding light on the agency's rulemaking process will be different from those arising when an agency approves a development agreement, such differences are immaterial to the core issue whether the agency has taken any steps foreclosing alternatives, including that of not going forward, or has otherwise created bureaucratic or financial momentum sufficient to incentivize ignoring environmental concerns.

CA(9) **(9)**

Pollution and Conservation Laws § 1.6—California Environmental Quality Act—Project—Approval.

A decision to devote available facilities and personnel to selected areas and to abstain from active pursuit of others is a policy or planning decision at a relatively high internal level. To ignore the impact of such a high-level policy decision in analyzing approval under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) would directly contradict the California Supreme Court's guidance to review not only the specific actions taken but also the surrounding circumstances when considering approval of a project. Whether such additional circumstances have any independent impact on the environment or otherwise constitute a project is a true red herring. The sole question under the law is whether some action constituted approval of a project.

CA(10) **(10)**

Pollution and Conservation Laws § 2.9—California Environmental Quality Act—Violation—Remedy.

Directing an agency to void its approval of the project is a typical remedy for a California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) violation.

CA(11) **(11)**

Pollution and Conservation Laws § 2.9—California Environmental Quality Act—Violation—Remedy.

Pub. Resources Code, § 21168.9, controls the court's authority when crafting a remedy for California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.) violations. Under this statute, upon finding a CEQA violation, a court should enter an order that includes (1) a mandate that the decision be voided in whole or in part, and/or (2) a mandate that the agency take specific action as may be necessary to bring the decision into compliance with CEQA. However, § 21168.9, subd. (c), provides in part that nothing therein authorizes a court to direct any public agency to exercise its discretion in any particular way. Thus,

where no discretion remains for the agency, courts have properly instructed them to prepare an environmental impact report when required. However, where the agency retains discretion on how to proceed under CEQA despite its previous violations, it may exercise that discretion on remand. Thus, courts can order an environmental impact report only where, under the circumstances of that case, the agency lacks discretion to proceed in a different fashion.

CA(12)[] (12)

Pollution and Conservation Laws § 1.6—California Environmental Quality Act—Baseline.

An agency should normally adopt as a baseline the physical environmental conditions in the vicinity of the project, as they exist at the time the environmental analysis is commenced (Cal. Code Regs., tit. 14, § 15125).

CA(13)[] (13)

Pollution and Conservation Laws § 1.6—California Environmental Quality Act—Project—Impacts.

The impacts of a proposed project are ordinarily to be compared to the actual environmental conditions existing at the time of the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) analysis, rather than to allowable conditions defined by a plan or regulatory framework.

CA(14)[] (14)

Pollution and Conservation Laws § 1—California Environmental Quality Act—Modifications to Environmental Regulations.

The California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) is not meant to stand as a barrier to appropriate modifications to environmental regulations, whether they tighten or loosen existing regulations, provided the lead agency properly informs the public of the effects of those modifications and no significant environmental impact will arise.

CA(15)[] (15)

Pollution and Conservation Laws § 2.2—California Environmental Quality Act—Environmental Impact Reports—Necessity of Preparing—Negative Declaration.

The California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) excuses the preparation of an environmental impact report and allows the use of a negative declaration when an initial study shows that there is no substantial evidence that the project may have a significant effect on the environment. Thus, one of the critical first steps in the act is to determine whether the project may have a significant effect on the environment (Pub. Resources Code, § 21082.2, subd. (d)).

CA(16)[] (16)

Pollution and Conservation Laws § 2.1—California Environmental Quality Act—Environmental Impact Reports—Necessity of Preparing—Greenhouse Gas Emissions.

As the California Environmental Quality Act Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.) explain, if there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment, the agency must prepare a draft environmental impact report (EIR) (Cal. Code Regs., tit. 14, § 15064, subd. (a)). An ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting (§ 15064, subd. (b)). With respect to greenhouse gases, lead agencies should consider the following factors, among others, when assessing the significance of impacts from

greenhouse gas emissions on the environment: (1) the extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting, (2) whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project, and (3) the extent to which the project complies **[*83]** with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions. If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding compliance with the adopted regulations or requirements, an EIR must be prepared for the project (*Cal. Code Regs., tit. 14, § 15064.4, subd. (b)*). More generally, agencies are encouraged to develop thresholds of significance to use in determining whether a project has significant environmental effects. A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, noncompliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant (*Cal. Code Regs., tit. 14, § 15064.7, subd. (a)*).

CA(17)[] **(17)**

Pollution and Conservation Laws § 2.1—California Environmental Quality Act—Environmental Impact Reports—Necessity of Preparing—Standard of Significance.

Despite the encouragement to develop thresholds of significance and to consider environmental impacts against certain standards, such comparisons cannot be used to determine automatically whether a given effect will or will not be significant. In each instance, notwithstanding compliance with a pertinent threshold of significance, the agency must still consider any fair argument that a certain environmental effect may be significant. A lead agency cannot avoid finding a potentially significant effect on the environment by rotely applying standards of significance that do not address that potential effect. Thus, if one can point to substantial evidence in the record that a project might constitute a significant effect on the environment notwithstanding the agency's applied standard of significance, then the agency cannot avoid its obligation to prepare an environmental impact report by rotely relying on its standard.

CA(18)[] **(18)**

Administrative Law § 19—Administrative Actions—Rulemaking—Procedural Requirements.

California's Administrative Procedure Act (Gov. Code, § 11340 et seq.) provides a procedural vehicle to review proposed regulations or modifications thereto in order to advance meaningful public participation in the adoption of administrative regulations by state agencies and create an administrative record assuring effective judicial review. The act establishes basic minimal procedural requirements for rulemaking in California. Pursuant to those procedural requirements, agencies must, among other things, (1) give the public notice of the proposed regulatory action; (2) issue a complete text of the proposed regulation with a statement of reasons for it; (3) give interested parties an opportunity to comment on the proposed regulation; (4) respond in writing to public comments; and (5) maintain a file as the record for the **[*84]** rulemaking proceeding. As part of the initial disclosures required under step two, a rulemaking agency must include facts, evidence, documents, testimony, or other evidence on which the agency relies to support an initial determination that the action will not have a significant adverse economic impact on business. The agency's initial statement is followed by a public comment period, after which, if the agency decides to enact the regulation, it must prepare a final statement of reasons for adopting the proposed rule, which must include an update of the information contained in the initial statement of

reasons. This final statement must also include a summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This aspect of the procedures is referred to as the economic impact assessment requirement.

CA(19)[] (19)

Administrative Law § 19—Administrative Actions—Rulemaking—Procedural Requirements—Economic Impact Assessment—Public Comments.

An agency's initial determination that the proposed regulatory action will not have a significant adverse economic impact on business need not be conclusive, and the qualifying adjective "significant" indicates that the agency need not assess or declare all adverse economic impacts anticipated. Similarly, an agency's initial determination of economic impact need not exhaustively examine the subject or involve extensive data collection. The agency is required only to make an initial showing that there was some factual basis for its decision. A regulation will not be invalidated simply because of disagreement over the strict accuracy of cost estimates on which the agency relied to support its initial determination. Once the initial assessment is complete, affected parties may comment on the agency's initial determination and supply additional information relevant to the issue. The agency must respond to the public comments and either change its proposal in response to the comments or explain why it has not.

CA(20)[] (20)

Administrative Law § 19—Administrative Actions—Rulemaking—Procedural Requirements—Economic Impact Assessment.

Under the California Administrative Procedure Act's (Gov. Code, § 11340 et seq.) economic analysis requirements, the relevant agency must consider whether the regulation will have a significant statewide adverse economic impact directly affecting business. Nothing in the language of Gov. Code, §§ 11346.5, 11346.3, suggests the economic interests relevant to the analysis under the act are solely interstate interests. Section 11346.5 broadly requires consideration of significant, statewide adverse economic impacts directly affecting business (§ 11346.5, subd. (a)(8)). While it then references interstate impacts, it does so by adding them to the **[*85]** required analysis rather than limiting the analytical scope. Likewise, § 11346.3 requires an analysis of several factors that are broadly drafted in a manner which does not suggest solely interstate impacts, such as the creation of new businesses or the elimination of existing businesses within the state, and the competitive advantages or disadvantages for businesses currently doing business within the state (§ 11346.3, subd. (c)(1)).

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Wanger Jones Helsley, Timothy Jones, John P. Kinsey and Steven K. Vote for Plaintiffs and Respondents.

Dorothy Rothrock; Heather Wallace; and Michael Jacob for California Manufacturers & Technology Association, Automotive Specialty Products Alliance, California Business Properties Association, California Chamber of Commerce, California Independent Oil Marketers Association, California Professional Association of Specialty Contractors, California Retailers Association, Consumer Specialty Products Association, National Elevator Industry, Inc., and Pacific Merchant Shipping Association as Amici Curiae on behalf of Plaintiffs and Respondents.

Judges: Opinion by Detjen, J., with Levy, Acting

P. J., and Poochigian, J., concurring.

Opinion by: Detjen, J.

Opinion

[7] DETJEN, J.—**

OVERVIEW

This case involves modifications to a set of regulations first adopted in 2008, known as the "Truck and Bus Regulation" (the regulations). In 2014, the State Air Resources **[***2]** Board (the Board) adopted proposed modifications to the regulations, extending certain deadlines for small fleet operators to comply with the regulations. John R. Lawson Rock & Oil, Inc. (Lawson), a fleet operator that had already incurred financial liability complying with the regulations, along with a related interest group, the California Trucking Association (collectively respondents), filed a writ petition against the Board and Richard Corey in his official capacity as executive officer of the board **[*86]** (defendants and appellants) alleging the 2014 modifications were improper under both the *California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.)* and *California's Administrative Procedure Act (APA; Gov. Code, § 11340 et seq.)*.

The trial court ultimately ruled in respondents' favor on both claims. With respect to *CEQA*, the court concluded the Board made several errors, including approving **[**8]** a project prior to the completion of an environmental study, adopting the wrong baseline for its analysis, incorrectly concluding the modifications would have no significant adverse impact on the environment, and improperly applying a piecemeal approach to the environmental review. With respect to the *APA*, the trial court found **[***3]** the Board conducted an incomplete economic impact analysis.

For the following reasons we conclude the trial court correctly determined the Board's actions violated *CEQA*. We find, however, that the violations are narrower than found by the trial court. We further find the Board's conduct violated the *APA*, voiding the modified regulations. We therefore affirm the trial court's judgment on the grounds set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2010 a regulatory scheme called the Truck and Bus Regulation, first passed in late 2008, became effective. (See *Cal. Code Regs., tit. 13, § 2025*.) The regulations are designed to reduce emissions of diesel particulate matter (PM), oxides from nitrogen (NOx), and greenhouse gases from large diesel vehicles. It does so, in part, by requiring vehicle owners to retrofit and upgrade existing vehicles to the equivalent of 2010 or newer model year engines.

Shortly before the regulations became effective, staff notified the Board that the ongoing global recession had substantially reduced overall trucking activity since the regulations were first envisioned, potentially warranting modifications to the expected regulations. The Board responded by delaying some reporting **[***4]** deadlines and requesting proposals for modifications to the regulations. The subsequent proposal resulted in certain modifications to the original regulations that would delay the initial compliance dates by a year and further defer engine replacements by two or more years for most fleets. These changes also eliminated a requirement that certain light trucks utilize a particulate matter filter and provided a 10-year window where only engines 20 years old, or older, would require modernization. The Board notes in its briefing that no legal challenges were filed against these modifications.
[*87]

The Contested Modifications

In October 2013, the Board received a status update on the regulations. In this update, the Board was informed that staff had been working with regulated fleets to meet compliance deadlines. Staff reported that, while "the vast majority of the 260,000 trucks registered in California [that] must comply with the requirements of the regulation [were] already compliant," 20,000 trucks still needed a filter, of which nearly 15,000 were in small fleets of three or fewer. Staff identified January 1, 2014, as a critical upcoming milestone "because it's the first time **[***5]** at least one vehicle for each of these fleets need[s] to become compliant," while noting that "small fleets typically have least access to capital, creating additional challenges" toward compliance.

As part of this update, staff identified "what [the Board] is doing to assist fleets in transitioning into compliance as we approach the upcoming compliance date." Staff pointed to several funding programs available to assist fleets with required modifications and noted "[s]taff is also proposing some new regulatory flexibility to be added to the regulation." As part of this regulatory flexibility, staff indicated it was "proposing to issue a regulatory advisory that would provide fleets that order a [particulate matter] filter or a replacement truck or that are eligible and apply for a **[**9]** grant or a loan to have until July 1, 2014, to complete the steps necessary to come into compliance" and stated "because we are planning to make regulatory changes to provide relief, we believe it is appropriate to provide access to these provisions while staff finalizes them to present to the Board by April 2014." All these proposals were part of what staff described as "a comprehensive strategy which will help many of **[***6]** [the currently noncompliant] fleets transition into compliant trucks." Staff explained that, moving forward, "staff will assess the emission and economic impacts of proposed regulatory changes," and "return to the Board by April 2014 with proposed amendments." In the meantime, staff noted they would issue a regulatory advisory to allow fleet operators to take advantage of the planned flexibility. Based on this presentation, the Board indicated its staff should examine these changes while some members expressed thanks that flexibility was being built into the regulations.

The Board's Regulatory Advisory

In November 2013, the Board issued the expected regulatory advisory concerning its plans to modify the current regulations. The regulatory advisory described steps the Board "is taking to assist vehicle owners with the transition to the upcoming January 1, 2014, particulate matter … filter compliance deadline under the Truck and Bus [R]egulation" and expressed its overall goal as providing "additional time for owners to complete their good **[*88]** faith compliance efforts" and "additional flexibility for many lower use vehicles and vehicles that operate solely in certain areas of the State." The advisory **[***7]** explained the Board "will recognize good faith efforts of vehicle owners to comply with the deadline" then in place by ensuring those meeting relevant criteria "will not be subject to enforcement action during the period through July 1, 2014."

Truck owners were also allowed "to take advantage of the following anticipated regulatory changes for all vehicles" prior to the expected April 2014 hearing at which the matter would be again discussed. Staff outlined these anticipated changes as: (1) reopening the period for vehicles to opt in to the existing low-mileage agricultural vehicle extension; (2) reopening the period for vehicles to opt in to the existing low-mileage construction truck extension; (3) reopening the period for vehicles to opt in to the existing particulate matter phase-in requirements; (4) increasing the thresholds for low-use exemptions; and (5) expanding the definition of "'NOx exempt'" areas. Staff also explained that the "PM filter requirements for vehicles operated exclusively in the existing and newly proposed 'NOx exempt' areas … will be delayed one year until January 1, 2015." The advisory further explained that "while … staff anticipates proposing amendments **[***8]** similar

to these administrative changes at the Board's regularly scheduled April 2014 meeting, the changes will not be finalized until approved by the Board." However, "[i]n the event that the proposed amendments differ from those identified above and impact a fleet's ability to comply with the regulation, … staff will provide fleets that have reported their intent to use these options additional time beyond the Board's April 2014 meeting to come into compliance."

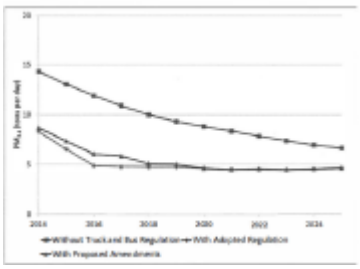
The Initial Statement of Reasons

On March 5, 2014, the Board released a staff report, which included its proposed amendments to the truck and bus regulation and its initial statement of reasons for proposed rulemaking (initial statement). The initial statement provided recommendations for modifications in line **[**10]** with those discussed at the October 2013 meeting and, relevant to this appeal, included distinct subsections discussing air quality, the environmental impacts analysis, and the economic impacts analysis and assessment. With respect to the disputed modifications, the initial statement sought to provide relief in areas with cleaner air by delaying the compliance schedule for all vehicles operating solely within certain exempt areas by one year for initial compliance and four **[***9]** years for final compliance. For small fleets outside of these areas, staff proposed "to defer the compliance requirements for the second and third truck in a small fleet by one year and two years, respectively. …" No **[*89]** changes were recommended regarding the first truck "because the January 1, 2014[,] compliance date has passed and many small fleet owners have already complied."

For fleets that had already complied with the prior particulate matter regulations, staff recommended extending the time they could use existing particulate matter retrofits, extending the use of credits with respect to the use of particulate matter filters, and allowing operators to continue operating if retrofitted particulate matter filters are recalled, all of which generally extended relevant deadlines for complying fleets. The credit program generally allowed trucks fitted with compliant particulate matter filters prior to 2012 to count against other trucks in the fleet that would otherwise need to be upgraded until the new deadlines were reached. The changes would also delay the point at which trucks outfitted with a particulate matter filter prior to 2014 would have to upgrade their engine to a 2010 **[***10]** model level.

The air quality section of the initial statement identified several reasons why reducing diesel particulate matter and black carbon—"a major constituent of diesel [particulate matter]"—was important nationally and locally, particularly in the South Coast and San Joaquin Valley regions. This section also included updated information about the types of trucks subject to regulation and their use in California. In conjunction with appendix F to the initial statement, the air quality section explained that current pollution estimates now included "up-to-date (2013) fuel sales and use data," the "latest nationwide truck sales projected in the Annual Energy Outlook," improved matching of engine and truck model years from prior estimates, and updated information "on how truck owners are actually complying" with the previously passed regulations. The air quality section then provided several charts showing how oxides of nitrogen and particulate matter emissions would decrease from the current levels estimated under the updated methodology and compared those reductions to the estimated reductions if the current regulations were left in place. As one example of how this data was presented, **[***11]** the below chart shows how the current data regarding particulate matter emissions (marked as the "Without Truck and Bus Regulation" line) compares to the data "With Adopted Regulation" and "With Proposed Amendments."

[*90] [11]**



The environmental impact analysis section disclosed the staff's opinion "that implementing the proposed amendments to the regulation would not result in an adverse impact on the environment" and explained the staff's process for making this determination. In discussing air quality benefits under this section, the initial statement noted that "staff projects a temporary delay in some emission benefits in the near term (until 2020) compared to emission benefits that may have been achieved absent the proposed amendments," but found that impact "minimized by the fact that overall emissions continue to be lower than originally expected due to the continued effects of the economic downturn." The initial statement then referred to the air quality section for further details. Reaching the heart of its conclusion, the initial statement then explained, "The amendments only change the mid-term timing of clean-up of the truck fleet and, therefore, do not result in any increase in emissions compared to existing **[***12]** environmental conditions. Also, despite the projected near-term delay in some emissions benefits … emissions … will continue to drop from today's levels as a result of the regulation with the proposed amendments and it will ultimately result in the same projected air quality benefits." In similar language, when discussing "'NOx exempt areas,'" the initial report stated, "Although emissions would not decline as rapidly, in these regions, trucks that travel in these areas would continue to meet the full requirements of the regulation and both NOx and PM emissions will continue to decline. Since there is no longer a need to substantially decrease NOx emissions in these attainment areas, no adverse impacts to air **[*91]** quality would occur … ." Ultimately, the section concluded that because "no significant adverse environmental impacts were identified, this environmental analysis does not include a discussion of mitigation measures or environmental alternatives."

Finally, the economic impacts analysis and assessment section claimed to discuss "the effect of the proposed amendments **[**12]** on individual fleet owners and businesses affected by the regulation." It generally concluded that the **[***13]** amendments "would reduce compliance costs for many fleet owners" by allowing "fleet owners more time to make the required upgrades, thereby providing time for used compliant truck prices to naturally decline." The section then discussed numerous expected costs, including vehicle price and replacement costs, retrofitting particulate matter filter costs, and other similar matters associated with the regulations. Within these analyses, staff considered things such as differences in impact between in-state and out-of-state fleets, differences in impact on high-mileage fleets, and annual operational, maintenance, and reporting costs. The section further considered the specific impact the modifications had on small businesses within California, noting "the proposed amendments would not impose any additional costs on small businesses, and should result in small businesses, many of them small fleets, being able to spread out" their compliance costs. At the same time, the section explained "the [amendments] could have a negative economic impact on retrofit manufacturers and installers," among others.

As part of the economic analysis, staff completed a standardized regulatory impacts assessment **[***14]** (standardized assessment or SRIA), which was ultimately submitted to the Department of Finance for review and approval. Included within this assessment was a discussion of costs and cost savings arising from the proposed amendments. In its discussion on the costs and cost savings for businesses, staff concluded, "The businesses required to comply are throughout the state of California, while all regulated businesses can benefit from the compliance delays, the

businesses that have already complied would not be affected." The report did not identify any analysis supporting this conclusion. In a later section on macroeconomic impacts, the assessment looked at competitiveness and job impacts in California, among other factors. Here, when discussing competitiveness, the assessment focused on "competitive advantage[s] of businesses outside of California to those in California" and found "no direct impact on competitiveness." The report noted that, while some businesses "have indicated that the compliance requirements would negatively impact their ability to achieve the necessary profits to stay in business," the amendments were designed "to provide the flexibility necessary to ensure these businesses **[***15]** are not eliminated" and the "strategy will be beneficial for California due to a favorable change in the trade balance between California and the rest of the world … ." With respect to job impacts, the assessment found there would "be no net loss in jobs over the **[*92]** life of the proposed Amendments," while noting there may be an immediate lower demand for trucks and exhaust retrofit devices, resulting in some job losses for those service providers.

Comments, Responses, and Approvals

Following release of the initial statement, the Board solicited and received public comments on its proposals. These comments included several from Lawson, which raised the issues litigated in this matter.

On April 24, 2014, the Board held another public meeting, at which time it was updated on the status of its proposed modifications. In that presentation, staff recommended adopting the proposed modifications with several nonsubstantive changes requiring a 15-day public comment period under the *APA*. The Board adopted this recommendation and initially approved the modified regulations by way of resolution 14-3, on April 25, 2014. As part of this approval, the Board approved **[**13]** and released written responses **[***16]** to comments on the environmental impacts analysis related to the modified regulations, rejecting all public criticisms of the document.

When providing the 15-day comment period, and a second 15-day comment period required after additional changes were made that increased compliance times for the second truck in a small fleet, among other matters, the Board noted that staff "has determined that these modifications do not change implementation of the regulation in any way that alters any of the conclusions of the environmental analysis … included in the Staff Report released on March 5, 2014," and that the "modifications do not cause any changes that alter the air quality emissions assessment or otherwise result in any other significant adverse environmental impacts … ."

Following these comment periods, the Board held another public meeting and received another update on the modifications. The staff update noted the original environmental analysis found no adverse environmental impacts and the 15-day changes did not alter that conclusion. Staff noted additional environmental comments had been received and responded to and recommended reaffirming the Board's finding of no adverse **[***17]** environmental impact and adopting the final regulation order.

On November 20, 2014, the Board issued resolution 14-41, adopting the final regulation order for the modified regulations and the written responses to the environmental and economic comments previously discussed. In line with this action, the Board issued its final statement of reasons for rulemaking, which incorporated the initial statement and provided written responses to all the comments received from the public. Included in these comments **[*93]** were dozens of assertions that the proposed modifications were harmful to fleets that had already complied with the prior regulations. In response to these comments, the Board wrote it "was concerned with small fleets, lower mileage fleets, and fleets in rural areas with cleaner air, all of which arguably continue to be impacted by the recession and are challenged in

complying with the regulation. In considering changes, the Board carefully considered various options to find the best balance in providing additional flexibility for such fleets while minimizing the impacts to compliant fleets and retaining the air quality benefits of the regulation. [The Board] recognizes that to those fleets **[***18]** that have already made investments to comply, providing additional flexibility can be viewed as unfair. However, most of the amendments were structured in a manner that would minimize the impact on such fleet owners that compete in the same markets. The amendments also included changes that reward fleets that have acted early and have already complied." The Board then pointed to responses to multiple related comments to support this claim. These additional responses included statements suggesting the Board considered the alleged impacts, such as, "The Board determined the amended regulation achieves the appropriate balance in addressing concerns about competitive disadvantage and protecting public health while still meeting air quality obligations." The Board also suggested it did not make certain changes to avoid significant competitive disadvantage concerns, writing "The Board determined that it was not appropriate to expand the definition [of certain work trucks] to include tractor-trailers because the amendments would no longer meet air quality objectives, and would create competitive disadvantage concerns among most for-hire fleets."

[14]** *The Present Proceedings*

On May 23, 2014, respondents **[***19]** filed their initial petition for a writ of mandate and complaint for declaratory and injunctive relief based on the Board's conduct to that point. The petition and complaint was amended in July 2014 and faced a quick demurrer on the grounds that the regulatory proceedings were not complete. On December 23, 2014, after the Board issued its final approval, respondents filed a second amended petition and complaint, which remains the operative pleading in this case.

The trial court held hearings on September 18 and October 16, 2015, before issuing its final statement of decision on June 7, 2016. The trial court first concluded the Board engaged in post hoc environmental review by approving amendments before the environmental review process was complete. The court reasoned the Board began carrying out and implementing the proposed amendments as early as November 2013, and the Board's April 25, 2014, approval was also premature given that additional environmental review remained. The court next found the Board should have prepared the **[*94]** functional equivalent of an environmental impact report (EIR), rather than adopt the proposed equivalent of a negative declaration, because a fair argument **[***20]** existed in the record that the amendments would have a significant effect on the environment. The court found substantial evidence showed potential increases in oxides of nitrogen, particulate matter, and greenhouse gases. In addition to these findings, the court also concluded the Board adopted an incorrect baseline for determining impacts on the environment because it did not utilize as a baseline measurement, "what would obtain under the unmodified 2010 Amendments" and instead used "the current conditions obtaining due to lack of enforcement of the 2010 Amendments." The court rejected the notion that a negative declaration could be utilized in the future in light of the fact "the criteria pollutant emissions caused by the Amendments vastly exceed[ed] the thresholds of significance" for oxides of nitrogen and particulate matter. Finally, the court found the Board had also violated the *APA* by utilizing a materially deficient economic impact analysis. The court found that, despite numerous comments on the issue of competitive impacts on compliant fleets, "there is no analysis in either the SRIA or the Fiscal Statement of the impacts to compl[ia]nt trucking companies being undercut in the market by non-compliant **[***21]** trucking companies due to the Amendments."

Based on these findings, the trial court granted

respondents' writ petition, voided the Board's approval of the 2014 amendments to the regulations and certification of the environmental documents related to the 2014 amendments, and issued a peremptory writ of mandamus to the Board ordering it "to comply with CEQA and the APA before taking any further action to approve, implement or enforce the 2014 Amendments." The court denied respondents' request for declaratory relief and awarded respondents their fees and costs.

This appeal timely followed.

DISCUSSION

Alleged CEQA Violations

The underlying writ petition includes multiple allegations of error under CEQA. Although we need not reach every allegation, our ultimate finding of CEQA error requires us to consider several alleged errors in order to ensure future compliance with CEQA should the Board continue to pursue modifications to the current regulations. Accordingly, we begin by identifying **[**15]** some basic CEQA principles, before analyzing those alleged errors.

CEQA and the Board's Regulatory Program

HN1[↑] CA(1)[↑] **(1)** The Board is not subject to the full scope of CEQA. Rather, it utilizes its own regulatory **[***22]** program when adopting or amending standards for the **[*95]** protection of ambient air quality. This process is permitted under the law as a certified regulatory program. (See *Pub. Resources Code, § 21080.5*; Cal. Code Regs., tit. 14, §§ 15250–15252.) Such programs are exempt from certain procedural aspects of CEQA because "they involve 'the same consideration of environmental issues as is provided by use of EIRs and negative declarations.'" (POET, LLC v. State Air Resources Bd. (2013) 218 Cal.App.4th 681, 709 [160 Cal. Rptr. 3d 69] (*POET I*).) Certification of a program is effectively a determination that the agency's regulatory program includes procedures for environmental review that are the functional equivalent of CEQA. (Californians for Alternatives to Toxics v. Department of Pesticide Regulation (2006) 136 Cal.App.4th 1049, 1059 [39 Cal. Rptr. 3d 393].) "The practical effect of this exemption is that a state agency acting under a certified regulatory program need not comply with the requirements for preparing initial studies, negative declarations or EIR's. [Citations.] The agency's actions, however, remain subject to other provisions of CEQA." (POET I, supra, 218 Cal.App.4th at p. 710.)

HN2[↑] CA(2)[↑] **(2)** The Board's "regulatory program is contained in sections 60005, 60006 and 60007 of title 17 of the California Code of Regulations. These provisions require the preparation of a staff report at least 45 days before the public hearing on a proposed regulation, which report is required to be available for public review and comment. (Cal. Code Regs., tit. 17, § 60005, subd. (a).) It is [the Board's] **[***23]** policy 'to prepare staff reports in a manner consistent with the environmental protection purposes of [the Board's] regulatory program and with the goals and policies of [CEQA].' (Cal. Code Regs., tit. 17, § 60005, subd. (b).) The provisions of the regulatory program also address environmental alternatives and responses to comments to the environmental assessment. (Cal. Code Regs., tit. 17, §§ 60006, 60007.)" (POET I, supra, 218 Cal.App.4th at p. 710.)

Although the Board follows slightly different procedures, we analyze the Board's conduct for compliance with CEQA's policies and legal mandates. (POET I, supra, 218 Cal.App.4th at p. 711.)

General Standards of Review

HN3[↑] In reviewing an agency's compliance with CEQA during the course of its legislative or quasi-legislative actions, the trial court's inquiry during a

mandamus proceeding "'shall extend only to whether there was a prejudicial abuse of discretion,'" which is established "'if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.'" (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 426 [53 Cal. Rptr. 3d 821, 150 P.3d 709]* (*Vineyard*), quoting *Pub. Resources Code, **[*96]** § 21168.5*.) We apply the same standard when reviewing a substitute environmental document for a certified regulatory program. (*POET I, supra, 218 Cal.App.4th at pp. 712–713*; *California Sportfishing Protection Alliance v. State Water Resources Control Bd. (2008) 160 Cal.App.4th 1625, 1644 [73 Cal. Rptr. 3d 560]* (*California Sportfishing*).)

HN4[↑] "In evaluating an EIR [or substitute environmental document] for *CEQA* **[**16]** compliance, … a reviewing court must adjust **[***24]** its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." (*Vineyard, supra, 40 Cal.4th at p. 435*.) When the claim is predominantly one of procedure, courts conduct an independent review of the agency's action, but when a challenge is made to a factual finding of the agency, we will review the record to determine whether the finding is supported by substantial evidence. (*POET I, supra, 218 Cal.App.4th at p. 713*.) When the informational requirements of *CEQA* have not been met, an agency has failed to proceed in a manner required by law and has therefore abused its discretion. (*California Sportfishing, supra, 160 Cal.App.4th at p. 1644*.) In assessing such a claim, courts apply an independent or de novo standard of review to the agency's action. (*Communities for a Better Environment v. City of Richmond (2010) 184 Cal.App.4th 70, 83 [108 Cal. Rptr. 3d 478]*.)

On appeal, we review the agency's action rather than the trial court's ruling, applying the same standard as the trial court. (*Vineyard, supra, 40 Cal.4th at p. 427*.) "We therefore resolve the substantive *CEQA* issues … by independently determining whether the administrative record demonstrates any legal error by the [agency] and whether it contains substantial evidence to support the [agency's] factual determinations." (*Ibid.*)

The Board's Approval of the Modifications

HN5[↑] ***CA(3)***[↑] **(3)** Although the Board is not subject to the full extent **[***25]** of *CEQA* regulations when utilizing its certified regulatory program, it is subject to various *CEQA* principles relevant to its regulatory actions. One of these principles is the expectation that *CEQA* documents, and by extension *CEQA* compliant documents like the Board's staff report, "be considered *before project approval*." (*POET I, supra, 218 Cal.App.4th at p. 716*.) As explained in the *CEQA guidelines*, "public agencies shall not undertake actions concerning the proposed public project that would have a significant adverse effect or limit the choice of alternatives or mitigation measures, before completion of *CEQA* compliance." (*CEQA Guidelines,*[1] *§ 15004, subd. (b)*; **[*97]** see *Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 394 [253 Cal.Rptr. 426, 764 P.2d 278]* ["A fundamental purpose of an EIR is to provide decision makers with information they can use in deciding *whether* to approve a proposed project, not to inform them of the environmental effects of projects that they have already approved. If postapproval environmental review were allowed, EIR's would likely become nothing more than *post hoc* rationalizations to support action already taken."].) The Board is subject to this same timing requirement. (*POET I, supra, 218 Cal.App.4th at p. 717* ["[W]e conclude that certified regulatory programs, while exempt from certain requirements of *CEQA*, are not exempt from the timing

[1] "CEQA Guidelines" refers to the regulations that implement CEQA and are set forth in California Code of Regulations, title 14, section 15000 et seq.

requirement **[***26]** in *Guidelines section 15004*."].)

The parties dispute whether the Board satisfied this timing requirement. According to respondents, the Board took two distinct steps that committed it to a definite course of action with respect to the **[**17]** proposed modifications. First, respondents contend the Board violated *CEQA* when its staff issued regulatory advisory 13-28 in November 2013. Respondents argue the Board necessarily limited its choice of alternatives or mitigation measures and committed itself to a definite course of action on the modifications when it issued an advisory telling fleet owners they could "'report and ***take advantage of*** applicable anticipated regulatory changes.'" Second, respondents see a *CEQA* violation at the time the Board first approved the amendments at the April 25, 2014, meeting. Respondents posit that the Board's *CEQA* review was not complete, according to regulatory rules, until the Board filed a notice of decision, which did not occur until November 2014, and that the approval in April 2014 included language demonstrating the environmental review was ongoing.

The Board disagrees. With respect to its conduct in issuing the regulatory advisory, the Board argues the advisory itself **[***27]** was not a project and did not bind the Board to adopting the proposed amendments or preclude consideration of alternatives. Rather, the Board states that it "was simply allowing vehicle owners an opportunity to report their intent to use amended provisions if they became available and be eligible for some delay in enforcement, if they reported that intent," conduct the Board contends is perfectly acceptable given its inherent discretion "to determine where, when, and how to utilize its enforcement resources." It further suggests any error at this stage is "moot and irrelevant because by the time the writ petition was filed, [the Board] did in fact conduct the full *CEQA* review of the proposed regulatory modifications." On the matter of its April 2014 approval, the Board's position is that it met all *CEQA* requirements prior to the April 2014 approval and that respondents are mistaking routine boilerplate language in its notice of approval for an admission that further environmental review was applicable. **[*98]** The Board asserts no further *CEQA* analysis was required after that point and further meetings were held only to comply with certain requirements of the *APA*.

[*28]** *The Board Violated CEQA by Approving a Project Too Early*

CA(4)[↑] **(4)** We begin with analyzing the Board's conduct when issuing the regulatory advisory. We ultimately find this action constituted the approval of a project under *CEQA*. Contrary to the framework of the Board's arguments, the project in this instance was not the advisory, but the proposed regulatory modifications. The Board's issuance of a public regulatory advisory stating that fleet operators could take advantage of the proposed regulatory modifications before they were enacted, and would not be subject to enforcement actions or penalties if those modifications were not enacted, is sufficient conduct to constitute approval of those regulations under *CEQA*. As the required environmental review was incomplete at the time of the *CEQA* project approval, the Board violated *CEQA*'s timing requirement.

HN6[↑] ***CA(5)***[↑] **(5)** A project is a broad concept under *CEQA* that asks whether certain entities' activities "'may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.'" (*Friends of the Sierra Railroad v. Tuolumne Park & Recreation Dist. (2007) 147 Cal.App.4th 643, 653 [54 Cal. Rptr. 3d 500]*.) Analogous to this case, "[t]his means that agency action approving or opening the way for a future development can be part of a project and can trigger **[***29]** *CEQA* even if the action takes place prior to planning or approval of all the specific features of the planned development." (*Id. at p. 654*.) **[**18]** This "opening the way" can

trigger CEQA where it constitutes an approval.

CA(6)[↑] **(6)** Although we agree with the Board that issuing the regulatory advisory itself did not constitute a project, this does not end our inquiry. HN7[↑] The modification of current regulations may constitute a project. (*POET, LLC v. State Air Resources Bd. (2017) 12 Cal.App.5th 52, 73–74 [218 Cal. Rptr. 3d 681]* (*POET II*).)

Prior to issuing the regulatory advisory, staff identified proposed modifications to the current framework of the regulations, modifications it called a comprehensive compliance strategy. The Board and its staff then indicated their intent not to prosecute those that failed to comply with the current controlling regulations if they identified their intent to comply with the expected proposal. The potential modifications were sufficiently detailed to allow staff to indicate they would quickly present modifications based on their presented outline to the Board and could rely on that outline as a basis for choosing not to enforce the present regulations. Such a plan is certainly **[*99]** detailed enough to constitute a project which cannot be approved without CEQA compliance. **[***30]** (See *Save Tara v. City of West Hollywood (2008) 45 Cal.4th 116, 130 [84 Cal. Rptr. 3d 614, 194 P.3d 344]* (*Save Tara*) [noting an EIR may not "be delayed beyond the time when it can, as a practical matter, serve its intended function of informing and guiding decision makers"].) Thus, under CEQA's timing requirement, we must consider whether the Board improperly approved this project prior to the completion of the required environmental analysis.

CA(7)[↑] **(7)** While the Board contends no project approval could exist prior to the formal approval from the Board, this is not correct. HN8[↑] An approval under CEQA is "the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person." (*CEQA Guidelines, § 15352, subd. (a)*.) "Generally speaking, an agency acts to approve a proposed course of action when it makes its earliest firm commitment to it, not when the final or last discretionary approval is made." (*North Coast Rivers Alliance v. Westlands Water Dist. (2014) 227 Cal.App.4th 832, 859 [174 Cal. Rptr. 3d 229]*, italics omitted.) Approvals under CEQA, therefore, are not dependent on "final" action by the lead agency, but by conduct detrimental to further fair environmental analysis.

Our Supreme Court provided an extensive analysis of this principle with respect to public/private development agreements in *Save Tara.* In that case, the city council for West **[***31]** Hollywood entered into a development agreement that was contingent on later CEQA review and other regulatory approvals. (*Save Tara, supra, 45 Cal.4th at pp. 123–124*.) The court found this agreement violated CEQA's timing requirement, noting in its analysis that the agreement included a loan not conditioned on CEQA compliance, that the city had made several statements suggesting it was committed to the project (*Save Tara, supra, at pp. 140–142*), and that the "[c]ity [had] proceeded with tenant relocation on the assumption the property would be redeveloped as in the proposed project" (*id. at p. 142*).

CA(8)[↑] **(8)** In its discussion regarding the general principles of CEQA's timing requirement, the Supreme Court explicitly rejected the city's argument that approval could not occur until the relevant agency entered into an unconditional agreement irrevocably vesting development rights. (*Save Tara, supra, 45 Cal.4th at p. 134*.) In language pertinent to this case, the court noted it **[**19]** had previously found approval "even though further discretionary governmental decisions would be needed before any environmental change could occur" (*ibid.*) and explained that limiting approval to unconditional agreements would ignore situations where bureaucratic and financial momentum had built irresistibly behind a proposed project, creating a strong **[***32]** incentive to ignore environmental concerns. (*Id. at p. 135*.) Notably, however, the court also **[*100]** rejected the idea that any

agreement, conditional or not, would constitute approval, stating specifically that ***HN9***[↑] approval "cannot be equated with the agency's mere interest in, or inclination to support, a project, no matter how well defined." (*Id. at p. 136*.) Balancing these positions, the court concluded the proper test for determining whether a project had been prematurely approved was whether the agency had taken any action that significantly furthered a project "'in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of *CEQA* review of that public project,'" including "the alternative of not going forward with the project." (*Id. at pp. 138–139*.) The court instructed reviewing courts to look "not only to the terms of the agreement but to the surrounding circumstances" when making this determination. (*Id. at p. 139*.)

The core principles set forth in *Save Tara* equally apply to public regulatory action, such as the proposed amendments at issue here. (*POET I, supra, 218 Cal.App.4th at p. 719*.) While the facts shedding light on the agency's rulemaking process will be different from those arising when an agency approves a development agreement, such differences **[***33]** are immaterial to the core issue whether the agency has taken any steps foreclosing alternatives, including that of not going forward, or has otherwise created bureaucratic or financial momentum sufficient to incentivize ignoring environmental concerns.

Under that standard, we conclude the Board did take action that significantly furthered the proposed regulations in a manner that foreclosed the alternative of not modifying the regulations. As the Board notes in its briefing, it was updated on issues regarding full implementation of the existing regulations in October 2013. At that time it was informed compliance was required by January 1, 2014, and that many small fleets were facing economic challenges in meeting this deadline. In response to this information, the Board directed its staff to propose modifications to the regulations. While such conduct certainly built momentum behind a change to the regulations, such momentum was well in line with *Save Tara*'s reminder that agencies may express interest in or even inclination toward proposed projects.

However, shortly after providing those instructions, staff responded, in November 2013, with draft modifications and an advisory to the **[***34]** public regarding the proposal. While the advisory informed the public that further action by the Board was necessary to implement any changes, and warned that the Board and staff may propose amendments, it expressly stated that, should modifications occur that "impact a fleet's ability to comply with the regulation, [the Board's] staff will provide fleets that have reported their intent to use these options additional time beyond the Board's April 2014 meeting to come into compliance." Thus, at the point of the November 2013 **[*101]** advisory, the Board, through its staff's statements, had confirmed it intended to change the current regulations and that it would not prosecute any fleet **[**20]** operator that failed to comply with those 2014 regulations between January 1, 2014, and the April 2014 board meeting. In related public comments, members of the Board were already expressing their gratitude for the forthcoming "flexibility" to the regulations.

We conclude such conduct qualifies as approval of the modified regulations under *CEQA*. While the Board had previously expressed an inclination to modify the regulations, its advisory made clear that, at some level, changes were coming. It thus put substantial **[***35]** momentum behind supporting the changes offered by staff, as written, even if it retained a stated authority to modify those recommendations. This momentum was further buttressed by an express and public confirmation that the regulations as currently drafted would not be enforced. This expression of intent wholly precluded any potential "not going forward" option, as even if the Board found a reason not to make changes it would have already delayed implementation of the regulations as written by at least four months, thereby ensuring that at least

some reduction in environmental impact under the pending regulations would not occur.

The Board argues that such a conclusion cannot stand because the Board was merely exercising its well-settled powers of prosecutorial discretion with respect to regulatory enforcement. Noting there is no case law on record suggesting the Board's "exercise of its prosecutorial discretion is constrained by CEQA," the Board argues there "is no evidence in the record that this temporary forbearance was likely to have any impact on the environment or otherwise constituted a project under CEQA." This argument is fundamentally flawed. Our conclusion in this matter **[***36]** does not add new limits to the Board's exercise of prosecutorial discretion, rather it enforces the limits CEQA places on all Board actions that approve projects under that overarching law. This is no different than occurred in *Save Tara*, where the agency was utilizing its uncontested authority to enter into contracts but did so in a manner that improperly approved a project under CEQA. (*Save Tara, supra, 45 Cal.4th at p. 140*.) It is, likewise, no different from how the board prematurely approved the low carbon fuel standard in *POET I* even though the board-approved modifications were subject to further comment and potential change. (*POET I, supra, 218 Cal.App.4th at pp. 722–726*.) In all such cases, there is no curtailment to the agency's ability to use a power generally. Rather, the law requires the agency to consider when it can properly use that power such that it does not purposefully or inadvertently sidestep the mandatory provisions of CEQA.

CA(9)[↑] **(9)** As the Board cited in its own briefing, HN10[↑] "[a] decision to devote available facilities and personnel to selected areas and to abstain from active **[*102]** pursuit of others is a policy or planning decision at a relatively high internal level." (*Roseville Community Hosp. v. State of California (1977) 74 Cal.App.3d 583, 590 [141 Cal. Rptr. 593]*.) To ignore the impact of such a high-level policy decision in analyzing approval under **[***37]** CEQA would directly contradict our Supreme Court's guidance in *Save Tara* to review not only the specific actions taken but also the surrounding circumstances when considering approval of a project. (*Save Tara, supra, 45 Cal.4th at p. 139*.) Whether such additional circumstances have any independent impact on the environment or otherwise constitute a project is a true red herring. The sole question under the law is whether some action constituted approval of a CEQA project. The project here is the ultimate modification of the regulations. **[**21]** Thus, the only relevant question is whether the Board took meaningful steps in support of that project, thereby foreclosing alternatives. As noted above, in this case we conclude such steps were taken prior to the Board conducting its environmental analysis, violating CEQA.[2]

Remedy for Early Approval

HN11[↑] CA(10)[↑] **(10)** "Directing an agency to void its approval of the project is a typical remedy … for a CEQA violation." (*POET I, supra, 218 Cal.App.4th at p. 759*.) This is what the mandate issued by the trial court ordered, along with a direction that the Board "comply with CEQA and the APA before taking any further action to approve, implement or enforce the 2014 Amendments." The parties do not dispute that affirming the trial court **[***38]** supports voiding the approval of the modifications under CEQA. However, the Board raised as an issue whether it would be required to prepare the functional equivalent of an EIR under the trial court's final statement of decision.

We conclude that, to the extent the trial court intended to specifically order the preparation of the functional equivalent of an EIR, it erred. We note,

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[2] Having concluded the Board improperly approved this CEQA project at the time it issued its regulatory advisory, we do not further consider whether its actions on April 25, 2014, also prematurely approved the modifications. Further, we need not reach whether improper piecemeal review occurred, as the initial approval was improper standing alone.

however, that the court's actual judgment imposes no direct requirement to do so. We consider this issue, however, based on the parties' competing interpretations.

HN12[↑] CA(11)[↑] **(11)** Public Resources Code section 21168.9 controls the court's authority when crafting a remedy for CEQA violations. (Berkeley Hillside Preservation v. City of Berkeley (2015) 60 Cal.4th 1086, 1121 [184 Cal. Rptr. 3d 643, 343 P.3d 834] (*Berkeley Hillside Preservation*).) Under this statute, upon finding a CEQA violation, "a court should enter an order that includes (1) a mandate that the decision be voided in whole or in part, and/or (2) a mandate that the **[*103]** agency 'take specific action as may be necessary to bring the … decision into compliance with' CEQA." (Berkeley Hillside Preservation, supra, at p. 1121.) However, "subdivision (c) of [Public Resources Code] section 21168.9 provides in part that '[n]othing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way.'" (Id. at p. 1122.) Thus, where no discretion remains for the agency, courts have properly **[***39]** instructed them to prepare an EIR when required. (Id. at p. 1121; see Save Tara, supra, 45 Cal.4th at p. 143.) However, where the agency retains discretion on how to proceed under CEQA despite its previous violations, it may exercise that discretion on remand. (Berkeley Hillside Preservation, supra, 60 Cal.4th at p. 1122.) Thus, courts can order an EIR only where, under the circumstances of that case, the agency lacks discretion to proceed in a different fashion. (*Ibid.*)

In this case, we do not believe the Board lacks discretion to act in compliance with CEQA without generating the functional equivalent of an EIR.[3] As the Board **[**22]** notes, it may choose to revert to the prior regulatory scheme, effectively choosing the no project option. In addition, in light of its analysis of the errors identified below, it remains possible the Board could issue something similar to a mitigated negative declaration or could modify the regulations in a manner that avoids the environmental impacts identified by respondents. The trial court's judgment accounts for this possibility, simply directing the Board to comply with CEQA and the APA as it exercises its discretion moving forward. We affirm that understanding of the judgment.

The Board's Choice of a Baseline

Although the Board's early approval requires that we void **[***40]** approval of the contested modifications, as we have noted the Board may continue to pursue those or similar modifications. As such, we turn to the actual environmental analysis completed to determine whether it ultimately complied with CEQA. In this review, the parties first dispute whether the Board adopted a baseline determination of the environmental conditions absent the proposed project that is consistent with CEQA.

Standards of Review and Applicable Law

HN13[↑] The baseline determination is an important component of the CEQA process, as it sets the criterion by which the agency determines whether the **[*104]** proposed project has a substantial adverse effect on the environment. (POET II, supra, 12 Cal.App.5th at p. 78.) We review de novo whether an agency has chosen to rely upon a standard that is consistent with CEQA. (Communities for a Better Environment v. South Coast Air Quality Management Dist. (2010) 48 Cal.4th 310, 319 [106 Cal. Rptr. 3d 502, 226 P.3d 985] (*Communities*); Center for Biological Diversity v. Department of Fish & Wildlife (2015) 62 Cal.4th 204, 219 [195 Cal. Rptr. 3d 247, 361 P.3d 342] (*Center for Biological Diversity*).) Once

[3] We accept the Board's concession that it is obligated to proceed to the functional equivalent of an EIR if it "decided to re-adopt the amendments without any modifications using the exact same record." Moreover, in light of the errors identified below, we do not agree that the Board's later approval of the modifications permits us to overlook any other errors in this case. (See POET I, supra, 218 Cal.App.4th at pp. 759–760.)

that standard is set, "an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence." (Communities, supra, 48 Cal.4th at p. 328; see Neighbors for Smart Rail v. Exposition Metro Line Construction Authority (2013) 57 Cal.4th 439, 449 [160 Cal. Rptr. 3d 1, 304 P.3d 499] (*Neighbors*).)

The Board Selected an Appropriate Baseline

CA(12)[↑] **(12)** The arguments presented **[***41]** on appeal walk a tightrope between the two standards of review noted above. Both parties agree, consistent with the case law, HN14[↑] the Board should normally adopt as a baseline "the physical environmental conditions in the vicinity of the project, as they exist … at the time the environmental analysis is commenced … ." (CEQA Guidelines, § 15125; see Communities, supra, 48 Cal.4th at p. 321 ["[T]he impacts of a proposed project are ordinarily to be compared to the actual environmental conditions existing at the time of CEQA analysis, rather than to allowable conditions defined by a plan or regulatory framework."].) However, according to respondents, the Board "did not employ this standard to its environmental analysis" because it "created a fictional universe in which the Existing **[**23]** Regulations did not exist," measuring the current environment without regard to expected reductions in future pollution based on the existing regulations.

Regardless of where the arguments fall specifically, we do not agree with respondents that the Board either adopted a baseline that was inconsistent with CEQA or erroneously measured the existing conditions by excluding future expected declines. Rather, we conclude the Board was within its discretion to adopt a baseline **[***42]** calculation that measured the current environment without further reducing figures based on regulations that should have taken effect during the course of the analysis.

CA(13)[↑] **(13)** *Communities* provides strong support for our conclusion. Like our case, *Communities* involved an agency issuing a negative declaration. However, in that case, the declaration arose because the baseline chosen for the project was the operation of certain boilers at their full permitted operational levels, despite the fact simultaneous maximum operation was not a realistic **[*105]** description of the existing conditions at the time. (Communities, supra, 48 Cal.4th at p. 322.) As we noted above, the Supreme Court explained "that HN15[↑] the impacts of a proposed project are ordinarily to be compared to the actual environmental conditions existing at the time of CEQA analysis, rather than to allowable conditions defined by a plan *or regulatory framework*." (Id. at p. 321, italics added.) This was so because "[a]n approach using hypothetical allowable conditions as the baseline results in 'illusory' comparisons that 'can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts,' a result at direct odds with CEQA's intent." (Id. at p. 322.)

CA(14)[↑] **(14)** In line **[***43]** with Communities, the administrative record in this case demonstrates that full compliance with the existing regulatory standards would also create an illusory comparison. The record basis for proposing a delay in the regulatory mandates was the recognized fact that limitations in credit and capital had left many small fleet operators unable to comply with the standards as written. There were many who had not yet complied and it takes no unrealistic inference to recognize that future emissions estimates based on full compliance would mislead the public as to the effectiveness of the current regulations. Indeed, the natural unevenness in implementation and enforcement of regulations means regulatory expectations based on full compliance are rarely likely to accurately identify the current environmental conditions relating to those regulations. Nor should such predictions be used. HN16[↑] CEQA is not meant to stand as a barrier to appropriate modifications to environmental

regulations, whether they tighten or loosen existing regulations, provided the lead agency properly informs the public of the effects of those modifications and no significant environmental impact will arise. (See *Neighbors, supra, 57 Cal.4th at p. 453* [noting **[***44]** the primary purpose an EIR is to provide "'public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment'"].) Respondents' insistence that current existing conditions must account for those trucks that should comply with regulations in the future, but as of yet have not, suffers from the same flaw as the decision in *Communities* to rely on permitted standards that have not been utilized previously, differing only in whether the decision artificially inflates or deflates the appropriate baseline. Both metrics assume future potential **[**24]** conditions rather than evaluate the actual current environmental conditions.

Although respondents seek to distinguish *Communities* in the context of this argument, they do so by arguing the trial court "found that the '"existing conditions" included the [Existing Regulations], and the emissions reductions that could be expected from enforcement of that regulation.'" This argument adds no weight to respondents' position. We do not review the trial court's action, nor do we defer to the trial court's findings in these matters. (*Center for Biological Diversity, supra, 62 Cal.4th at p. 215* ["In determining whether **[*106]** there has been an abuse **[***45]** of discretion, we review the agency's action, not the trial court's decision."].) As our analysis of *Communities* shows, existing conditions do not properly include expected regulatory reductions. Including such predictions in the baseline adds a potential for gamesmanship and misdirection to the analysis and creates a scenario whereby the relevant conditions are no longer statically defined or tied to the existing circumstances at the beginning of the review.

Likewise, we find substantial evidence supports the Board's decision to measure current existing conditions without reference to future expected reductions based on existing regulations. As a matter of logic, future expected reductions are not inherently relevant to a measurement of existing conditions in the same way that constantly fluctuating conditions, such as existed in *Communities, supra, 48 Cal.4th at pages 327–328*, would be to ensuring decision makers are provided adequate information on the project's impacts. Thus, the Board was within its discretion to determine reliance on such factors when measuring the baseline was not proper. Moreover, the record before us demonstrates that these expected reductions were already in jeopardy due to financial costs associated with **[***46]** upgrading existing vehicles not in compliance and the continued issues with availability of capital for small fleets following the global recession. The Board was considering alternatives to the regulations based on this evidence and we conclude such information constitutes substantial evidence supporting the Board's decision to measure based exclusively on current outputs.

Ultimately, we take no issue with respondents' statement that "[p]lainly, the 'existing environmental conditions' include applicable laws and regulations," but such a recitation does not prove the error respondents pursue. By adopting as a baseline the current environmental conditions, the Board did take into account the applicable laws and regulations as they had affected the environment to that point in time. Indeed, the initial report noted in appendix F the many ways the Board updated its analysis to determine the most current environmental conditions. That the Board properly exercised its discretion when not adjusting its baseline to include speculative future reductions based on expected implementations under those laws and regulations does not mean those laws and regulations were retroactively excluded from the Board's **[***47]** baseline analysis. We find no error in this methodology.

Possibility the Project Will Substantially Impact the Environment

Having determined the Board adopted a proper baseline, we next consider whether respondents produced any evidence supporting a fair argument that the project would have a substantial impact on the environment. In doing so, we take up respondents' related argument concerning how CEQA Guidelines, **[*107]** section 15125, subdivision (e) impacts the Board's decision **[**25]** not to consider a temporary increase in pollutants significant. Although we conclude the Board properly determined there would be no substantial impact on the environment under the significance standards it chose to apply, we find a fair argument exists that the project will impact the environment in the short term. We further recognize the Board may not rotely apply standards of significance that do not address that potential effect once evidence of the risk has been identified. Accordingly, we conclude the Board abused its discretion in issuing the functional equivalent of a negative declaration.

The parties' dispute with respect to this issue centers on the criteria relied upon by the Board to assess whether any alleged impacts on the environment **[***48]** from modifying the regulation are significant. According to the Board, the modifications had no substantial impact under two different analyses. First, when measured against the current output of pollutants, the Board found that implementing the amendments would result in a continual decrease in pollutant output. Thus, at no point would the regulations result in an absolute increase in pollutants. Second, when compared to California's long-term air pollution reduction plans, the Board found implementation of the amendments resulted in a slower projected decrease in pollutants but that this slower pace would have no impact on California's ability to meet its 2023 emission goals. Respondents do not directly attack these findings. Rather, respondents contend a fair argument exists that three types of pollutants, oxides of nitrogen, particulate matter, and greenhouse gases, will increase in the short term over the measurements that would have existed had the original regulations remained in place. Respondents claim these increases are significant, both at a local and statewide level.

Standard of Review and Applicable Law

HN17[↑] CA(15)[↑] **(15)** "'CEQA excuses the preparation of an EIR and allows the use of a negative **[***49]** declaration when an initial study shows that there is no substantial evidence that the project may have a significant effect on the environment.'" (Rominger v. County of Colusa (2014) 229 Cal.App.4th 690, 713 [177 Cal. Rptr. 3d 677] (*Rominger*).) Thus, one of the critical first steps in CEQA "is to determine whether the project *may* have a significant effect on the environment." (Protect the Historic Amador Waterways v. Amador Water Agency (2004) 116 Cal.App.4th 1099, 1106 [11 Cal. Rptr. 3d 104] (*Amador Waterways*); see Pub. Resources Code, § 21082.2, subd. (d).)

CA(16)[↑] **(16)** As the CEQA Guidelines explain, HN18[↑] if "there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment, the agency shall prepare a draft EIR." (CEQA Guidelines, § 15064, subd. (a).) "An ironclad definition of significant **[*108]** effect is not always possible because the significance of an activity may vary with the setting." (Id., subd. (b).) With respect to greenhouse gases, lead agencies "should consider the following factors, among others, when assessing the significance of impacts from greenhouse gas emissions on the environment: [¶] (1) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting; [¶] (2) Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project[;] [¶] (3) The extent **[***50]** to which the project complies with regulations or requirements adopted to implement a statewide,

regional, or local plan for the reduction or mitigation of greenhouse gas emissions. … If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable **[**26]** notwithstanding compliance with the adopted regulations or requirements, an EIR must be prepared for the project." (*CEQA Guidelines, § 15064.4, subd. (b)*.) More generally, ***HN19***[⬆] agencies are encouraged to develop thresholds of significance to use in determining whether a project has significant environmental effects. "A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant." (*CEQA Guidelines, § 15064.7, subd. (a)*.)

HN20[⬆] ***CA(17)***[⬆] **(17)** Despite the encouragement to develop thresholds of significance and to consider environmental impacts against certain standards, such comparisons "cannot be used to determine automatically whether a given effect will or will not be significant. … In each **[***51]** instance, notwithstanding compliance with a pertinent threshold of significance, the agency must still consider any fair argument that a certain environmental effect may be significant." (*Amador Waterways, supra, 116 Cal.App.4th at pp. 1108–1109*.) In other words, "[a] lead agency cannot avoid finding a potentially significant effect on the environment by rotely applying standards of significance that do not address that potential effect." (*Rominger, supra, 229 Cal.App.4th at p. 717*.) Thus, if one can point to substantial evidence in the record that a project might constitute a significant effect on the environment notwithstanding the agency's applied standard of significance, then the agency cannot avoid its obligation to prepare an EIR by rotely relying on its standard. (*Ibid.*)

HN21[⬆] In reviewing an agency's decision to adopt a negative declaration, courts utilize the same fair argument test applied by the agency. (*Rominger, supra, 229 Cal.App.4th at p. 713*.) "The fair argument standard is met if the agency's initial study of the project produces *substantial evidence supporting a fair argument that the proposed project may have a significant adverse effect on the environment*." (*Citizens for the Restoration of L Street v. City of Fresno (2014) 229 Cal.App.4th 340, 364 [177 Cal. Rptr. 3d 96]*.) "The fair **[*109]** argument standard is a low threshold." (*Ibid.*) We review this issue independently. (*Rominger, supra, 229 Cal.App.4th at p. 713*.)

The Board Ignored a Fair Argument in This Case

In challenging **[***52]** the Board's decision in this case, respondents needed "to '"demonstrate by citation to the record the existence of substantial evidence supporting a fair argument of significant environmental impact."'" (*Rominger, supra, 229 Cal.App.4th at p. 727*.) With respect to oxides of nitrogen, particulate matter, and greenhouse gases, respondents point to specific data in the initial statement showing that each would increase across California under the amended regulations when compared to the then-existing regulations. Respondents further point to evidence the increases identified are significant on a statewide basis and with respect to specific geographical areas.[4]

[27]** The Board does not directly tackle these alleged increases in its briefing.[5] Rather, in its

[4] For oxides of nitrogen, respondents point to evidence the change will increase emissions by five tons per day in 2014 and 21 tons per day in 2017. Respondents compare these figures to the significance standard of 10 tons per year for projects in the San Joaquin Valley and claim they would constitute over 2 percent of statewide on-road mobile sources of emissions in 2017. For particulate matter, respondents compare a 1.1-ton-per-day increase in 2017 with the 15-ton-per-year significance standard in the San Joaquin Valley and claim the increase could account for 1.4 percent of statewide on-road motor vehicle emissions. For greenhouse gases, respondents focus on black carbon emissions and argue the short-term increase identified is nearly 1 percent of the statewide daily greenhouse gas inventory.

[5] The initial statement does seem to consider a five-ton-per-day

opening brief, the Board recognizes that it found emissions are projected to decline at a slower pace between 2015 and 2017, with the overall decrease being nearly identical by 2018. It then concedes, "this comparison *could* show the potential for a lower rate of reductions, and thus, an unrealized emissions benefit," before, without citation to the record, arguing "the emissions reductions as projected in 2010 were no longer valid and reliable to use as a baseline in 2014." In reply, **[***53]** it further attempts to tie its baseline determination to the significance issue by arguing that "in erroneously finding [the Board] used the incorrect baseline, the trial court improperly found a 'fair argument.'" (Boldface & some capitalization omitted.) Ultimately, the Board's argument is that the evidence supports the Board's "finding of no significant impacts because the 2014 amendments result in the **[*110]** same emissions reductions in 2023 allowing California to meet its State Implementation Plan, which is the primary objective of the Truck and Bus Regulation."

As noted above, the Board cannot simply rely on its settled baseline determination and factors of significance in the face of substantial evidence the project might have a significant impact on the environment. (*Rominger, supra, 229 Cal.App.4th at p. 717*.) While the Board could reasonably rely on either the direct reduction in emissions or the ultimate compliance with California's air pollution reduction goals when conducting its initial study (see *Center for Biological Diversity, supra, 62 Cal.4th at p. 223*), its reliance on these significance standards did not alleviate it from its obligation to proceed further if respondents identified evidence in the record suggesting the project may significantly impact the environment under **[***54]** different standards.

Here, we find respondents did just that. Although respondents raise the issue in the context of determining a proper baseline, they correctly note that under the *CEQA Guidelines* the Board is obligated to discuss "inconsistencies between the proposed project and applicable general plans, specific plans and regional plans," including the state implementation plan (reflecting the state's long-term air pollution reduction goals) and plans for the reduction of greenhouse gas emissions in any EIR's generated. (*CEQA Guidelines, § 15125, subd. (d)*.) In its initial statement, the Board provides information regarding such a comparison, although it finds no inconsistency in the long term. It is this same evidence that respondents cite to for their "fair argument." While the Board may disagree with the conclusions drawn by respondents regarding the short- to medium-term impacts, the evidence is sufficient to require the Board to make that disagreement public through the equivalent of an **[**28]** EIR, where such a comparison is generally required. (See *Neighbors, supra, 57 Cal.4th at p. 455* ["Though we might rationally choose to endure short- or medium-term hardship for a long-term, permanent benefit, deciding to make that tradeoff requires some **[***55]** knowledge about the severity and duration of the near-term hardship."].) The Board's failure to acknowledge and act upon this fair argument violated *CEQA*.

Contentions Under the APA

Although we find the modified regulations cannot stand under *CEQA*, the parties also dispute whether the Board properly complied with the *APA*'s provisions regarding the need to assess certain potential adverse economic impacts arising from the modifications. The trial court found the Board did not proceed according to the *APA*'s requirements in conducting its analysis and responding to community comments. We reach this issue because proper compliance with the *APA* will be required should the Board further pursue **[*111]** regulatory modifications. On this point, we

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increase in oxides of nitrogen in 2017 within the San Joaquin Valley, concluding "emissions would remain at or below the level that would provide for attainment by 2017" resulting in "no expected impact on 1-hour ozone SIP [State Implementation Plan] for the San Joaquin Valley." The statement seems to also consider black carbon impacts. However, the Board makes no argument these analyses correspond to respondents' positions or otherwise supports the Board's conduct.

received amicus curiae briefing from a coalition of 10 business and industry organizations interested in the proper application of the APA's economic impact analysis requirements.[6]

Relevant APA Principles

CA(18)[↑] **(18)** Born from a perception that "'there existed too many regulations imposing greater than necessary burdens on the state and particularly upon small businesses,'" HN22[↑] the APA provides a procedural vehicle to review proposed regulations or modifications thereto in order to "'advance **[***56]** "meaningful public participation in the adoption of administrative regulations by state agencies" and create "an administrative record assuring effective judicial review."'" (*Western States Petroleum Assn. v. Board of Equalization (2013) 57 Cal.4th 401, 425, 424 [159 Cal. Rptr. 3d 702, 304 P.3d 188]* (*Western States*).) In other words, the APA establishes basic minimal procedural requirements for rulemaking in California. (*POET I, supra, 218 Cal.App.4th at p. 743*.) "Pursuant to those procedural requirements, agencies must, among other things, (1) give the public notice of the proposed regulatory action; (2) issue a complete text of the proposed regulation with a statement of reasons for it; (3) give interested parties an opportunity to comment on the proposed regulation; (4) respond in writing to public comments; and (5) maintain a file as the record for the rulemaking proceeding." (*Id. at pp. 743–744*.)

HN23[↑] As part of the initial disclosures required under step two, a rulemaking agency "must include '[f]acts, evidence, documents, testimony, or other evidence on which the agency relies to support an initial determination that the action will not have a significant adverse economic impact on business.'" (*Western States, supra, 57 Cal.4th at p. 425*.) The agency's initial statement is followed by a public comment period, after which, "if the agency decides to enact the regulation, it must prepare a 'final statement of reasons' **[***57]** for adopting the proposed rule, which must include '[a]n update of the information contained in the initial statement of reasons.'" (*Id. at p. 426*.) This final statement "must also include '[a] summary of each objection or recommendation made regarding the specific adoption, **[**29]** amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change.'" (*Ibid.*) This aspect of the procedures is referred to as the economic impact assessment requirement. (*Id. at p. 425*.)

Looking at this requirement more granularly, under *Government Code section 11346.5, subdivision (a)(8)*, "If a state agency, in adopting, amending, **[*112]** or repealing any administrative regulation, makes an initial determination that the action will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, it shall make a declaration to that effect in the notice of proposed action." Similarly, under *Government Code section 11346.3, subdivision (a)*, "A state agency proposing to adopt, amend, or repeal any administrative regulation shall assess the potential for adverse economic impact on California business enterprises and individuals, **[***58]** avoiding the imposition of unnecessary or unreasonable regulations or reporting, recordkeeping, or compliance requirements." *Section 11346.3* requires the agency to "prepare a standardized regulatory impact analysis," that "shall address" several factors including the "creation or elimination of jobs within the state," the "creation of new businesses or the elimination of existing businesses within the state," and the "competitive advantages or disadvantages for businesses currently doing business within the state." (*Id.,*

[6] Amici curiae have requested we take judicial notice of certain legislative documents reflecting the intent and purpose behind enacting the APA. The Board opposed taking notice of these documents and we deferred ruling on the request. Because we do not ultimately rely on the contested documents, we deny the motion as moot.

subd. (c)(1).)

HN24[↑] CA(19)[↑] **(19)** An agency's initial determination "'need not be conclusive, and the qualifying adjective "significant" indicates that the agency need not assess or declare *all* adverse economic impact[s] anticipated.'" (Western States, supra, 57 Cal.4th at p. 428.) Similarly, "an agency's initial determination of economic impact need not exhaustively examine the subject or involve extensive data collection. The agency is required only to 'make an initial showing that there was some factual basis for [its] decision.'" (Id. at p. 429.) Indeed, "a regulation will not be invalidated simply because of disagreement over the strict accuracy of cost estimates on which the agency relied to support its initial determination." (*Ibid.*) Once the initial **[***59]** assessment is complete, "affected parties may comment on the agency's initial determination and supply additional information relevant to the issue." (*Ibid.*) The agency "must respond to the public comments and either change its proposal in response to the comments or explain why it has not." (*Ibid.*)

Standard of Review

HN25[↑] We review the Board's "initial determination to determine that the [Board] has substantially complied with its obligations, and whether it is supported by some substantial evidence." (California Assn. of Medical Products Suppliers v. Maxwell-Jolly (2011) 199 Cal.App.4th 286, 307 [131 Cal. Rptr. 3d 692].) Interpreting the relevant statutes to determine whether the Board has substantially complied with its obligations is a question of law to which we apply an independent standard of review. (POET I, supra, 218 Cal.App.4th at p. 748.)

In its briefing, the Board argues "[t]he standard of review for a purely procedural APA claim is not precisely clear" and, relying primarily on Yamaha **[*113]** Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1 [78 Cal. Rptr. 2d 1, 960 P.2d 1031] (*Yamaha*), argues its conduct **[**30]** fell within its regulatory and rulemaking authority and thus is subject to a deferential review where we accord the Board's decisions great weight and respect. Although there are circumstances where such a standard of review is applicable to the Board's conduct, it is not in review of APA procedural compliance issues. Indeed, we held **[***60]** so definitively in POET I, supra, 218 Cal.App.4th at pages 747–748, where we rejected this same argument and reliance on *Yamaha*. Contrary to the Board's arguments in response to amici curiae, *POET I* is not distinguishable simply because it dealt specifically with rules relating to maintaining the record file during rulemaking. As we noted in *POET I*, the procedures set forth in chapter 3.5, article 5 of the APA, which include not only the rulemaking file requirements but all the contested provisions in this case, govern "the adoption and amendment of regulations by state agencies" and "establish[] 'basic minimum procedural requirements' for rulemaking," the violation of which may result in the regulation being declared invalid. (POET I, supra, 218 Cal.App.4th at pp. 743–744.) Our conclusion in *POET I*, that we independently review and interpret the procedural requirements of the APA, controls.

We further note this conclusion comports with our Supreme Court's precedent in Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal.4th 557, 576–577 [59 Cal. Rptr. 2d 186, 927 P.2d 296], and Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 204–205 [149 Cal. Rptr. 1, 583 P.2d 744]. Both of those cases explained that an agency's decision to include non-APA compliant interpretations of legal principles in its regulations will not result in additional deference to the agency. Here, the Board claims its economic analysis resulted from its interpretation of how the APA's analytical process **[***61]** should be conducted—i.e., that the Board need only consider whether California companies will be harmed vis-à-vis competition with out-of-state companies. Although the Board attempts to rely on an approval of its economic analysis from the Department of Finance to claim its interpretation of the APA was proper, it

points to no formal regulation supporting its interpretation and, as respondents point out, the record itself provides no indication the Board's interpretation was even conveyed to the Department of Finance when it reviewed the Board's work. Even if within the realm of the Board's authority, which our conclusion in *POET I* demonstrates is not the case, such unstated and undeveloped interpretations do not comply with the *APA* and are entitled to no deference. (*Tidewater Marine Western, Inc. v. Bradshaw, supra, 14 Cal.4th at p. 576* ["'[T]o give weight to [an improperly adopted regulation] in a controversy that pits [the agency] against an individual member of exactly that class the *APA* sought to protect … would permit an agency to flout the *APA* by penalizing those who were entitled to notice and opportunity to be heard but received neither.'"].) **[*114]** Ultimately, review here is not fundamentally different from any other set of laws under which the Board **[***62]** must operate when engaged in its rulemaking activities, including *CEQA*.

The Board's Conduct Violated the APA

CA(20)[↑] **(20)** As detailed above, ***HN26***[↑] under the *APA*'s economic analysis requirements, the relevant agency must consider whether the regulation will have a significant statewide adverse economic impact directly affecting business. The Board's argument in support of its economic analysis under this standard centers on accepting the premise that the Board "interpreted this provision as requiring an analysis of the competitiveness **[**31]** of the whole California trucking industry relative to the industry outside the state." The Board contends it had no obligation under the *APA* to extend its analysis further, in part because the evidence offered of harm to certain trucking fleets was "speculative, and expressed the general sentiment that the truck fleets that had already complied would be at a financial disadvantage as compared to the truck fleets that had not yet complied."

We do not agree with the Board that the economic impact analysis requirements are so narrowly drawn. Nothing in the language of the relevant statutes suggests the economic interests relevant to the *APA* analysis are solely interstate interests. **[***63]** *Government Code section 11346.5* broadly requires consideration of "significant, statewide adverse economic impact[s] directly affecting business." (*Id., subd. (a)(8)*.) While it then references interstate impacts, it does so by adding them to the required analysis rather than limiting the analytical scope. (*Ibid.* ["including the ability of California businesses to compete with businesses in other states"].) Likewise, *Government Code section 11346.3* requires an analysis of several factors that are broadly drafted in a manner which does not suggest solely interstate impacts, such as the "creation of new businesses or the elimination of existing businesses within the state," and the "competitive advantages or disadvantages for businesses currently doing business within the state." (*Id., subd. (c)(1)*.) This later provision strongly suggests the Board must look at each type of business subject to the relevant proposals and consider whether those proposals will advantage or disadvantage that particular type, despite the source of those impacts being advantages the regulations bring to other in-state businesses. Finally, the *APA*'s general purpose of relieving stress on small businesses subject to unnecessary regulation further supports a broad reading of the **[***64]** required analysis. The desire to relieve burdens on small businesses necessarily entails a consideration of how those small businesses are impacted by regulations relative to larger in-state businesses that will not feel the impact of such regulations at the same scale. We further conclude the Board was not permitted under the statutory scheme to ignore evidence of **[*115]** impacts to specific segments of businesses already doing business in California when proceeding under the *APA*. If the Board's proposed regulatory amendments placed the state's thumb on the scale for one group of in-state businesses over another, it needed to consider that impact.

Notably, the Board's discussions in the relevant documents appear to recognize this requirement, despite its current arguments on appeal. When discussing expected changes in costs for particulate matter filter upgrades for heavier trucks, the initial statement explained "[l]ong-haul trucking fleets that are based in California or outside California do not compete in the same markets as vocational trucks and are affected differently because of their business model and type of truck used." Likewise, the initial **[***65]** statement, when discussing changes in costs for long-haul fleets, explained there may be potential differences in impact between large and small fleets, "fleet owners that have acted early or have downsized, and owners that cannot afford to comply." The initial statement also included a separate discussion of impacts on small businesses and took the time to recognize, although not analyze, the fact that there needed to be a balancing between the needs of compliant and noncompliant fleets.

We further recognize that evidence of in-state effects between compliant and noncompliant fleets was presented to the **[**32]** Board in the form of testimonials provided by impacted businesses. These testimonials informed the Board that significant expenditures had been required to comply with the previous compliance deadlines, that noncompliant fleets without those additional expenses were therefore able to undercut compliant fleets on pricing, and that providing additional time for those noncompliant fleets to meet the relevant standards under the modified regulations could result in substantial harm to some of those businesses, including bankruptcy. Such evidence is not mere speculation and in similar **[***66]** contexts, specific testimonial evidence from the public has been readily identified as substantial evidence supporting the need for a response. (See *Architectural Heritage Assn. v. County of Monterey (2004) 122 Cal.App.4th 1095, 1117–1118 [19 Cal. Rptr. 3d 469]* [discussing relevant evidence in *CEQA* fair argument context to include public testimony].) Accordingly, regardless of whether the Board was aware of such impacts at the time it made its initial report, it was made aware of them through the proper procedural mechanism of public comment and, as such, had an obligation to respond under the *APA*. (See *Western States, supra, 57 Cal.4th at p. 429* [explaining that, upon provision of proper comments from public, agency "must respond to the public comments and either change its proposal in response to the comments or explain why it has not"].)

The Board's responses to this evidence were insufficient under the *APA*. Although the Board appeared to respond to the comments received, its **[*116]** responses were not supported by any record evidence. For example, the Board alleged that it had considered issues of fairness and structured provisions in the modifications accordingly. Yet it argues the exact opposite on appeal—that it did not consider intrastate competition—and we have been pointed to no analysis in the administrative record showing the Board **[***67]** actually analyzed such impacts and acted in light of these concerns. As the *APA* requires the Board to explain why it chose not to make changes in the face of substantial evidence of impacts, unsupported assertions the evidence—neither actually collected nor reviewed by staff—was considered in drafting the regulations simply cannot satisfy the *APA*. In failing to properly respond to the comments regarding intrastate competition issues, the Board failed to abide by its obligations under the *APA* in either form or substance.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

Levy, Acting P. J., and Poochigian, J., concurred.

End of Document

N.C. Wildlife Fed'n v. N.C. DOT

United States Court of Appeals for the Fourth Circuit

March 21, 2012, Argued; May 3, 2012, Decided

No. 11-2210

Reporter
677 F.3d 596 *; 2012 U.S. App. LEXIS 9073 **; 42 ELR 20099; 74 ERC (BNA) 1705; 2012 WL 1548685

NORTH CAROLINA WILDLIFE FEDERATION; CLEAN AIR CAROLINA; YADKIN RIVERKEEPER, Plaintiffs-Appellants, v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; EUGENE CONTI, Secretary of the North Carolina Department of Transportation; FEDERAL HIGHWAY ADMINISTRATION; JOHN F. SULLIVAN, Division Administrator, Federal Highway Administration, Defendants-Appellees.

Subsequent History: Related proceeding at *Clean Air Carolina v. N.C. DOT, 2014 U.S. Dist. LEXIS 160407 (W.D.N.C., Nov. 14, 2014)*

Prior History: [1]** Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. (5:10-cv-00476-D). James C. Dever III, Chief District Judge.

N.C. Wildlife Fed'n v. N.C. DOT, 2011 U.S. Dist. LEXIS 123085 (E.D.N.C., Oct. 24, 2011)

Disposition: VACATED AND REMANDED.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN1[] **Standards of Review, Abuse of Discretion**

National Environmental Protection Act claims are subject to judicial review under the Administrative Procedure Act, which permits a reviewing court to set aside an agency action if the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *5 U.S.C.S. § 706(2)(A)*. This inquiry must be searching and careful, but the ultimate standard of review is a narrow one. A reviewing court must ensure that the agency has examined the relevant data and articulated a satisfactory explanation for its action, and must not reduce itself to a "rubber-stamp" of agency action.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN2[] **Natural Resources & Public Lands, National Environmental Policy Act**

The National Environmental Protection Act (NEPA) process includes a range of action-forcing procedures that require agencies to take a hard look at environmental consequences of a proposed action and to provide for broad dissemination of relevant environmental information. This process does not mandate particular substantive results, but merely prohibits uninformed—rather than unwise—agency action. By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct. Similarly, the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN3[] **Environmental & Natural Resources, Environmental Impact Statements**

At the heart of the National Environmental Protection Act (NEPA) is a requirement that for every major federal action significantly affecting the quality of the human environment, the agency involved must prepare a detailed environmental impact statement. This statement must assess, inter alia, (1) alternatives to the proposed action, and (2) the environmental impact of the proposed action. An agency's assessment of alternatives to the proposed action sharply defines the issues and provided a clear basis for choice among options by the decisionmaker and the public. *40 C.F.R. § 1502.14*. Agencies must rigorously explore and objectively evaluate all reasonable alternatives. *40 C.F.R. § 1502.14(a)*. Although agencies have discretion to identify the range of reasonable alternatives, they must include the alternative of no action. *40 C.F.R. § 1502.14(c)-(d)*. An agency's assessment of environmental impacts, in turn, is the scientific and analytic basis for the comparison of alternatives. *40 C.F.R. § 1502.16*. As part of this analysis, agencies must measure the indirect and cumulative environmental effects of proposed actions. *40 C.F.R. § 1502.16(a)-(b)*. Conclusory statements that the indirect and cumulative effects will be minimal or that such effects are inevitable are insufficient under NEPA.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN4[] **Natural Resources & Public Lands, National Environmental Policy Act**

National Environmental Protection Act (NEPA) procedures emphasize clarity and transparency of process over particular substantive outcomes. Accordingly, agencies violate NEPA when they fail to disclose that their analysis contains incomplete information. Such required up-front disclosures include relevant shortcomings in the data or models.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

HN5[] **Environmental & Natural Resources, Environmental Impact Statements**

The very purpose of public issuance of an environmental impact statement is to provide a springboard for public comment.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN6[] **Natural Resources & Public Lands, National Environmental Policy Act**

The National Environmental Protection Act (NEPA) requires that an agency's alternatives analysis include a "no build" alternative. *40 C.F.R. § 1502.14(d)*. Without accurate baseline data, an agency cannot carefully consider information about significant environment impacts, resulting in an arbitrary and capricious decision.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN7[] **Natural Resources & Public Lands, National Environmental Policy Act**

In the context of the National Environmental Protection Act, an agency's action must be upheld, if at all, on the basis articulated by the agency itself. The "basis articulated by the agency" is the administrative record, not subsequent litigation rationalizations.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN8[] **Natural Resources & Public Lands, National Environmental Policy Act**

The National Environmental Protection Act (NEPA) emphasizes the importance of an open and public environmental assessment process. NEPA guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Counsel: ARGUED: Frank S. Holleman, III, SOUTHERN ENVIRONMENTAL LAW CENTER, Chapel Hill, North Carolina, for Appellants.

Seth Morgan Wood, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina; Scott Thomas Slusser, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees.

ON BRIEF: Chandra T. Taylor, Kimberley Hunter, J. David Farren, SOUTHERN ENVIRONMENTAL LAW CENTER, Chapel Hill, North Carolina, for Appellants.

Roy Cooper, Attorney General, Raleigh, North Carolina, for Appellees North Carolina Department of Transportation and Eugene Conti, Secretary of the North Carolina Department of Transportation; Thomas G. Walker, United States Attorney, Raleigh, North Carolina, for Appellees Federal Highway Administration and John F. Sullivan, Division Administrator, Federal Highway Administration.

Judges: Before MOTZ, SHEDD, and AGEE, Circuit Judges. Judge Motz wrote the opinion, in which Judge Shedd and Judge Agee joined.

Opinion by: DIANA GRIBBON MOTZ

Opinion

[*598] DIANA GRIBBON MOTZ, Circuit Judge:

The North Carolina Department of **[**2]** Transportation and the Federal Highway Administration (collectively "the Agencies") recently approved construction of a new twenty-mile toll road in North Carolina linking Mecklenburg and Union Counties—the Monroe Connector Bypass. Seeking to enjoin construction of the toll road, the North Carolina Wildlife Federation, Clean Air Carolina, and Yadkin Riverkeeper (collectively "the Conservation Groups") filed this suit, contending that the process by which the Agencies approved the road violated the National Environmental Protection Act ("NEPA"). The district court granted summary judgment to the Agencies. The Conservation Groups now appeal. Because the Agencies failed to

disclose critical assumptions underlying their decision to build the road and instead provided the public with incorrect information, they did indeed violate NEPA. Accordingly, we must vacate the judgment of the district court and remand for further proceedings consistent with this opinion.

I.

We begin by recounting the undisputed facts and the procedural history of this case.

A.

In 2007, after a number of failed attempts, the North Carolina Department of Transportation again proposed construction of the Monroe Connector **[**3]** Bypass (hereinafter "the Monroe Connector") and, under the Federal Highway Administration's supervision, commenced the environmental assessment process required by NEPA.

The Agencies began by creating a Statement of Purpose and Need, which evaluated the region's existing transportation network, including an in-depth analysis of U.S. Highway 74. That road serves as the "primary transportation connection between Union County, the fastest growing county in North Carolina, and Mecklenburg County/City of Charlotte, the economic hub of the region," and "also serves as an important commercial corridor." The Agencies determined that U.S. 74's "[a]verage travel speeds range from approximately 20 to 30 miles per hour during the peak hour" with "one-third of the intersections operating at an unacceptable Level of Service." The Statement of Purpose and Need concluded that U.S. 74 suffers from "[c]apacity [d]eficiencies" and does not allow for "high-speed regional travel."

To remedy these shortcomings, the Agencies proposed developing "a facility that allows for safe, reliable, high-speed regional travel in the US 74 Corridor . . . while maintaining access to properties along existing US 74."

[*599] In evaluating **[**4]** possibilities that might meet these goals, the Agencies created an Environmental Impact Statement (herein-after "Impact Statement"). The Agencies began with a draft Impact Statement, and after taking public comment, published a final Impact Statement. *See* 40 C.F.R. §§ 1502.9(a), 1503.1(a), 1503.4.

The draft Impact Statement analyzed a wide variety of proposals, among them the Agencies' preferred choice—the Monroe Connector. After two initial screenings, the Agencies eliminated all but three categories of proposals: (1) improve U.S. 74, (2) construct the Monroe Connector, and (3) a hybrid—combining the Monroe Connector with improvements to U.S. 74. Within these categories, the Agencies developed twenty-five "preliminary study alternatives." They analyzed these preliminary study alternatives to determine which ones "should be carried forward" as "detailed study alternatives" to receive greater analysis. After considering economic impacts and traffic projections, the Agencies "carried forward" sixteen "build" alternatives for detailed study.[1] These "build" alternatives consisted of nearly identical paths for constructing the Monroe Connector.

The Agencies also carried forward a "no action" alternative—a scenario "without major improvements." The draft Impact Statement and the final Impact Statement explained that the purpose of the "no action" or "no build" alternative was "to provide a baseline for comparison" with the "build" alternatives. For example, in the draft Impact Statement, the Agencies compared the year-2035 traffic projections for the "build" alternatives against the year-2035 traffic projections for the "no build" baseline. Similarly, in the final Impact Statement the Agencies compared the indirect and cumulative environmental effects of the "build"

[1] The Agencies eliminated the hybrid category **[**5]** after determining that the necessary improvements "would have a significant adverse impact on businesses and the economy of Union County." They eliminated the "improve U.S. 74" category after projecting that by 2035, daily traffic volume on an improved U.S. 74 would far exceed traffic volume on U.S. 74 and the Monroe Connector combined.

alternatives with the "no build" baseline. Given its widespread use the accuracy of the "no build" baseline was critically important.

The Agencies created the "no build" baseline using information from a local planning organization. **[**6]** They relied on the Mecklenburg-Union Metropolitan Planning Organization ("MUMPO") to develop socioeconomic data based on its Regional Travel Demand Model. This model projects "population, household, and employment figures" for the region using a two-step process. First, a "top-down" analysis of "census and employment projection data . . . at the county [level]" calculated "the maximum number of households, population and employment." Appellees' Br. at 15-16. Second, a "bottom-up" process allocated the top-down projected growth throughout the Monroe Connector's future land use study area. *Id*.

The bottom-up process divided the area into 571 "traffic analysis zones." MUMPO's model then calculated projected growth for each of these zones using a number of "land development factors": developable and redevelopable residential land, population change, water availability, sewer availability, expert predicted growth, municipal growth policy, and travel time to employment. A zone's "travel time to employment" depended on MUMPO's anticipated roadway network for the region. This anticipated roadway network *included* the proposed Monroe Connector. Thus, although the Agencies used MUMPO's **[*600]** projections **[**7]** as the "no build" baseline, part of MUMPO's data actually *assumed construction of the Monroe Connector*. By using MUMPO's data, therefore, the Agencies incorporated "build" assumptions into the "no build" baseline.

Throughout the NEPA process, public commentators repeatedly asked the Agencies whether the "no build" baseline in fact assumed construction of the Monroe Connector. In responding to these comments, the Agencies either failed to address the underlying issue or incorrectly stated that the Monroe Connector was not factored into the "no build" baseline.

For example, when the Agencies published their estimate that the 2035 "build" traffic volume would be *less* than the 2035 "no build" baseline traffic volume, the Conservation Groups queried whether this "implausibl[e]" conclusion might be the result of the "no build" data actually "assum[ing] that the Monroe Connector" would be built. Without responding to the Conservation Groups' underlying concerns regarding the accuracy of the "no build" baseline, the Agencies simply issued an errata table lowering the 2035 "no build" traffic projection baseline to below the "build" levels. The Agencies offered no explanation as to the source **[**8]** of the error and instead summarily stated that "the 2035 No-Build Alternative [traffic] forecast was inadvertently overestimated," and assured the public that "all other conclusions and discussions remain valid."

Similarly, when the Agencies concluded that the indirect and cumulative environmental effects of the Monroe Connector were minimal compared to the "no build" baseline, the United States Fish and Wildlife Service requested "further clarification regarding the basis for the No-build scenario." "Specifically," the Fish and Wildlife Service asked "if MUMPO's [projections] are the basis for the no-build scenario and [if] they contain the [Monroe Connector], how is this a true characterization of no-build?" The Agencies responded with a memorandum drafted by their consultant, Baker Engineering, concluding that "the methodology for determining the No-Build scenario . . . is appropriate and defensible." Baker expressly stated, however, that "the MUMPO . . . projections do *not* account for the Monroe Connector[ ]." (emphasis added).

Unsatisfied with this response, the Fish and Wildlife Service asked whether the Agencies were "doubly sure about th[eir] assumption." The Agencies subsequently **[**9]** asked Baker to contact MUMPO and local officials to ask whether they "would agree with [its] assumption that the[ ] ["no build" baseline] forecasts represent a future

scenario without the Monroe Connector." After receiving generally confirming responses, Baker assured the Fish and Wildlife Service. In light of this assurance, although the Fish and Wildlife Service "continued to be concerned about the level of impacts," it issued its Endangered Species Act concurrence, thereby removing a major impediment to the Monroe Connector.

On August 27, 2010, the Agencies issued their Record of Decision—the final component of the NEPA process. *See* 40 C.F.R. § 1505.2. The Conservation Groups again asked whether the underlying data represented a true "no build" scenario. The Record of Decision responded with additional denials, stating that the "socioeconomic forecasts for the No Build Scenario *did not include* the Monroe Connector." (emphasis added). The Record of Decision ultimately selected a site for construction of the Monroe Connector at an approximate cost of $800 million.

B.

On November 2, 2010, the Conservation Groups filed this action seeking to enjoin **[*601]** construction of the Monroe Connector. **[**10]** After the district court denied the Conservation Groups' motions for a preliminary injunction and to complete and supplement the record, the parties filed cross-motions for summary judgment.

The Conservation Groups asserted that the Agencies violated NEPA by: "(1) failing to analyze the environmental impacts of the Monroe Connector[ ]; (2) conducting a flawed analysis of alternatives; and (3) presenting materially false and misleading information to other agencies and to the public." *N.C. Wildlife Fed'n v. N.C. Dep't of Transp., 2011 U.S. Dist. LEXIS 123085, 2011 WL 5042075, at *1 (E.D.N.C. Oct. 24, 2011)*. In response, for the first time, the Agencies admitted that the "no build" baseline data did, indeed, assume the existence of the Monroe Connector, but the Agencies nonetheless contended that they were entitled to summary judgment. *See 2011 U.S. Dist. LEXIS 123085, [WL] at *4, *9*. The district court agreed with the Agencies, reasoning that their "use of and reliance on [MUMPO's] data was reasonable and did not violate defendants' NEPA obligations." *2011 U.S. Dist. LEXIS 123085, [WL] at *10*. Accordingly, the district court granted summary judgment to the Agencies.

The Conservation Groups timely noted this appeal.

II.

HN1[↑] NEPA claims are subject to judicial review under the Administrative **[**11]** Procedure Act, which permits a reviewing court to set aside an agency action if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *5 U.S.C. § 706(2)(A)*; *see Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 763, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004)*; *Marsh v. Or. Natural Res. Council, 490 U.S. 360, 375-76, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)*. "This inquiry must 'be searching and careful,' but 'the ultimate standard of review is a narrow one.'" *Marsh, 490 U.S. at 378* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)*). A reviewing court must ensure that the agency has "'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action,'" *F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 513, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009)* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)*), and must not reduce itself to a "rubber-stamp" of agency action. *Federal Maritime Com. v. Seatrain Lines, Inc., 411 U.S. 726, 745-46, 93 S. Ct. 1773, 36 L. Ed. 2d 620 (1973)*; *see also Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 192 (4th Cir. 2009)*.

HN2[↑] The NEPA process includes a range of "'action-forcing' procedures that require . . . agencies [to] take a 'hard **[**12]** look' at environmental consequences [of a proposed action] and [to] provide for broad dissemination of relevant environmental information." *Robertson v. Methow*

Valley Citizens Council, 490 U.S. 332, 350, 109 S. Ct. 1835, 104 L. Ed. 2d 351 (1989) (quotation marks and citation omitted). This process does not mandate particular substantive results, but "merely prohibits uninformed—rather than unwise—agency action." *Id. at 351*; *see also Pub. Citizen, 541 U.S. at 756-57* ("NEPA imposes only procedural requirements"; not "particular results"). "By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct. Similarly, the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at **[*602]** a meaningful time." *Marsh, 490 U.S. at 371* (citing *Robertson, 490 U.S. at 349*).

HN3[↑] "At the heart of NEPA is a requirement" that for every "major Federal action[ ] significantly affecting the quality of the human environment," the agency involved must prepare "a detailed" environmental impact statement. *Pub. Citizen, 541 U.S. at 757* (quoting *42 U.S.C. § 4332(2)(C)*). This **[**13]** statement must assess, inter alia, (1) "alternatives to the proposed action," and (2) "the environmental impact of the proposed action." *Id.; see also Shenandoah Valley Network v. Capka, 669 F.3d 194, 196 (4th Cir. 2012)*; *Nat'l Audubon Soc'y v. Dep't of the Navy, 422 F.3d 174, 185 (4th Cir. 2005)*.

An agency's assessment of alternatives to the proposed action "sharply defin[es] the issues and provid[es] a clear basis for choice among options by the decisionmaker and the public." *40 C.F.R. § 1502.14*. Agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives." *Id. § 1502.14(a)*. Although agencies have discretion to identify the range of "reasonable" alternatives, they *must* "include the alternative of no action." *Id. § 1502.14(c)-(d)*; *see also Theodore Roosevelt Conserv. P'ship v. Salazar, 661 F.3d 66, 72, 398 U.S. App. D.C. 199 (D.C. Cir. 2011)*.

An agency's assessment of environmental impacts, in turn, is the "scientific and analytic basis for the comparison[ ]" of alternatives. *40 C.F.R. § 1502.16*. As part of this analysis, agencies *must* measure the indirect and cumulative environmental effects of proposed actions. *See id. § 1502.16(a)-(b)*. Conclusory statements that the indirect **[**14]** and cumulative effects will be minimal or that such effects are inevitable are insufficient under NEPA. *See Ctr. for Biological Diversity v. United States DOI, 623 F.3d 633, 642-43 (9th Cir. 2010)*; *Davis v. Mineta, 302 F.3d 1104, 1122-23 (10th Cir. 2002)*; *see also State Farm, 463 U.S. at 43*.

III.

In this case, there is no dispute that the Monroe Connector constitutes a "major Federal action" under NEPA, which requires an environmental impact statement. The Conservation Groups argue that the Agencies failed to assess alternatives or measure the indirect and cumulative effects of the Monroe Connector because of a fundamental inaccuracy in the "no build" baseline. Specifically, the Conservation Groups maintain that, in calculating the "no-build" baseline, the Agencies relied on data that assumed that the Monroe Connector existed. By doing so, the Agencies assertedly conflated the "no build" and "build" scenarios, making it impossible to accurately isolate and assess the environmental impacts of the Monroe Connector. Moreover, the Conservation Groups claim that the Agencies compounded this error by refusing to acknowledge it to the public, and instead, maintaining throughout the administrative **[**15]** process that the "no build" data did *not* assume the existence of the Monroe Connector.

The Agencies concede much of the Conservations Groups' argument. At the district court, the Agencies acknowledged that MUMPO's data assumed the existence of the Monroe Connector. *See N.C. Wildlife Fed'n, 2011 U.S. Dist. LEXIS 123085, 2011 WL 5042075, at *4, *9*. Before us, the Agencies also conceded that this fact came to their attention during the administrative process. *See* Oral Argument at 17:32, 18:45, 26:50, *N.C.*

Wildlife Fed'n v. N.C. Dep't of Transp., 677 F.3d 596, 2012 U.S. App. LEXIS 9073 (4th Cir. 2012) (No. 11-2210), *available at http://coop.ca4.uscourts.gov/OAarchive/mp3/11-2210-20120321.mp3*. The Agencies additionally **[*603]** admitted that they publicly (and erroneously) denied this fact throughout the administrative process. *See* Oral Argument at 30:20, 35:18, 37:07, 38:47; *N.C. Wildlife Fed'n, 2011 U.S. Dist. LEXIS 123085, 2011 WL 5042075, at *5*. Nonetheless, the Agencies maintain that because they "conducted a thorough analysis of the environmental impacts" of the Monroe Connector and "accepted comments from the public," we should defer to their expertise. Appellees' Br. at 29.

What the Agencies would have us ignore is that ***HN4***[↑] NEPA procedures emphasize clarity and transparency **[**16]** of process over particular substantive outcomes. *See Pub. Citizen, 541 U.S. at 756-57*; *Robertson, 490 U.S. at 350-51*; *see also Or. Natural Desert Ass'n v. BLM, 625 F.3d 1092, 1121 n.24 (9th Cir. 2010)* ("Clarity is at a premium in NEPA because the statute . . . is a democratic decisionmaking tool . . . ."). Accordingly, agencies violate NEPA when they fail to disclose that their analysis contains incomplete information. *See N.M. ex rel. Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 708 (10th Cir. 2009)*; *Native Ecosystems Council v. U.S. Forest Serv., 418 F.3d 953, 964 (9th Cir. 2005)*; *Sierra Club v. U.S. Army Corps of Eng'rs, 701 F.2d 1011, 1030 (2d Cir. 1983)*; *see also State Farm, 463 U.S. at 43* (holding that an agency acts arbitrarily and capriciously when it fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made") (internal quotation marks omitted). Such required "up-front disclosures [include] relevant shortcomings in the data or models." *Lands Council v. Powell, 395 F.3d 1019, 1032 (9th Cir. 2005)*; *see 40 C.F.R. § 1502.22* (An agency "shall make **[**17]** clear" if there is "incomplete or unavailable information" in an environmental impact statement.). Here, the Agencies not only failed to disclose the assumptions underlying MUMPO's data, but provided the public with erroneous information.

HN5[↑] The very purpose of public issuance of an environmental impact statement is to "provid[e] a springboard for public comment." *Pub. Citizen, 541 U.S. at 768* (alteration in original). In this case, however, the Agencies' responses to the public comments contravened that purpose. In commenting, the Fish and Wildlife Service and a number of private parties, including the Conservation Groups, repeatedly raised questions regarding the "no build" baseline. But, rather than take these opportunities to make a "candid acknowledgment" of what they knew to be the truth, *Nat'l Audubon Soc'y, 422 F.3d at 185*, the Agencies maintained that the "no build" data did not include the Monroe Connector.

This mischaracterization related to a critical aspect of the NEPA process—the accuracy of the "no build" baseline. ***HN6***[↑] NEPA requires that an agency's alternatives analysis include a "no build" alternative. *40 C.F.R. § 1502.14(d)*. "Without [accurate baseline] data, an agency cannot **[**18]** carefully consider information about significant environment impacts . . . resulting in an arbitrary and capricious decision." *See N. Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1085 (9th Cir. 2011)*. Accordingly, courts not infrequently find NEPA violations when an agency miscalculates the "no build" baseline or when the baseline assumes the existence of a proposed project. *See, e.g., Friends of Yosemite Valley v. Kempthorne, 520 F.3d 1024, 1037-38 (9th Cir. 2008)*;[2] *N.C. Alliance for Transp. Reform, Inc. v.*

[2] *Laguna Greenbelt v. United States Dep't of Transp., 42 F.3d 517 (9th Cir. 1994)*, on which the Agencies heavily rely, not only predates *Friends of Yosemite*, but in fact provides no support for the Agencies' arguments. There, the court rejected the argument that relying on "local planning documents that assume[d] the existence of the tollroad" violated NEPA, but only because the "record show[ed] that 98.5% of all land in the project's 'area of benefit' [wa]s already accounted for by either existing or committed land uses not contingent on construction of the [project]." *Id. at 525*. The case at **[**19]** hand is markedly different. The record here is devoid of any evidence establishing that the region is developmentally saturated

United States DOT, 151 F. Supp. 2d 661, 690 (M.D.N.C. 2001).

[*604] In an attempt to avoid this outcome, the Agencies contend that although they provided the Fish and Wildlife Service, the Conservation Groups, and the public incorrect information regarding the "no build" data, their subsequent admissions during this litigation cured these missteps. They cite no support for this proposition, and we have found none. To accept the Agencies' argument would amount to acceptance of "post hoc rationalizations for agency action," *State Farm, 463 U.S. at 50*, rather than "judg[ing] the propriety of [the] action solely by the grounds invoked by the agency." *SEC v. Chenery Corp., 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)*.

This we cannot do. For "[i]t is well-established that ***HN7***[↑] an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm, 463 U.S. at 50* (citing *Chenery, 332 U.S. at 196*). The "basis articulated by the agency" is the administrative record, not subsequent litigation rationalizations. *See O'Reilly v. U.S. Army Corps of Eng'rs, 477 F.3d 225, 238-39 (5th Cir. 2007)*; **[**20]** *Hall v. U.S. Envt'l Prot. Agency, 273 F.3d 1146, 1161 (9th Cir. 2001)*. Our focus on the administrative record in this case is particularly appropriate given that ***HN8***[↑] NEPA emphasizes the importance of an open and public environmental assessment process. *See Nat'l Audubon Soc'y, 422 F.3d at 184*. NEPA "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson, 490 U.S. at 349*.[3]

The Agencies now admit that the administrative record mischaracterizes the "no build" data. Such an acknowledgment made during litigation does not change the fact that the NEPA process itself relied on those mischaracterizations. For example, the Record of Decision—the "final agency action," *Natural Desert, 625 F.3d at 1118*, and conclusive statement of "what the [agency's] decision was," *40 C.F.R. § 1505.2(a)*—incorrectly states that the "socioeconomic forecasts for the No Build Scenario did not include the Monroe Connector." Litigation admissions cannot change this.

When relevant information "is not available during the [impact statement] process and is not available to the public for comment[,] . . . the [impact statement] process cannot serve its larger informational role, **[*605]** and the public is deprived of [its] opportunity to play a role in the decision-making process." *N. Plains, 668 F.3d at 1085* (citing *Robertson, 490 U.S. at 349*). Accordingly, we reject **[**22]** the Agencies' argument that their after-the-fact disclosures assuage the harms incurred during the NEPA process.[4]

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such that a major toll road will have no appreciable environmental impact.

[3] The Agencies have steadfastly opposed the Conservation Groups' attempts to supplement the administrative record with contemporaneous emails between agency officials, assertedly evidencing that the Agencies acted in bad faith. In doing so, the Agencies have repeatedly argued that the certified administrative record provides the complete basis for judicial review. *See* Appellees' Br. at 55. Though we need not decide whether the district court abused its discretion in denying the Conservation Groups' motion to supplement the administrative record with these emails, we do note the incongruity of the Agencies' position: the Agencies contend that the Conservation Groups should not be **[**21]** permitted to add to the administrative record emails sent *before* the record closed, while at the same time urging us to give controlling weight to their litigation concessions, not made until well *after* the administrative record closed.

[4] The Agencies briefly raise two other arguments. First, they contend that through Baker they adequately responded to concerns about the propriety of the "no build" data. But in response to queries from public and private groups as to the propriety of the "no build" data, Baker undertook two patently inadequate steps. One concluded that the Monroe Connector was *not* in the "no build" baseline, the other did not focus at all on the potential error.

Second, the Agencies maintain that the Conservation Groups "overstate" the importance of the error involved in including the Monroe Connector in the "no build" baseline. The Agencies acknowledge that the error affected one of the factors in MUMPO's model—travel time to employment. In general, areas with reduced travel time to employment tend to experience greater population growth and development, which can substantially impact the local

In sum, although we need not and do not decide whether NEPA permits the Agencies to use MUMPO's data in this case, we do hold that by doing so without disclosing the data's underlying assumptions and by falsely responding to public concerns, the Agencies failed to take the required "'hard look' at environmental consequences." *Shenandoah Valley, 669 F.3d at 196*. We therefore vacate the judgment of the district court and remand so that the Agencies and the public can fully (and publicly) evaluate the "no build" data.[5]

IV.

For the reasons discussed above, we vacate the judgment of the district court and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED

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environment. But by including the Monroe Connector in the "no build" baseline's travel time to employment, the Agencies *assumed* that the new road *would not* decrease travel time to employment, and **[**23]** thus would not cause development with attendant environmental impacts. To minimize this mistake, the Agencies argue that the model incorporated other, untainted factors. In doing so, the Agencies ignore their own record evidence of the importance of travel time to employment. Not only did this factor receive disproportionate weight in the model, but the Agencies repeatedly noted that decreased travel time to employment often spurs development. Accordingly, the administrative record does not demonstrate the irrelevance of travel time to employment. To assume this fact would overstep our limited scope of review. *See Chenery, 332 U.S. at 196*.

[5] The Conservation Groups point to **[**24]** a number of other instances where the Agencies assertedly failed to comply with NEPA's requirements. *See, e.g.*, *40 C.F.R. § 1502.24*. We need not address these contentions because on remand, when the Agencies reevaluate the Impact Statement, they will have an opportunity to provide full public disclosure and all necessary explanations of their process.

Neighbors for Smart Rail v. Exposition Metro Line Construction Authority

Supreme Court of California

August 5, 2013, Filed

S202828

Reporter
57 Cal. 4th 439 *; 304 P.3d 499 **; 160 Cal. Rptr. 3d 1 ***; 2013 Cal. LEXIS 6645 ****; 2013 WL 3970107

NEIGHBORS FOR SMART RAIL, Plaintiff and Appellant, v. EXPOSITION METRO LINE CONSTRUCTION AUTHORITY et al., Defendants and Respondents; LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY et al., Real Parties in Interest.

Subsequent History: Reported at *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority, 2013 Cal. LEXIS 8510 (Cal., Aug. 5, 2013)*

Time for Granting or Denying Rehearing Extended *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority, 2013 Cal. LEXIS 8370 (Cal., Aug. 20, 2013)*

Rehearing denied by *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority, 2013 Cal. LEXIS 7692 (Cal., Sept. 18, 2013)*

Prior History: [**1]** Superior Court of Los Angeles County, No. BS125233, Thomas I. McKnew, Jr., Judge. Court of Appeal, Second Appellate District, Division Eight, No. B232655.

Neighbors for Smart Rail v. Exposition Metro Line Construction Authority, 205 Cal. App. 4th 552, 139 Cal. Rptr. 3d 759, 2012 Cal. App. LEXIS 549 (Cal. App. 2d Dist., 2012)

LexisNexis® Headnotes

Environmental Law > General Overview

HN1[] **Environmental Law**

While an agency has the discretion under some circumstances to omit environmental analysis of impacts on existing conditions and instead use only a baseline of projected future conditions, existing conditions will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. *Cal. Code Regs., tit. 14, § 15125, subd. (a)*. A departure from this norm can be justified by substantial evidence that an analysis based on existing conditions would tend to be misleading or without informational value to environmental impact report users.

Environmental Law > General Overview

HN2[] **Environmental Law**

The fundamental goal of an environmental impact report (EIR) is to inform decision makers and the public of any significant adverse effects a project is likely to have on the physical environment. *Pub. Resources Code, § 21061*. To make such an assessment, an EIR must delineate environmental conditions prevailing absent the project, defining a

baseline against which predicted effects can be described and quantified.

Environmental Law > General Overview

HN3 **Environmental Law**

See Cal. Code Regs., tit. 14, § 15125, subd. (a).

Environmental Law > General Overview

Governments > Legislation > Interpretation

HN4 **Environmental Law**

In interpreting the California Environmental Quality Act, Pub. Resources Code, § 21000 et seq., the court accords the CEQA Guidelines, Cal. Code Regs., tit. 14, § 15000 et seq., great weight except where they are clearly unauthorized or erroneous.

Environmental Law > General Overview

HN5 **Environmental Law**

Under the California Environmental Quality Act (CEQA), Pub. Resources Code, § 21000 et seq., and CEQA Guidelines, Cal. Code Regs., tit. 14, § 15000 et seq., projected future conditions may be used as the sole baseline for impacts analysis if their use in place of measured existing conditions—a departure from the norm stated in Cal. Code Regs., tit. 14, § 15125, subd. (a)—is justified by unusual aspects of the project or the surrounding conditions. That the future conditions analysis would be informative is insufficient, but an agency does have discretion to completely omit an analysis of impacts on existing conditions when inclusion of such an analysis would detract from an effectiveness of the environmental impact report as an informational document, either because an analysis based on existing conditions would be uninformative or because it would be misleading to decision makers and the public.

Environmental Law > General Overview

HN6 **Environmental Law**

To the extent a departure from the norm of an existing conditions baseline, Cal. Code Regs., tit. 14, § 15125, subd. (a), promotes public participation and more informed decisionmaking by providing a more accurate picture of a proposed project's likely impacts, the California Environmental Quality Act (CEQA), Pub. Resources Code, § 21000 et seq., permits the departure. Thus an agency may forgo analysis of a project's impacts on existing environmental conditions if such an analysis would be uninformative or misleading to decision makers and the public.

Environmental Law > General Overview

HN7 **Environmental Law**

The burden of justification for a departure from the norm of an existing conditions baseline applies when an agency substitutes a future conditions analysis for one based on existing conditions, omitting the latter, and not to an agency's decision to examine project impacts on both existing and future conditions. The need for justification arises when an agency chooses to evaluate only the impacts on future conditions, forgoing the existing conditions analysis called for under the California Environmental Quality Act (CEQA), Pub. Resources Code, § 21000 et seq., Guidelines, Cal. Code Regs., tit. 14, § 15000 et seq.

Environmental Law > General Overview

HN8 **Environmental Law**

The norm for an environmental impact report (EIR) under the California Environmental Quality Act (CEQA), Pub. Resources Code, § 21000 et seq., is

analysis against a baseline of existing conditions. In addition to Cal. Code Regs., tit. 14, § 15125, subd. (a), which expressly so provides, the CEQA Guidelines, Cal. Code Regs., tit. 14, § 15000 et seq., provide that an EIR should normally limit its examination to changes in the existing physical conditions in the affected area, considering both direct and indirect effects and giving due consideration to both the short- and long-term effects of the project. Cal. Code Regs., tit. 14, § 15126.2, subd. (a). Moreover, the Guidelines explain that the no project alternative analysis is not the baseline for determining whether the proposed project's environmental impacts may be significant, unless it is identical to the existing environmental setting analysis which does establish that baseline, § 15125. § 15126.6, subd. (e)(1). While the latter regulation does not absolutely prohibit the use of a future conditions baseline where appropriate, it makes clear that normally the baseline for determining a project's significant adverse impacts is not the same as the no project alternative, which takes into account future changes in the environment reasonably expected to occur if the project is not approved. § 15126.6, subd. (e)(2), (3)(C).

Environmental Law > General Overview

HN9[] **Environmental Law**

The California Environmental Quality Act (CEQA), Pub. Resources Code, § 21000 et seq., Guidelines, Cal. Code Regs., tit. 14, § 15000 et seq., establish the default of an existing conditions baseline even for projects expected to be in operation for many years or decades. That a project will have a long operational life, by itself, does not justify an agency's failing to assess its impacts on existing environmental conditions. For such projects as for others, existing conditions constitute the norm from which a departure must be justified.

Environmental Law > General Overview

HN10[] **Environmental Law**

Even when a project is intended and expected to improve conditions in the long term—20 or 30 years after an environmental impact report (EIR) is prepared—decision makers and members of the public are entitled under the California Environmental Quality Act (CEQA), Pub. Resources Code, § 21000 et seq., to know the short-term and medium-term environmental costs of achieving that desirable improvement. These costs include not only the impacts involved in constructing the project but also those the project will create during its initial years of operation. Though people might rationally choose to endure short- or medium-term hardship for a long-term, permanent benefit, deciding to make that trade-off requires some knowledge about the severity and duration of the near-term hardship. An EIR stating that in 20 or 30 years the project will improve the environment, but neglecting, without justification, to provide any evaluation of the project's impacts in the meantime, does not give due consideration to both the short-term and long-term effects of the project, Cal. Code Regs., tit. 14, § 15126.2, subd. (a), and does not serve CEQA's informational purpose well. The omission of an existing conditions analysis must be justified, even if the project is designed to alleviate adverse environmental conditions over the long term.

Environmental Law > General Overview

HN11[] **Environmental Law**

The public and decision makers are entitled to the most accurate information on project impacts practically possible, and the choice of a baseline must reflect that goal.

Environmental Law > General Overview

HN12[] **Environmental Law**

Quantitative and technical descriptions of environmental conditions have a place in an analysis under the California Environmental Quality Act (CEQA), *Pub. Resources Code, § 21000 et seq.*, but an agency must not create unwarranted barriers to public understanding of the environmental impact report (EIR) by unnecessarily substituting a baseline of projected future conditions for one based on actual existing conditions. The EIR allows the public to know the basis on which its responsible officials either approve or reject environmentally significant action, thereby promoting informed self-government.

Environmental Law > General Overview

HN13 **Environmental Law**

Agencies normally must do what *Cal. Code Regs., tit. 14, § 15125, subd. (a)*, expressly requires—compare a project's impacts to existing environmental conditions, as that term is broadly understood, to determine their significance. The question an agency must ask in choosing a baseline is not, "Would an existing conditions analysis add information to a future conditions analysis?" It is, "Do we have a reason to omit the existing conditions analysis and substitute one based on future conditions?" Of course, where an agency concludes an analysis of impacts on future conditions is also needed in any portion of the environmental impact report, it may include such an analysis.

Environmental Law > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN14 **Environmental Law**

While an agency preparing an environmental impact report (EIR) does have discretion to omit an analysis of the project's significant impacts on existing environmental conditions and substitute a baseline consisting of environmental conditions projected to exist in the future, the agency must justify its decision by showing an existing conditions analysis would be misleading or without informational value. *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council (2010) 190 Cal.App.4th 1351*, and *Madera Oversight Coalition, Inc. v. County of Madera (2011) 199 Cal.App.4th 48*, are disapproved insofar as they hold an agency may never employ predicted future conditions as the sole baseline for analysis of a project's environmental impacts. Because this standard involves a primarily factual assessment, the agency's determination is reviewed only for substantial evidence supporting it. If substantial evidence supports an agency's determination that an existing conditions impacts analysis would provide little or no relevant information or would be misleading as to the project's true impacts, a reviewing court may not substitute its own judgment on this point for that of the agency.

Environmental Law > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN15 **Environmental Law**

Except where the California Environmental Quality Act (CEQA), *Pub. Resources Code, § 21000 et seq.*, or the CEQA Guidelines, *Cal. Code Regs., tit. 14, § 15000 et seq.*, tie CEQA analysis to planning done for a different purpose, an environmental impact report (EIR) must be judged on its fulfillment of CEQA's mandates, not those of other statutes.

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN16 **Administrative Proceedings &**

Litigation, Judicial Review

An omission in the significant impacts analysis of an environmental impact report (EIR) is deemed prejudicial if it deprived the public and decision makers of substantial relevant information about the project's likely adverse impacts. Although an agency's failure to disclose information called for by the California Environmental Quality Act (CEQA), *Pub. Resources Code, § 21000 et seq.*, may be prejudicial regardless of whether a different outcome would have resulted if the public agency had complied with the law, *Pub. Resources Code, § 21005, subd. (a)*, under CEQA there is no presumption that error is prejudicial, *§ 21005, subd. (b)*. Insubstantial or merely technical omissions are not grounds for relief. A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.

Environmental Law > General Overview

HN17[] **Environmental Law**

The California Environmental Quality Act (CEQA), *Pub. Resources Code, § 21000 et seq.*, allows an agency to approve or carry out a project with potential adverse impacts if binding mitigation measures have been required in, or incorporated into the project or if those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency. *Pub. Resources Code, § 21081, subd. (a)*. Under *Cal. Code Regs., tit. 14, § 15091, subd. (b)*, findings to this effect shall be supported by substantial evidence in the record.

Headnotes/Syllabus

Summary

CALIFORNIA OFFICIAL REPORTS

SUMMARY

An agency approved a project to construct a light-rail line to be operated by the Los Angeles County Metropolitan Transportation Authority. The baseline for the impacts analysis consisted of predicted impacts in the year 2030 to traffic congestion and air quality. A group challenged the approval under the California Environmental Quality Act (*Pub. Resources Code, § 21000 et seq.*). The trial court denied the group's petition for writ of mandate (Superior Court of Los Angeles County, No. BS125233, Thomas I. McKnew, Jr., Judge.) The Court of Appeal, Second Dist., Div. Eight, No. B232655, affirmed.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that an agency preparing an environmental impact report (EIR) has discretion to omit an analysis of the project's significant impacts on existing environmental conditions and substitute a baseline consisting of environmental conditions projected to exist in the future, but the agency must justify its decision by showing that an existing conditions analysis would be misleading or without informational value. In the current case, no substantial evidence supported the omission of the existing impacts on traffic and air quality. However, a plurality of the court found that the error was not prejudicial because the analysis of future effects demonstrated a lack of grounds to suppose the same analysis performed against existing conditions would have produced substantially different information. The EIR satisfied the requirement for mitigation measures for potentially significant spillover parking effects because it proposed to monitor on-street parking and establish permit parking programs in cooperation with municipal agencies. (Opinion by Werdegar, J., with Kennard, and Corrigan, JJ., concurring. Concurring and dissenting opinion by Baxter, J., with Cantil-Sakauye, C. J., and Chin, J., concurring (see p. 466). Concurring and dissenting opinion by Liu, J. (see p. 478).) **[*440]**

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] (1)

Pollution and Conservation Laws § 2.6—California Environmental Quality Act—Environmental Impact Reports—Existing Conditions Baseline.

The fundamental goal of an environmental impact report (EIR) is to inform decision makers and the public of any significant adverse effects a project is likely to have on the physical environment (Pub. Resources Code, § 21061). To make such an assessment, an EIR must delineate environmental conditions prevailing absent the project, defining a baseline against which predicted effects can be described and quantified.

CA(2)[] (2)

Pollution and Conservation Laws § 2.6—California Environmental Quality Act—Environmental Impact Reports—Existing Conditions Baseline—Departures—Justification—Future Conditions.

To the extent a departure from the norm of an existing conditions baseline (Cal. Code Regs., tit. 14, § 15125, subd. (a)) promotes public participation and more informed decisionmaking by providing a more accurate picture of a proposed project's likely impacts, the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.) permits the departure. The burden of justification for a departure from the norm of an existing conditions baseline applies when an agency substitutes a future conditions analysis for one based on existing conditions, omitting the latter, and not to an agency's decision to examine project impacts on both existing and future conditions. The need for justification arises when an agency chooses to evaluate only the impacts on future conditions, forgoing the existing conditions analysis called for under the CEQA Guidelines (Guidelines, § 15000 et seq.).

CA(3)[] (3)

Pollution and Conservation Laws § 2.6—California Environmental Quality Act—Environmental Impact Reports—Existing Conditions Baseline.

The norm for an environmental impact report (EIR) under the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.) is analysis against a baseline of existing conditions. In addition to § 15125, subd. (a), of the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.), which expressly so provides, the CEQA Guidelines provide that an EIR should normally limit its examination to changes in the existing physical conditions in the affected area, considering both direct and indirect effects and giving due consideration to both the short-term and long-term effects of the project (Guidelines, § 15126.2, subd. (a)). Moreover, the Guidelines explain that the no **[*441]** project alternative analysis is not the baseline for determining whether the proposed project's environmental impacts may be significant, unless it is identical to the existing environmental setting analysis which does establish that baseline (Guidelines, § 15126.6, subd. (e)(1)). While the latter regulation does not absolutely prohibit the use of a future conditions baseline where appropriate, it makes clear that normally the baseline for determining a project's significant adverse impacts is not the same as the no project alternative, which takes into account future changes in the environment reasonably expected to occur if the project is not approved (Guidelines, § 15126.6, subd. (e)(2), (3)(C)).

CA(4)[] (4)

Pollution and Conservation Laws § 2.6—California Environmental Quality Act——

Environmental—Impact Reports—Existing Conditions Baseline.

The California Environmental Quality Act (CEQA; *Pub. Resources Code, § 21000 et seq.*) Guidelines (*Cal. Code Regs., tit. 14, § 15000 et seq.*) establish the default of an existing conditions baseline even for projects expected to be in operation for many years or decades. That a project will have a long operational life, by itself, does not justify an agency's failing to assess its impacts on existing environmental conditions. For such projects as for others, existing conditions constitute the norm from which a departure must be justified.

CA(5)[⬇] **(5)**

Pollution and Conservation Laws § 2.6—California Environmental Quality Act—Environmental Impact Reports—Existing Conditions Baseline—Departures—Burden of Justification—Future Conditions.

Even when a project is intended and expected to improve conditions in the long term—20 or 30 years after an environmental impact report (EIR) is prepared—decision makers and members of the public are entitled under the California Environmental Quality Act (CEQA; *Pub. Resources Code, § 21000 et seq.*) to know the short- and medium-term environmental costs of achieving that desirable improvement. These costs include not only the impacts involved in constructing the project but also those the project will create during its initial years of operation. Though people might rationally choose to endure short- or medium-term hardship for a long-term, permanent benefit, deciding to make that tradeoff requires some knowledge about the severity and duration of the near-term hardship. An EIR stating that in 20 or 30 years the project will improve the environment, but neglecting, without justification, to provide any evaluation of the project's impacts in the meantime, does not give due consideration to both the short-term and long-term effects of the project (*Cal. Code Regs., tit. 14, § 15126.2, subd. (a)*) and does not serve CEQA's informational purpose well. The omission of an existing conditions analysis must be justified, even if the project is designed to alleviate adverse environmental conditions over the long term. The **[*442]** public and decision makers are entitled to the most accurate information on project impacts practically possible, and the choice of a baseline must reflect that goal.

CA(6)[⬇] **(6)**

Pollution and Conservation Laws § 2.6—California Environmental Quality Act—Environmental Impact Reports—Existing Conditions Baseline.

Quantitative and technical descriptions of environmental conditions have a place in an analysis under the California Environmental Quality Act (CEQA; *Pub. Resources Code, § 21000 et seq.*), but an agency must not create unwarranted barriers to public understanding of the environmental impact report (EIR) by unnecessarily substituting a baseline of projected future conditions for one based on actual existing conditions. The EIR allows the public to know the basis on which its responsible officials either approve or reject environmentally significant action, thereby promoting informed self-government.

CA(7)[⬇] **(7)**

Pollution and Conservation Laws § 2.6—California Environmental Quality Act—Environmental Impact Reports—Existing Conditions Baseline—Departures.

Agencies normally must do what *Cal. Code Regs., tit. 14, § 15125, subd. (a)*, expressly requires—compare a project's impacts to existing environmental conditions, as that term is broadly understood, to determine their significance. The question an agency must ask in choosing a baseline

is not, "Would an existing conditions analysis add information to a future conditions analysis?" It is, "Do we have a reason to omit the existing conditions analysis and substitute one based on future conditions?" Of course, where an agency concludes an analysis of impacts on future conditions is also needed in any portion of the environmental impact report, it may include such an analysis.

CA(8)[] **(8)**

Pollution and Conservation Laws § 2.6—California Environmental Quality Act—Environmental Impact Reports—Existing Conditions Baseline—Departures—Justification—Review.

While an agency preparing an environmental impact report (EIR) does have discretion to omit an analysis of the project's significant impacts on existing environmental conditions and substitute a baseline consisting of environmental conditions projected to exist in the future, the agency must justify its decision by showing an existing conditions analysis would be misleading or without informational value. Because this standard involves a primarily factual assessment, the agency's determination is reviewed only for substantial evidence supporting it. If substantial evidence supports an agency's determination that an existing conditions impacts analysis would provide little or no relevant information or would be misleading as to the project's true impacts, a reviewing court may not substitute its own judgment on this point for that of the agency. (Disapproving to the **[*443]** extent inconsistent: *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council (2010) 190 Cal.App.4th 1351 [119 Cal.Rptr.3d 481]*, and *Madera Oversight Coalition, Inc. v. County of Madera (2011) 199 Cal.App.4th 48 [131 Cal.Rptr.3d 626]*.)

CA(9)[] **(9)**

Pollution and Conservation Laws § 2.3—California Environmental Quality Act—Environmental Impact Reports—Other Statutes.

Except where the California Environmental Quality Act (CEQA; *Pub. Resources Code, § 21000 et seq.*) or the CEQA Guidelines (*Cal. Code Regs., tit. 14, § 15000 et seq.*) tie CEQA analysis to planning done for a different purpose, an environmental impact report (EIR) must be judged on its fulfillment of CEQA's mandates, not those of other statutes.

CA(10)[] **(10)**

Pollution and Conservation Laws § 2.6—California Environmental Quality Act—Environmental Impact Reports—Existing Conditions Baseline—Departure—s——Future Conditions—Light Rail.

In a case involving approval of a light-rail project, the administrative record did not offer substantial evidence to support the agency's decision to limit its analysis of project impacts on traffic congestion and air quality to predicted impacts in the year 2030, to the exclusion of likely impacts on conditions existing when the environmental impact report was prepared or when the project was to begin operation.

[*Cal. Forms of Pleading and Practice (2013) ch. 418, Pollution and Environmental Matters, § 418.35*; 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 841.]

CA(11)[] **(11)**

Pollution and Conservation Laws § 2.5—California Environmental Quality Act—Environmental Impact Reports—Mitigation Measures.

The California Environmental Quality Act (CEQA; *Pub. Resources Code, § 21000 et seq.*) allows an agency to approve or carry out a project with potential adverse impacts if binding mitigation

measures have been required in, or incorporated into the project or if those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency (*Pub. Resources Code, § 21081, subd. (a)*). Under *Cal. Code Regs., tit. 14, § 15091, subd. (b)*, findings to this effect shall be supported by substantial evidence in the record.

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Judges: Opinion by Werdegar, J., with Kennard, and Corrigan, JJ., concurring. Concurring and dissenting opinion by Baxter, J., with Cantil-Sakauye, C. J., and Chin, J., concurring.

Concurring and dissenting opinion by Liu, J.

Opinion by: Werdegar

Opinion

[*7] [**504]** **WERDEGAR, J.**—This case presents a challenge under the California Environmental Quality Act (CEQA; *Pub. Resources Code, § 21000 et seq.*) [1] to the approval by defendant Exposition Metro Line Construction Authority (Expo Authority) of a project to construct a light-rail line running from Culver City to Santa Monica. Once completed, the transit **[****4]** line is to be operated by real party in interest Los Angeles County Metropolitan Transportation Authority (MTA).

Plaintiff Neighbors for Smart Rail (Neighbors) contends the Expo Authority's environmental impact report (the EIR) for the project is deficient in two respects: (1) by exclusively employing an analytic baseline of conditions in the year 2030 to assess likely impacts on traffic congestion and air quality, the EIR fails to disclose the effects the project will have on *existing* environmental conditions in the project area; and (2) the EIR fails to incorporate mandatory and enforceable mitigation measures for potentially significant spillover parking effects in the neighborhoods of certain planned rail stations.

We agree with Neighbors on its first claim, but not on its second. (1) ***HN1***[⬆] While an agency has the discretion under some circumstances to omit environmental analysis of impacts on existing conditions and instead use only a baseline of projected future conditions, existing conditions "will normally constitute the baseline physical conditions by which a lead agency determines whether an impact **[****5]** is significant." (*Cal. Code Regs., tit. 14, § 15125, subd. (a)*.) A departure from this norm can be justified by substantial evidence that an analysis based on existing conditions would tend to be misleading or without informational value to EIR users. Here, however, the Expo Authority fails to demonstrate the existence of such evidence in the administrative record. (2) The EIR's mitigation measure for spillover parking effects satisfied CEQA's requirements by including enforceable mandates for actions by MTA and the Expo Authority, as well as planned actions to be implemented by the municipalities responsible for parking regulations on streets near the planned rail stations. (*§ 21081, subd. (a)*; *Cal. Code Regs., tit. 14, § 15091*.)
[*446]

Although we conclude the EIR fails to satisfy CEQA's requirements in the first respect claimed, we also conclude the agency's abuse of discretion was nonprejudicial. Under the particular facts of this case, the agency's examination of certain environmental impacts only on projected year 2030 conditions, and not on existing **[***8]** environmental conditions, did not deprive the agency or the **[**505]** public of substantial relevant information on those impacts. (*Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection (2008) 44 Cal.4th 459, 485–486 [80 Cal. Rptr. 3d 28, 187 P.3d 888]*.) **[****6]** We will therefore affirm the judgment of the Court of Appeal, which affirmed the superior court's denial of Neighbors's petition for writ of mandate.

FACTUAL AND PROCEDURAL BACKGROUND

Formally known as phase 2 of the Exposition Corridor Transit Project (Expo Phase 2), the project at issue consists of a light-rail transit line running from a station in Culver City (the western terminus of phase 1, which connects to downtown Los Angeles), through the Westside area of the City of Los Angeles, to a terminus in Santa Monica. The project's purpose is to provide high-capacity transit service between the Westside area of Los Angeles and Santa Monica, thereby accommodating population and employment growth in the area,

[1] All statutory references are to the Public Resources Code unless otherwise specified.

improving mobility for the large population of transit-dependent Westside residents, providing an alternative to the area's congested roadways, and enhancing access to downtown Los Angeles, Culver City, Santa Monica, and other destinations in the corridor.

The Expo Authority issued a notice of preparation of an EIR for Expo Phase 2 in February 2007, circulated a draft EIR for public comment in January 2009, and published its final EIR in December 2009. In February 2010, it certified **[****7]** the EIR's compliance with CEQA, selected the transit mode and route recommended in the EIR, and approved the Expo Phase 2 project.

Neighbors petitioned the superior court for a writ of mandate, alleging the Expo Authority's approval of Expo Phase 2 violated CEQA in several respects. The superior court denied the petition in full, and the Court of Appeal affirmed, rejecting all of Neighbors's CEQA claims on the merits. We granted Neighbors's petition for review, which raised only two issues: the propriety of the Expo Authority's exclusive use of a future conditions baseline for assessment of the project impacts on traffic and air quality, and the adequacy of the mitigation measure the Expo Authority adopted for possible impacts on street parking near planned transit stations. We resolve those two issues below. **[*447]**

DISCUSSION

I. *Use of Future Conditions as a Baseline for Analysis of Project Impacts* [2]

CA(1)[↑] **(1)** HN2[↑] The fundamental goal of an EIR is to inform decision makers **[****8]** and the public of any significant adverse effects a project is likely to have on the physical environment. (§ 21061; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 428 [53 Cal. Rptr. 3d 821, 150 P.3d 709]*.) To make such an assessment, an EIR must delineate environmental conditions prevailing absent the project, defining a baseline against which predicted effects can be described and quantified. (*Communities for a Better Environment v. South Coast Air Quality Management Dist. (2010) 48 Cal.4th 310, 315 [106 Cal. Rptr. 3d 502, 226 P.3d 985]* (*Communities for a Better Environment*).) The question posed here is whether that baseline may consist *solely* of conditions projected to exist ab **[***9]** sent the project at a date in the distant future or whether the EIR must include an analysis of the project's significant impacts on measured conditions existing at the time the environmental analysis is performed.

The Expo Authority's chosen analytic method and its stated reasons for that choice will be described in detail below; suffice it here to say the agency first projected the traffic and air quality conditions that would exist in the project area in the year 2030, then estimated the effect that operation of the Expo Phase **[****9]** 2 transit line would have on those conditions at that future time. With regard to traffic delays due to the rail line crossing streets at grade, the EIR found some adverse effects were likely in 2030, but none rising to a level deemed significant. With regard to air quality, no adverse effects were projected to occur; the project was **[**506]** expected to have a generally beneficial impact on air quality by slightly reducing automobile travel in the study area in comparison with conditions otherwise expected in 2030.

Neighbors contends the Expo Authority proceeded contrary to CEQA's commands, thus abusing its discretion as a matter of law (§ 21168.5), in its choice of a baseline for analysis of traffic and air quality impacts. The Expo Authority and the MTA contend agencies have discretion to choose future conditions baselines if their choice is supported by substantial evidence, as the Expo Authority's choice

[2] With the exception of part I.B.5., *post*, which addresses prejudice, the analysis in this part (as well as that in pt. II., *post*) expresses the view of a majority of the court. (See conc. & dis. opn. of Liu, J., *post*, at pp. 478–480, 481.)

assertedly was here. [3] We first ask whether an **[*448]** agency's discretion *ever* extends to use of a future conditions baseline to the exclusion of one reflecting conditions at the time of the environmental analysis. Concluding that existing conditions is the normal baseline under CEQA, but that **[****10]** factual circumstances can justify an agency departing from that norm when necessary to prevent misinforming or misleading the public and decision makers, we then ask whether the administrative record here contains substantial evidence of such circumstances.

A. *Use of Future Conditions Baselines Generally*

For the proposition that the baseline for an EIR's significant impacts analysis must reflect existing conditions, Neighbors relies heavily on *section 15125, subdivision (a) of the CEQA guidelines* (CEQA Guidelines or Guidelines), [4] which provides: ***HN3***[↑] "An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation **[****11]** is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. *This environmental* ***[***10]*** *setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.*" (*Cal. Code Regs., tit. 14, § 15125, subd. (a)*, italics added (*Guidelines section 15125(a)*).)

In *Communities for a Better Environment*, we relied on *Guidelines section 15125(a) and CEQA* case **[****12]** law for the principle that the baseline for an agency's primary environmental analysis under CEQA must ordinarily be the *actually* existing physical conditions rather than *hypothetical* conditions that could have existed under applicable permits or regulations. (*Communities for a Better Environment, supra, 48 Cal.4th at pp. 320–322*.) Applying this principle, we held the air pollution effects of a project to expand a petroleum refinery were to be measured against the existing emission levels rather than against the levels that would have existed had all the refinery's boilers operated simultaneously at their maximum permitted capacities. (*Id. at pp. 322–327*.)
[*449]

In a separate part of the *Communities for a Better Environment* analysis, we addressed the problem of defining an existing conditions baseline in circumstances where the existing conditions themselves change or fluctuate over time, as the refinery's operations and emissions assertedly did. (*Communities for a Better Environment, supra, 48 Cal.4th at pp. 327–328*.) We concluded that despite **[**507]** the CEQA Guidelines' reference to "the time the notice of preparation is published, or if no notice of preparation is published, … the time environmental **[****13]** analysis is commenced" (*Guidelines, § 15125(a)*), "[n]either CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence." (*Communities for a Better Environment, at p. 328*.)

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[3] The Expo Authority also contends Neighbors failed to exhaust the future conditions baseline issue in the administrative forum. The Court of Appeal held the issue exhausted, and the Expo Authority did not raise the exhaustion issue in its answer to Neighbors's petition for review. As the exhaustion question was not raised in the petition for review or answer, and is not fairly included in the merits of the baseline issue on which we granted review, we decline to address it here. (See *Cal. Rules of Court, rule 8.520(b)(3)*.)

[4] The CEQA Guidelines, promulgated by the state's Natural Resources Agency, are authorized by *section 21083* and found in *title 14 of the California Code of Regulations, section 15000 et seq.* By statutory mandate, the Guidelines provide "criteria for public agencies to follow in determining whether or not a proposed project may have a 'significant effect on the environment.' " (*§ 21083, subd. (b)*.) ***HN4***[↑] In interpreting CEQA, we accord the Guidelines great weight except where they are clearly unauthorized or erroneous. (*Communities for a Better Environment, supra, 48 Cal.4th at p. 319, fn. 4*; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, supra, 40 Cal.4th at p. 428, fn. 5*.)

Communities for a Better Environment provides guidance here in its insistence that CEQA analysis employ a realistic baseline that will give the public and decision makers the most accurate picture practically possible of the project's likely impacts. (*Communities for a Better Environment, supra, 48 Cal.4th at pp. 322, 325, 328*.) It did not, however, decide either the propriety of using solely a future conditions baseline or the standard of review by which such a choice is to be judged. Our holding that the analysis must measure impacts against actually existing conditions was in contrast to the use of hypothetical permitted conditions, not projected future conditions. And our holding that **[****14]** agencies enjoy discretion to choose a suitable baseline, subject to review for substantial evidence, related to the choice of a measurement technique for existing conditions, not to the choice between an existing conditions baseline and one employing solely conditions projected to prevail in the distant future.

Justice Baxter therefore errs in citing *Communities for a Better Environment* for the proposition that an agency's future baseline choice is valid if it is "a realistic measure of the physical conditions without the proposed project … ." (Conc. & dis. opn. of Baxter, J., *post*, at p. 470.) In *Communities for a Better Environment*, we held an agency's discretionary decision on "exactly how the *existing* physical conditions with **[***11]** out the project can most realistically be measured" is reviewed for substantial evidence supporting the measurement method. (*Communities for a Better Environment, supra, 48 Cal.4th at p. 328*, italics added.) We did not hold or imply agencies enjoy equivalent discretion under CEQA and the CEQA Guidelines to *omit* all **[****15]** analysis of the project's impacts on existing conditions and measure impacts only against conditions projected to prevail 20 or 30 years in the future, so long as their projections are realistic.
[*450]

Nor does the concurring and dissenting opinion's citation to *Cherry Valley Pass Acres & Neighbors v. City of Beaumont (2010) 190 Cal.App.4th 316 [118 Cal. Rptr. 3d 182]* aid its argument. (Conc. & dis. opn. of Baxter, J., *post*, at p. 469.) The cited decision merely applied *Communities for a Better Environment* to determine that a water allocation approximating the property's recent historical use constituted a realistic measure of existing conditions. (*Cherry Valley Pass Acres & Neighbors v. City of Beaumont, supra, 190 Cal.App.4th at pp. 337*‘338.) The case has nothing to say about an agency's decision to omit an existing conditions analysis and employ solely a baseline of conditions in the distant future.

The Courts of Appeal, however, have since addressed the future conditions baseline question directly in *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council (2010) 190 Cal.App.4th 1351 [119 Cal. Rptr. 3d 481]* (*Sunnyvale West*), *Madera Oversight Coalition, Inc. v. County of Madera (2011) 199 Cal.App.4th 48 [131 Cal. Rptr. 3d 626]*, and *Pfeiffer v. City of Sunnyvale City Council (2011) 200 Cal.App.4th 1552 [135 Cal. Rptr. 3d 380]* **[****16]** (*Pfeiffer*), as well as in the present litigation.

In *Sunnyvale West*, the appellate court held inadequate an EIR's analysis of a road extension project's traffic impacts because it used projected conditions in the year 2020 as its only baseline, even though EIR preparation began in 2007 and the project was approved in 2008. (*Sunnyvale West, supra, 190 Cal.App.4th at pp. 1358, 1360, 1370*.) While acknowledging that *Guidelines section 15125(a)* and our decision **[**508]** in *Communities for a Better Environment* provided agencies discretion on how best to measure *existing* conditions, the court concluded "nothing in the law authorizes environmental impacts to be evaluated only against predicted conditions more than a decade after EIR certification and project approval." (*Sunnyvale West, at p. 1380*.) The use of a single future conditions baseline was per se a violation of CEQA; it was not a discretionary choice that could be justified by substantial evidence. (*Sunnyvale West, at p. 1383*.)

The *Sunnyvale West* court observed that, although in its view the baseline for analysis of a project's direct impacts must be existing conditions, "discussions of the foreseeable changes and expected future conditions **[****17]** … may be necessary to an intelligent understanding of a project's impacts over time and full compliance with CEQA." (*Sunnyvale West, supra, 190 Cal.App.4th at p. 1381*.) In particular, the effects of the project under predicted future conditions, themselves projected in part on the assumption that other approved or planned projects will proceed, are appropriately considered in an EIR's analysis of cumulative impacts (see *Cal. Code Regs., tit. 14, § 15130*) or in a discussion comparing the project to the "no project alternative" (*id.*, *§ 15126.6, subd. (e)*). (*Sunnyvale West, at pp. 1381–1382*.) **[*451]** So long as the EIR evaluated the project's **[***12]** significant impacts on existing conditions, the court saw "no problem" with *also* examining the effect on projected future conditions "where helpful to an intelligent understanding of the project's environmental impacts." (*Id. at p. 1382*.)

The court in *Madera Oversight Coalition, Inc. v. County of Madera*, considering the adequacy of an EIR's discussion of a mixed-use property development's traffic impacts, followed *Sunnyvale West* on the baseline question. Without extensive additional statutory analysis, the court adopted from *Sunnyvale West* the rule that **[****18]** agencies "do not have the discretion to adopt a baseline that uses conditions predicted to occur on a date subsequent to the certification of the EIR." (*Madera Oversight Coalition, Inc. v. County of Madera, supra, 199 Cal.App.4th at p. 90*.)

In *Pfeiffer*, a different panel of the same court that decided *Sunnyvale West* reviewed the EIR for a medical center's expansion project. The EIR's analysis of traffic impacts compared, for various road segments and intersections in the project's vicinity, existing traffic conditions with various growth and project scenarios. (*Pfeiffer, supra, 200 Cal.App.4th at p. 1571*.) Holding the plaintiffs had not shown this analysis inadequate under CEQA, *Pfeiffer* distinguished *Sunnyvale West* as involving the use of *only* a future conditions baseline, whereas in *Pfeiffer* "the traffic baselines included in the EIR were not limited to projected traffic conditions in the year 2020, but also included existing conditions and the traffic growth anticipated from approved but not yet constructed developments." (*Pfeiffer, at p. 1573*.)

The appellate court in the present case flatly disagreed with the *Sunnyvale West* analysis. Noting that *Guidelines section 15125(a)* states **[****19]** the EIR's description of existing environmental conditions " '*normally*' " serves as the baseline for analysis of project impacts, the court reasoned that "[t]o state the norm is to recognize the possibility of departure from the norm" and concluded the *Sunnyvale West* court erred in finding in the law an absolute rule against use of projected future conditions as the baseline. In the lower court's view, future conditions are properly used as a baseline if the projections on which they are based are reliable and their use "provide[s] information that is relevant and permits informed decisionmaking."

We conclude CEQA and the Guidelines dictate a rule less restrictive than *Sunnyvale West*'s but more restrictive than that articulated by the Court of Appeal below. ***HN5***[↑] Projected future conditions may be used as the sole baseline for impacts analysis if their use in place of measured existing conditions—a departure from the norm stated in *Guidelines section 15125(a)*—is justified by unusual aspects of the project or the surrounding conditions. That the future conditions **[**509]** analysis would be informative is insufficient, but an agency **[*452]** does have discretion to completely omit an analysis of impacts on existing **[****20]** conditions when inclusion of such an analysis would detract from an EIR's effectiveness as an informational document, either because an analysis based on existing conditions would be uninformative or because it would be misleading to decision makers and the public.

Before addressing the use of a future conditions baseline, we pause to clarify some potentially confusing aspects of the standard analysis, in which the project's impacts are assessed against existing environmental conditions. First, although most projects for which an EIR is prepared do not yet exist or are not yet in operation at the time the EIR is written, it **[***13]** is common for an EIR's impacts analysis to assume, counterfactually, that the project exists and is in full operation at the time the environmental analysis is conducted. (See, e.g., *Gilroy Citizens for Responsible Planning v. City of Gilroy (2006) 140 Cal.App.4th 911, 916–917, 933 [45 Cal. Rptr. 3d 102]* [EIR analyzed impacts on city's existing central business district of developing proposed outlying retail center]; *Association of Irritated Residents v. County of Madera (2003) 107 Cal.App.4th 1383, 1389, 1393–1394 [133 Cal. Rptr. 2d 718]* [EIR analyzed impacts on wildlife of replacing existing farm fields with proposed dairy operation]; **[****21]** cf. 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed. 2013) Significant Environmental Effects, § 13.21, p. 635 (rev. 3/13) [EIR must analyze significant effects of entire project, including phases to be implemented later].) In such an analysis, the EIR attempts to *predict* the impacts a project would have on the existing environment if approved and implemented. CEQA's wording reflects the fact that projects generally are not yet operating when an EIR is prepared: an EIR must be prepared for any project "that may have" a significant environmental effect (*§ 21100, subd. (a)*); the report's purpose is to inform the public and decision makers as to the effects a proposed project "is likely to have" on the environment (*§ 21061*); and the "environment" referred to is the set of physical conditions in the area "which will be affected" by the project (*§ 21060.5*).

Second, we note that in appropriate circumstances an existing conditions analysis may take account of environmental conditions that will exist when the project begins operations; the agency is not strictly limited to those prevailing during the period of EIR preparation. An agency may, where appropriate, **[****22]** adjust its existing conditions baseline to account for a major change in environmental conditions that is expected to occur before project implementation. In so adjusting its existing conditions baseline, an agency exercises its discretion on how best to define such a baseline under the circumstance of rapidly changing environmental conditions. (*Communities for a Better Environment, supra, 48 Cal.4th at p. 328*.) As we explained in our earlier decision, CEQA imposes no "uniform, inflexible rule for determination of the existing conditions baseline," instead leaving to a sound exercise of **[*453]** agency discretion the exact method of measuring the existing environmental conditions upon which the project will operate. (*48 Cal.4th at p. 328*.) Interpreting the statute and regulations in accord with the central purpose of an EIR—"to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment" (*§ 21061*)—we find nothing precluding an agency from employing, under appropriate factual circumstances, a baseline of conditions expected to obtain at the time the proposed project would go into operation.

For example, in an EIR for **[****23]** a new office building, the analysis of impacts on sunlight and views in the surrounding neighborhood might reasonably take account of a larger tower already under construction on an adjacent site at the time of EIR preparation. For a large-scale transportation project like that at issue here, to the extent changing background conditions during the project's lengthy approval and construction period are expected to affect the project's likely impacts, the agency has discretion to consider those changing background conditions in formulating its analytical baseline. Contrary to Justice Baxter's view (conc. & dis. opn. of **[**510]** Baxter, J., *post*, at p. 476), such a date-of-implementation **[***14]** baseline does not share the principal problem presented by a baseline of conditions expected to prevail in the more distant future following years of project operation—it does

not omit impacts expected to occur during the project's early period of operation.

CA(2)[↑] **(2)** Is it ever appropriate for an EIR's significant impacts analysis to use conditions predicted to prevail in the more distant future, well beyond the date the project is expected to begin operation, to the exclusion of an existing conditions baseline? We conclude **[****24]** agencies do have such discretion. The key, again, is the EIR's role as an informational document. *HN6*[↑] To the extent a departure from the "norm[]" of an existing conditions baseline (*Guidelines, § 15125(a)*) promotes public participation and more informed decisionmaking by providing a more accurate picture of a proposed project's likely impacts, CEQA permits the departure. Thus an agency may forgo analysis of a project's impacts on existing environmental conditions if such an analysis would be uninformative or misleading to decision makers and the public. [5]

[*454]

Parenthetically, we stress that *HN7*[↑] the burden of justification articulated above applies when an agency *substitutes* a future conditions analysis for one based on existing conditions, omitting the latter, and not to an agency's decision to examine project impacts on *both* existing and future conditions. As the *Sunnyvale West* court observed, a project's effects on future conditions are appropriately considered in an EIR's discussion of cumulative effects and in discussion of the no project alternative. (*Sunnyvale West, supra, 190 Cal.App.4th at pp. 1381–1382*.) [6] But nothing in CEQA law precludes an agency, as well, from considering both types of baseline—existing **[****26]** and future conditions—in its primary analysis of the project's significant adverse effects. (*Pfeiffer, supra, 200 Cal.App.4th at p. 1573*; *Woodward Park Homeowners Assn., Inc. v. City of Fresno (2007) 150 Cal.App.4th 683, 707 [58 Cal. Rptr. 3d 102]*.) The need for justification arises when an agency chooses to evaluate *only* the impacts on future conditions, foregoing the existing conditions analysis called for under the CEQA Guidelines.

[*15]** *CA(3)*[↑] **(3)** The need to justify omission of an existing conditions analysis derives in part from the CEQA Guidelines, which clearly establish that *HN8*[↑] the norm for an EIR is analysis **[****27]** against a baseline of existing conditions. In addition to *Guidelines section 15125(a)*, which expressly so provides, the Guidelines provide that an EIR "should normally limit its examination to changes in the *existing* physical conditions in the affected area," considering both direct and indirect effects and "giving due consideration to both the short-term and long-term effects" of the project. (*Cal. Code Regs., tit. 14, § 15126.2, subd. (a)*, italics added.) Moreover, the Guidelines explain that "[t]he no project alternative analysis is not the **[**511]** baseline for determining whether the proposed project's environmental impacts may be significant,

[5] Amicus curiae South Coast Air Quality Management District provides a hypothetical example of factual conditions in which use of an existing conditions baseline would arguably mask potentially significant project impacts that would be revealed by using a future conditions baseline. In this illustration, an existing industrial facility currently emits an air pollutant in the amount of 1,000 pounds per day. By the year 2020, if no new project is undertaken at the facility, emissions of the pollutant are projected to fall to 500 pounds per day due to enforcement of regulations already adopted and to turnover in the facility's vehicle fleet. **[****25]** The operator proposes to use the facility for a new project that will emit 750 pounds per day of the pollutant upon implementation and through at least 2020. An analysis comparing the project's emissions to existing emissions would conclude the project would reduce pollution and thus have no significant adverse impact, while an analysis using a baseline of projected year 2020 conditions would show the project is likely to increase emissions by 250 pounds per day, a (presumably significant) 50 percent increase over baseline conditions.

[6] A cumulative impacts analysis focuses on the effects of the proposed project together with other projects causing related impacts and may rely on projections of future conditions that are expected to contribute to a cumulative adverse effect (*Cal. Code Regs., tit. 14, § 15130, subds. (a)(1), (b)*), while analysis of the no project alternative includes a discussion of "what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services" (*Cal. Code Regs., tit. 14, § 15126.6, subd. (e)(2)*).

unless it is identical to the existing environmental setting analysis which does establish that baseline (see *Section 15125*).” (*Cal. Code Regs., tit. 14, § 15126.6, subd. (e)(1)*.) While the latter regulation does not absolutely prohibit the use of a future conditions baseline where appropriate, it makes clear that normally the baseline for determining a project's significant adverse impacts is *not* the same as the no project alternative, which takes into account future changes in the environment reasonably expected to occur if the project is not approved. **[****28]** (*Id., subd. (e)(2)*, *(3)(C)*.)
[*455]

CA(4)[] **(4)** *HN9*[] The CEQA Guidelines establish the default of an existing conditions baseline even for projects expected to be in operation for many years or decades. That a project will have a long operational life, by itself, does not justify an agency's failing to assess its impacts on existing environmental conditions. For such projects as for others, existing conditions constitute the norm from which a departure must be justified—not only because the CEQA Guidelines so state, but because using existing conditions serves CEQA's goals in important ways.

CA(5)[] **(5)** *HN10*[] Even when a project is intended and expected to improve conditions in the long term—20 or 30 years after an EIR is prepared—decision makers and members of the public are entitled under CEQA to know the short- and medium-term environmental costs of achieving that desirable improvement. These costs include not only the impacts involved in constructing the project but also those the project will create during its initial years of operation. Though we might rationally choose to endure short- or medium-term hardship for a long-term, permanent benefit, deciding to make that tradeoff requires some knowledge about the severity **[****29]** and duration of the near-term hardship. An EIR stating that in 20 or 30 years the project will improve the environment, but neglecting, without justification, to provide any evaluation of the project's impacts in the meantime, does not “giv[e] due consideration to both the short-term and long-term effects” of the project (*Cal. Code Regs., tit. 14, § 15126.2, subd. (a)*) and does not serve CEQA's informational purpose well. The omission of an existing conditions analysis must be justified, even if the project is designed to alleviate adverse environmental conditions over the long term.

In addition, existing environmental conditions have the advantage that they can generally be directly measured and need not be projected through a predictive model. However sophisticated and well designed a model is, its product carries the inherent uncertainty of every long-term prediction, uncertainty that tends to increase with the period of projection. For example, if future population in the project area is projected using an annual growth multiplier, a small error in that multiplier will itself be multiplied and compounded as the projection is pushed further into the **[***16]** future. *HN11*[] The public and decision **[****30]** makers are entitled to the most accurate information on project impacts practically possible, and the choice of a baseline must reflect that goal.

CA(6)[] **(6)** Finally, use of existing conditions as a baseline makes the analysis more accessible to decision makers and especially to members of the public, who may be familiar with the existing environment but not technically equipped to assess a projection into the distant future. As an amicus curiae observes, “[a]nyone can review an EIR's discussion of current environmental **[*456]** conditions and determine whether [it] comports with that person's knowledge and experience of the world.” But “[i]n a hypothetical future world, the environment is what the statisticians say it is.” *HN12*[] Quantitative and technical descriptions of environmental conditions have a place in CEQA analysis, but an agency must not create unwarranted barriers to public understanding of the EIR by unnecessarily substituting a baseline of projected future conditions for one based on actual existing conditions. (See *Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 392 [253*

Cal.Rptr. 426, 764 P.2d 278] [EIR allows the public to "know the basis on which its responsible officials either **[****31]** approve or reject environmentally significant action," thereby promoting "informed self-government"].)

[512]** Justice Baxter's concurring and dissenting opinion proposes a significantly more lax rule, similar to that espoused by the Court of Appeal below, under which a future conditions baseline may be employed, in lieu of one based on existing environmental conditions, so long as it is "a realistic measure of the physical conditions without the proposed project" projected at the agency's chosen future date. (Conc. & dis. opn. of Baxter, J., *post*, at p. 470.) As discussed earlier, such a rule cannot be derived from *Communities for a Better Environment* or the other authority cited for it. Moreover, it would drain Guidelines section 15125(a)'s last sentence (providing that existing environmental conditions "will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant") of virtually all prescriptive effect. Perhaps most important, it would sanction the unwarranted omission of information on years or decades of a project's environmental impacts and open the door to gamesmanship in the choice of baselines.

Under the rule proposed in Justice **[****32]** Baxter's opinion, agencies evaluating projects intended to exist and operate for many decades could seemingly choose a baseline of conditions from *any* period of the project's expected operations, 15, 30 or 60 years in the future, so long as the agency's projections were supported by reasonably reliable data and predictive modeling. Existing environmental conditions would constitute the "normal[]" baseline for an EIR (Guidelines § 15125(a))—*except* for any case where the agency chose a different baseline. Agencies would be empowered routinely to omit discussion of short- and medium-term operational effects, preparing EIRs that told the public and decision makers only what impacts could be expected decades down the road. An agency that wished to hide significant adverse impacts expected to occur in the project's initial years of operation could choose to analyze the project's environmental effects only at some more distant period, when changes in background conditions might mask or swamp the adverse effects seen in the shorter term. That no intentional hiding **[*457]** of likely impacts appears in this case does not negate the potential for manipulation of the baseline under a rule that **[***17]** provides **[****33]** agencies unbounded discretion in the choice.

CA(7)[↑] **(7)** Contrary to Justice Baxter's claim, our holding here does not impose any "wasteful" or "additional" substantive requirement on agencies. (Conc. & dis. opn. of Baxter, J., *post*, at p. 478.) We hold only that HN13[↑] agencies normally must do what Guidelines section 15125(a) expressly requires—compare the project's impacts to existing environmental conditions, as that term is broadly understood, to determine their significance. The question we would have an agency ask in choosing a baseline is not, "Would an existing conditions analysis *add* information to a future conditions analysis?" It is, "Do we have a reason to *omit* the existing conditions analysis and substitute one based on future conditions?" Of course, where an agency concludes an analysis of impacts on future conditions is also needed in any portion of the EIR, it may include such an analysis. But any duplication of effort therein involved is not a product of this decision.

CA(8)[↑] **(8)** For all these reasons, we hold that HN14[↑] while an agency preparing an EIR does have discretion to omit an analysis of the project's significant impacts on existing environmental conditions and substitute a baseline consisting **[****34]** of environmental conditions projected to exist in the future, the agency must justify its decision by showing an existing conditions analysis would be misleading or without informational value. Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council, supra, 190 Cal.App.4th 1351, and Madera Oversight Coalition, Inc. v.

County of Madera, supra, 199 Cal.App.4th 48, are disapproved insofar as they hold an agency may never employ predicted future conditions as the sole baseline for analysis of a project's environmental impacts.

Because the standard articulated here involves a primarily factual assessment, the agency's determination is reviewed only for substantial evidence supporting it. (*Vineyard Area Citizens for Responsible **[**513]** Growth, Inc. v. City of Rancho Cordova, supra, 40 Cal.4th at p. 435*.) If substantial evidence supports an agency's determination that an existing conditions impacts analysis would provide little or no relevant information or would be misleading as to the project's true impacts, a reviewing court may not substitute its own judgment on this point for that of the agency. (*Ibid.*)

B. *The Expo Authority's Use of a Year 2030 Baseline*

1. **[****35]** *Traffic congestion analysis*

As proposed in the EIR, the Expo Phase 2 project will cross several streets at grade rather than with bridges or tunnels. To analyze the resulting impacts on traffic congestion, the Expo Authority used the following method:
[*458]

(1) For numerous street intersections in the vicinity, the agency directly observed existing congestion in 2007 and 2008, measuring it as the average delay in travel through each intersection during the morning and afternoon peak travel periods. The delay was expressed in terms of "Level of Service" (LOS), ranging from LOS A (free flow) to LOS F (extreme congestion). [7]

[*18]** (2) Using MTA's traffic projection model, which incorporates regional growth projections from the Southern California Association of Governments, the Expo Authority predicted the LOS for each intersection in the year 2030 if the **[****36]** Expo Phase 2 project is *not* built (and assuming no other transit improvements along the project corridor).

(3) For each intersection studied, the Expo Authority then predicted the LOS in the year 2030 if the Expo Phase 2 project *is* built and operated. These projections took into account automobile trip reductions expected to result from the project and additional peak hour trips to drop off or pick up passengers at stations, as well as the impact of stoppages at grade crossings as each train passes.

(4) For each intersection, the predicted year 2030 LOS with the project was compared to the predicted year 2030 LOS without the project and the significance of any impact assessed. An adverse impact on delay was considered significant if the project was projected to cause service to deteriorate from LOS A, B, C, or D to LOS E or F or, for those intersections projected to be at LOS E or F in 2030 without the project, if the project would increase delay by four seconds or more.

Using this method, the EIR projects some additional local traffic congestion in 2030 due to the project, but none rising above the significance thresholds just described. For example, at the intersection of Stewart Street **[****37]** and Olympic Boulevard, vehicles in the year 2030 are expected to experience a morning peak period delay of 34.2 seconds absent the project and 49 seconds with the project, but this 14.8-second increase in delay is not considered significant because it only moves the intersection from LOS C to LOS D, and not into the unsatisfactory categories of LOS E and F. At 20th Street and Olympic Boulevard, the project is expected to cause an additional 0.8 seconds of delay, considered insignificant because it does not change the projected LOS, which is expected to be unsatisfactory (LOS E) in 2030 even without the project, and falls below the four-second

[7] For signalized intersections, delay at LOS A is less than or equal to 10 seconds, at LOS B it is between 10 and 20 seconds, at LOS C it is between 20 and 35 seconds, at LOS D it is between 35 and 55 seconds, at LOS E it is between 55 and 80 seconds, and at LOS F it is greater than 80 seconds. The LOS thresholds are lower for unsignalized intersections.

significance threshold. Several other intersections fit these patterns of insignificant adverse impact, **[*459]** while at many other intersections the project is projected to *reduce* traffic delay in 2030, due in part to intersection improvements proposed in conjunction with the transit line.

2. *Air pollution analysis*

Based on projections of an increase in vehicle miles traveled in the region, the EIR predicts an increase in air pollution emissions by 2030 if the Expo Phase 2 project is not built. The project would result in fewer vehicle miles traveled, **[****38]** in comparison to the no-build alternative, and hence in fewer emissions **[**514]** in 2030. By reducing vehicle travel and the resulting emissions below those otherwise expected, project implementation "would have a beneficial impact on regional pollutant levels over the life of the project."

3. *Explanation of baseline choice*

In the introduction to the EIR's factual findings, the Expo Authority explains that it found use of a future conditions baseline for traffic and air quality impacts analysis necessary "so that the public and the decision makers may understand the future impacts on traffic and air quality of approving and not approving the project." The EIR continues: "The evaluation of future traffic and air quality conditions utilizes adopted official demographic and [*sic*] projections for the project area and region. Past experience with the adopted demographic projections indicate that it is reasonable to assume that the population **[***19]** of the project area and the region will continue to increase over the life of the project. The projected population increases will, in turn, result in increased traffic congestion and increased air emissions from mobile sources in the project area and **[****39]** in the region. [¶] For most of the environmental topics in the [EIR] and in these Findings, the Authority finds that existing environmental conditions are the appropriate baseline condition for the purpose of determining whether an impact is significant. However, the Authority finds that the existing physical environmental conditions (current population and traffic levels) do not provide a reasonable baseline for the purpose of determining whether traffic and air quality impacts of the Project are significant. The Authority is electing to utilize the future baseline conditions for the purposes of determining the significance of impacts to traffic and air quality."

Further explanation of the baseline choice is provided in a later section on the EIR's methods for determining impacts: "A transportation project includes significant capital infrastructure and is intended to meet long-term needs. As a result, the permanent effects of those transportation projects are, and should be, evaluated based on a longer-term perspective that takes **[*460]** increases in population and programmed changes to the transportation system into account. Since the project is addressing both existing and long-term transportation **[****40]** shortfalls, that longer-term perspective should include reasonably foreseeable other improvements. [¶] For this project the long-term permanent impacts are evaluated against what is [*sic*] expected to be existing conditions in 2030. This assumes the planned growth (jobs and employment) and related funded transportation improvements as proposed in the [Southern California Association of Governments Regional Transportation Plan]. In addition, short-term impacts associated with the construction period (2011 to 2015) of the project have also been evaluated. [¶] … Because population and traffic are anticipated to increase over the life of the project, this approach provides the public and decision makers with a realistic evaluation of the significance of air quality and traffic impacts over the life of the project."

[*20]** The Expo Authority's explanation of its baseline choice in its briefing places similar reliance on the inevitability of population and traffic growth in the project area: "It is undisputed that the population, employment and concomitant traffic congestion will continue to increase through 2030 on the west side. [Citation.] It is absurd to suggest that the Authority use 2007

[**41]** population, employment and traffic to determine the Project's operational impacts when the 2007 conditions will no longer exist when the Project is fully operational."

4. *Propriety of baseline choice*

We discern no substantial evidence supporting the Expo Authority's decision to omit an analysis of the project's traffic and air quality impacts on existing environmental conditions. Although the agency did not expressly find an existing conditions analysis would have been misleading or without informational value, its finding that for analysis of traffic congestion and air pollution impacts "existing physical environmental conditions … do not provide a reasonable baseline" may be construed as so asserting. Unfortunately, nothing in the record supports that **[**515]** determination, and without such evidence the Expo Authority cannot justify its decision to completely omit an analysis of the project's impacts on existing traffic congestion and air quality.

The Expo Authority observes that "2007 conditions will no longer exist when the Project is fully operational." As discussed earlier, CEQA allows an agency to adjust its existing conditions baseline to account for an important change that will **[****42]** occur between the time an EIR is prepared and the time of project implementation. (See pt. I.A., *ante*.) But the Expo Authority did not measure traffic congestion and air pollution impacts against existing environmental conditions when the project begins operations. The agency used *no* existing conditions baseline, adjusted or unadjusted, for analysis of these impacts, instead employing *only* a baseline of projected 2030 conditions.

[*461]

That the Expo Phase 2 project is "intended to meet long-term needs" for public transportation is an insufficient justification. By focusing solely on the project's operational impacts in the distant future, the EIR neglects to inform the public and decision makers explicitly of any operational impacts that could occur in the project's first 15 years of operation. (The only short-term impacts on traffic and air quality analyzed were those resulting from the project's *construction*.) The absence of such "due consideration to both the short-term and long-term effects" of the project (*Cal. Code Regs., tit. 14, § 15126.2, subd. (a)*) **[****43]** threatens to deprive the EIR's users of the opportunity to weigh the project's environmental costs and benefits in an informed manner.

Similarly, that project area population, traffic, and emissions of air pollutants are expected to continue increasing through and beyond 2030 does not justify the agency's failure to analyze operational impacts under earlier conditions. The expectation of change may make it important for the agency to *also* examine impacts under future conditions (whether in the significant impacts analysis, the cumulative impacts analysis, or the discussion of the no project alternative), but it does not constitute substantial evidence supporting a determination that an existing conditions analysis would be uninformative or misleading.

Nor does the fact ridership is not expected to reach maximum levels immediately upon the transit line's opening constitute substantial evidence justifying the failure to examine impacts on existing conditions. [8] The level of ridership on the proposed transit line is a characteristic of the *project in operation*, not a characteristic of the *environmental baseline* against which project impacts are measured. As noted earlier, an existing conditions

[8] The record does not indicate full ridership will first be achieved in 2030. The passage cited in the Expo Authority's brief, found in the EIR's discussion of parking impacts and mitigation along Colorado Avenue, reads as follows: "On opening day, 71 to 92 percent of the 2030 parking demand would be provided depending on the Preferred Alternative selected. This would be reasonably consistent with opening day ridership, which is estimated at approximately 77 percent of the year 2030 forecasts." While this makes clear ridership on opening day is expected to be below its ultimate maximum, it does not purport to predict how fast ridership will increase or when it will reach its full level, other than assuming that level will be reached by or before the year 2030. From common experience, one might expect fewer than 15 years will be needed for commuters to start using a new transit line.

[**44]** analysis often assumes the project exists and is in full operation at the time the environmental analysis is conducted, measuring the likely impacts against a baseline of conditions existing at the time of environmental analysis. Thus the Expo Authority did not need to employ a baseline of predicted 2030 background conditions in order to measure the impacts of full ridership; those likely impacts could have been predicted against an existing conditions baseline. **[***21]** Justice Baxter's concurring and dissenting opinion, in suggesting the **[*462]** year 2030 baseline was chosen as representative of full ridership, ignores the fact that ridership is not a baseline condition but a characteristic of the project's operations. (Conc. & dis. opn. of Baxter, J., *post*, at p. 473.) In any event, neither the EIR nor the Expo Authority's briefs, nor Justice Baxter's opinion explains whether ridership levels would affect the project's impacts on traffic congestion and **[**516]** air pollution, and if so, whether the effect would be positive or negative; the likelihood of changing ridership levels thus cannot be considered substantial evidence an existing conditions analysis—whatever ridership level it assumed—would be useless **[****45]** or misleading.

CA(9)[↑] **(9)** In its brief, the Expo Authority states it "chose 2030 because when it issued the [notice of preparation of the EIR] in 2007, 2030 was the planning horizon for transportation projects in the adopted [Southern California Association of Governments] Regional Transportation Plan," and asserts **[****46]** that federal law requires the use of this long-term perspective in planning for federally funded transportation projects. To the extent the agency is arguing that a technique used for planning under another statutory scheme necessarily satisfies CEQA's requirements for analysis of a project's impacts, we disagree. *HN15*[↑] Except where CEQA or the CEQA Guidelines tie CEQA analysis to planning done for a different purpose (see, e.g., *§ 21081.2, subd. (a)* [CEQA findings on traffic impacts not required for certain residential infill projects that are in compliance with other municipal plans and ordinances]), an EIR must be judged on its fulfillment of CEQA's mandates, not those of other statutes. And while we try to interpret CEQA in a manner consistent with other planning schemes (see *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, supra, 40 Cal.4th at pp. 432–434*), no issue of conflict or incompatibility arises here. Nothing prevents an agency preparing an EIR from analyzing the impacts of a project against an existing conditions baseline even if the agency has also planned under other statutes for the project's long-term operation. Moreover, the use of multiple **[****47]** baselines for direct impacts analysis does not violate CEQA (see *Pfeiffer, supra, 200 Cal.App.4th at p. 1573*; *Woodward Park Homeowners Assn., Inc. v. City of Fresno, supra, 150 Cal.App.4th at p. 707*), and even when the EIR uses solely an existing conditions baseline for direct impacts analysis, available information about the longer term impacts of the project, together with other foreseeable developments, is appropriately incorporated into the EIR under the rubric of a cumulative impacts analysis (*Cal. Code Regs., tit. 14, § 15130*). There is thus no necessary connection between use of a year 2030 horizon for transportation planning generally and the agency's choice of conditions in that year as the sole baseline for project impacts analysis under CEQA.

CA(10)[↑] **(10)** In summary, the administrative record does not offer substantial evidence to support the Expo Authority's decision to limit its analysis of project impacts on traffic congestion and air quality to predicted impacts in **[*463]** the year 2030, to the exclusion of likely impacts on conditions existing when the EIR was prepared or when the project begins operation.

5. *Prejudice*

HN16[↑] An omission in an EIR's significant impacts analysis is deemed prejudicial **[****48]** if it deprived the public and decision makers of substantial relevant information **[***22]** about the project's likely adverse impacts. Although an agency's failure to disclose information called for

by CEQA may be prejudicial "regardless of whether a different outcome would have resulted if the public agency had complied" with the law (*§ 21005, subd. (a)*), under CEQA "there is no presumption that error is prejudicial" (*§ 21005, subd. (b)*). Insubstantial or merely technical omissions are not grounds for relief. (*Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection, supra, 44 Cal.4th at pp. 485–486*.) "A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*Kings County Farm Bureau v. City of Hanford (1990) 221 Cal. App. 3d 692, 712 [270 Cal. Rptr. 650]*.)

With regard to the analysis of Expo Phase 2's traffic congestion impacts, we conclude the EIR's use exclusively of a future conditions baseline had no such prejudicial effect. Although the EIR failed to analyze the project's impacts on existing traffic congestion, **[**517]** it did **[****49]** include an extensive analysis of year 2030 congestion effects, finding no significant adverse impacts. That detailed analysis demonstrates the lack of grounds to suppose the same analysis performed against existing traffic conditions would have produced any substantially different information.

The EIR revealed that project impacts on congestion at intersections along the chosen rail route are expected in most cases to be *favorable* in 2030, that most of the adverse impacts expected are small, and that even the few relatively large adverse impacts expected would not, if applied to existing conditions, result in significant changes in delay status. [9] Although Neighbors has argued that intersections expected to reach unsatisfactory status by 2030 without the project might do so earlier because of project impacts, the EIR **[*464]** showed that those intersections would experience favorable, or in one instance adverse but very minor, impacts in 2030 due to the project. [10] Design changes reducing delay are built into the project at many intersections, and the expected gradual increase in traffic generally could not reasonably be thought likely to result in substantially larger project impacts on congestion **[****50]** under existing conditions **[***23]** than under 2030 conditions. [11] In these particular factual circumstances, the EIR's omission did not "preclude[] informed decisionmaking and informed public participation." (*Kings County Farm Bureau*

[9] For the majority of the more than 100 intersection/peak period combinations studied, the project's expected impact in 2030 is favorable or nonexistent. Where the predicted impact is adverse, it is generally minor, exceeding 10 seconds in only seven instances. And of the 10 currently satisfactory intersections (those in LOS status A through D) on which the rail project is expected to have the greatest adverse impacts in 2030, including the seven on which the projected 2030 impact exceeds 10 seconds, *none* are currently close enough to LOS E so that the 2030 impact, if applied to existing conditions, would put the intersection into unsatisfactory status. Only two currently satisfactory intersections are within 10 seconds of the LOS E threshold, and the project is projected to affect delay *favorably* at both.

[10] Five intersection/peak period combinations along the proposed transit line meet the criteria of being **[****51]** currently in a satisfactory LOS and projected to turn unsatisfactory by 2030 in the project's absence. For four of the five, the project's 2030 impact on congestion is expected to be favorable, reducing delay in amounts ranging from 1.1 seconds to 30.1 seconds. The single projected adverse impact in this group is very small, 0.8 seconds. And since the existing morning peak delay at that intersection (20th Street and Olympic Boulevard) is 42.6 seconds, the adverse project impact under existing conditions would have to be 12.4 seconds, or more than 15 times the adverse impact in 2030, to put the intersection over the 55-second threshold into LOS E. To posit such an extreme difference in impacts would be unsupported speculation.

[11] The record shows that, baseline conditions aside, the project's *operations* may differ somewhat on opening day from later periods, in that ridership on the transit line is expected initially to be only 77 percent of its eventual level. As noted earlier, however, an existing conditions impacts analysis ordinarily assumes, counterfactually, that the project is in full operation. And even if an existing conditions analysis assumed 77 percent ridership, no substantial **[****52]** difference in impacts would be likely. The rail project's favorable effect on project area traffic is projected to be modest even at full ridership: a reduction of 0.38 percent in vehicle miles traveled in 2030. Even if the 77 percent initial ridership implies that initially the project will reduce vehicle miles traveled only by 0.29 percent, there are no grounds to believe such an extremely minor difference (0.09 percentage points) could substantially alter the project impacts on existing congestion at the individual intersections studied.

v. City of Hanford, supra, 221 Cal. App. 3d at p. 712.)

We reach the same conclusion as to the analysis of air quality impacts. Based on the prediction that operation of the Expo Phase 2 project would reduce the vehicle miles traveled in the project area and hence reduce emissions of pollutants, the EIR concluded project implementation "would have a beneficial impact on regional pollutant levels over the life of the project … ." But the project will begin reducing vehicle miles travelled as soon as it starts operating, as some of those who would otherwise drive decide to take the new train. Under the EIR's logic, to which Neighbors raises no objection other than the choice of a baseline, the project's impact **[****53]** on air quality will thus be beneficial *throughout* its operation, not only in 2030. The EIR's formal use of a year 2030 baseline for this analysis was thus an insubstantial, technical error that cannot be considered prejudicial. (*Environmental Protection Information Center v. California Dept. of Forestry [**518] & Fire Protection, supra, 44 Cal.4th at pp. 486–488*.)

To comply fully with CEQA's informational mandate, the Expo Authority should have analyzed the project's effects on existing traffic congestion and **[*465]** air quality conditions. Under the specific circumstances of this case, however, its failure to do so did not deprive agency decision makers or the public of substantial information relevant to approving the project, and is therefore not a ground for setting that decision aside.

II. *Adequacy of Mitigation Measure for Spillover Parking Effects*

As proposed in the EIR, the Expo Phase 2 project does not include construction of parking facilities at several stations. The EIR recognizes that some transit patrons will nevertheless attempt to park near these stations, and near-station streets where parking is neither time limited nor restricted to those with residential permits "could be impacted **[****54]** by spillover parking." To mitigate this potential impact, the EIR proposed, and the agency adopted, a series of measures. On-street parking in areas where spillover effects are anticipated will be monitored before and for six months after the opening of the transit line. If a parking shortage results, MTA will help the responsible local jurisdiction establish an appropriate permit parking program, for which MTA will pay the signage and administrative costs. If a permit program is inappropriate for the area, MTA "will work with the local jurisdictions" to decide on another option, such as time-restricted, metered, or shared **[***24]** parking arrangements. By means of this mitigation measure, the EIR concludes, any adverse spillover parking effect will be rendered less than significant.

CA(11)[↑] **(11)** Neighbors contends this mitigation measure is insufficiently enforceable because it depends on the cooperation of municipal agencies having jurisdiction over parking in the vicinity of the stations. *HN17*[↑] CEQA, however, allows an agency to approve or carry out a project with potential adverse impacts if binding mitigation measures have been "required in, or incorporated into" the project *or* if "[t]hose changes or alterations **[****55]** are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency." (*§ 21081, subd. (a)*; see *Cal. Code Regs., tit. 14, § 15091, subd. (b)* [findings to this effect "shall be supported by substantial evidence in the record"].) The Expo Authority made both findings as to its spillover parking mitigation measure, and both findings are supported by substantial evidence.

Under the adopted mitigation measure, MTA is *required* to monitor parking in the potentially affected neighborhoods, to pay for a residential permit parking program where station spillover has resulted in a street parking shortage, and to assist in developing other measures where a residential permit program is inappropriate. But as MTA cannot institute street parking restrictions without the cooperation of the local municipalities, some part of the mitigation, to the extent it is needed, will indeed be the responsibility of **[*466]** other public agencies, which "can and should" (*§ 21081, subd.*

(a)(2)) adopt parking programs and restrictions to alleviate pressure from commuters using the new transit line.

Neighbors relies on *Federation of Hillside & Canyon Associations v. City of Los Angeles (2000) 83 Cal.App.4th 1252, 1260–1262 [100 Cal. Rptr. 2d 301]*, **[****56]** in which the appellate court found a city's proposed measures to mitigate the transportation impacts of a general plan framework were inadequate. The transportation plan involved in that case, however, was designed to mitigate the effects of massive population and employment growth planned for the city and would have required $ 12 billion from various sources, of which the city's own portion far exceeded its available funds. (*Id. at p. 1256*.) The city thus "acknowledged in the [mitigation plan] that there was great uncertainty as to whether the mitigation measures would ever be funded or implemented" (*id. at p. 1261*), leading the court to find no substantial evidence that enforceable mitigation measures had been incorporated into or were required by the project.

The circumstances in *Federation of Hillside & Canyon Associations* are not comparable **[**519]** to those here, where the mitigation measure at issue involves only the monitoring of parking near several transit stations and, if a shortage develops, the cooperative implementation of one or more relatively low-cost solutions. While the Expo Authority and MTA cannot guarantee local governments will cooperate to implement permit parking programs **[****57]** or other parking restrictions, the record supports the conclusion these municipalities "can and should" (*§ 21081, subd. (a)(2)*) do so. Neighbors's speculation a municipality might not agree to a permit parking program—which MTA would pay for and which would benefit the municipality's own residents—is not sufficient to show the agency violated CEQA by adopting this mitigation measure. (See *City of Marina v. Board of Trustees of California State University (2006) 39 Cal.4th 341, 364–365 [46 Cal. Rptr. 3d 355, 138 P.3d 692]* [the finding that mitigation through sharing the **[***25]** cost of necessary improvements with the responsible agency is infeasible was not justified by speculation that the agency might not agree to undertake the improvements].)

DISPOSITION

The judgment of the Court of Appeal is affirmed.

Kennard, J., and Corrigan, J., concurred.

Concur by: Baxter (In Part); Liu (In Part)

Dissent by: Baxter (In Part); Liu (In Part)

Dissent

BAXTER, J., Concurring and Dissenting.—Enacted by the Legislature in 1970, the California Environmental Quality Act (CEQA; *Pub. Resources [*467] Code,* [1] *§ 21000 et seq.*) aims to enhance the environmental quality of the state and promote long-term protection of the environment. (*§ 21001*.) To achieve these objectives, CEQA establishes a comprehensive review process for analyzing **[****58]** the potential environmental impacts of a proposed project and assessing how such impacts might be mitigated. Inasmuch as the review process can be quite lengthy and involved, the Legislature has declared it our state policy that the public agencies responsible for carrying out the process must do so "in the most efficient, expeditious manner," so as to conserve the available financial, governmental, and other resources for application toward mitigation efforts. (*§ 21003, subd. (f)*.) It is also the Legislature's intent that courts "shall not" interpret the statutory and regulatory requirements of CEQA "in a manner which imposes procedural or substantive requirements beyond those explicitly stated in [CEQA] or in the state guidelines." (*§ 21083.1*.)

[1] All further statutory references are to this code unless otherwise indicated.

The majority's analysis of the baseline issue fails to honor these legislative prerogatives. [2] The upshot of that analysis is this: An environmental impact report (EIR) may omit an analysis of a proposed project's impacts on existing conditions *only when* its inclusion "would detract from [the] EIR's effectiveness as an informational document." (Lead opn., *ante*, at **[****59]** p. 452.) The majority's categorical rule means that, notwithstanding the particular nature and circumstances of a proposed project, a lead agency abuses its discretion when it evaluates environmental impacts with a baseline of projected future conditions in lieu of an existing conditions baseline, even though selection of the former is reasonable under the circumstances and substantial evidence supports the analysis. In short, even if an EIR's analysis of impacts using a future conditions baseline, standing alone, would provide a realistic measure of a project's impacts that allows for informed decisionmaking and public participation, the majority mandates that the EIR also undertake and include an existing conditions analysis, so long as such an analysis would not in fact diminish the effectiveness of the document. (Lead opn., *ante*, at pp. 451–452.)

Although it is easy to see the wastefulness of requiring an existing conditions analysis **[**520]** when a future conditions analysis provides a realistic assessment of a project's significant **[****60]** adverse effects, there are several legal reasons why the majority's holding is in error. Most notably, the majority's restrictions on agency discretion find no support in CEQA or in the regulations promulgated thereunder. (See pt. **[***26]** II.A., *post*.) In addition, the restrictions are contrary to our decisions recognizing an agency's discretion in selecting a baseline and case law requiring deferential review of agency decisions. (See *ibid*.)
[*468]

Apart from these legal defects, the majority's analysis is objectionable for the further reason that it adds a significant level of complexity and uncertainty to an already arduous environmental review process. To begin with, the stated restrictions are ambiguous and create opportunities for litigation over their applicability. Moreover, the ease of alleging an abuse of discretion under the majority's analysis is likely to prompt challenges whenever an existing conditions baseline is omitted, causing delays that may add significantly to a project's costs or derail it altogether. (See pt. II.B., *post*.) The mere threat of such challenges may prompt lead agencies to engage in existing conditions analyses as a matter of course, even if such exercises would **[****61]** not materially improve public disclosure or informed decisionmaking, and this despite the declared state policy requiring that the review process be conducted efficiently and expeditiously in order to conserve financial and governmental resources. (See *ibid*.) That the majority needlessly complicates and protracts the CEQA review process is most unfortunate, for both the public and the environment.

In sum, I concur in the ultimate affirmance of the Court of Appeal judgment, which upheld certification of the EIR for the proposed light-rail project at issue (Expo Phase 2). I also concur in the majority's rejection of the spillover parking contentions of plaintiff Neighbors for Smart Rail (Neighbors). But I dissent from the majority's analysis of the baseline issue and its conclusion that the lead agency (Expo Authority) abused its discretion in approving the EIR's use of an analytic baseline of traffic and air quality conditions projected to exist in the year 2030 (the 2030 baseline), in lieu of a baseline of the conditions existing in 2007 when the notice of preparation of the EIR was published.

As a major infrastructure project designed specifically to address projected long-term increases **[****62]** in traffic congestion and air pollution, Expo Phase 2's very operation will, over

[2] I use the term "majority" to refer to those portions of the lead opinion's analysis in which Justice Liu concurs. (See conc. & dis. opn. of Liu, J., *post*, at pp. 478–480, 481.)

time, achieve environmental objectives and efficiencies in complete alignment with CEQA's goals of enhancing and protecting the environment in this state. The majority does not disagree that the traffic and air quality conditions in 2007 will no longer exist when Expo Phase 2 is fully operational. But despite Expo Authority's reliance on this reality as a justification for omitting an impacts analysis based on the 2007 conditions, the majority proceeds to fault the agency for failing to analyze the conditions projected to exist eight years after that date, when Expo Phase 2 is scheduled to begin operations in 2015. (See lead opn., *ante*, at pp. 461, 462.) The unfairness of today's decision is stunning: the majority finds an abuse of discretion based on the lead agency's failure to use a baseline that is nowhere mentioned in the CEQA statutes, regulations, or case law, and that no agency or member of the public ever advocated in the administrative review process below.
[*469]

Unlike the majority, I conclude, consistent with the statutory and decisional law governing review in CEQA proceedings, that the record amply **[****63]** supports Expo Authority's use of the 2030 baseline in place of an existing conditions baseline. (See pt. I., *post*.) The record also confirms that substantial evidence supports the 2030 baseline as a realistic baseline for measuring the project's operational impacts on traffic and air quality conditions. (*Ibid*.)

[*27] I.**

The basic purpose of an EIR is "to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." (§ 21061; see § 21002.1, subd. (a).) **[**521]** CEQA defines a "significant effect on the environment" as meaning "a substantial, or potentially substantial, adverse change in the environment." (§ 21068.)

In order to provide meaningful information to the decision makers and the public, an EIR must clearly and accurately identify the effects of the proposed project as distinguished from nonproject effects. To determine if a project is likely to have a significant effect on the environment, the lead agency "must use some measure of the environment's state absent the **[****64]** project." (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 315 [106 Cal. Rptr. 3d 502, 226 P.3d 985] (*Communities for a Better Environment*).) The "environment" means the physical conditions existing within the area "which will be affected by a proposed project." (§ 21060.5.)

As relevant here, "[a]n EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will *normally* constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." (Cal. Code Regs., tit. 14, § 15125, subd. (a), italics added; [3] see Guidelines, § 15126.2, subd. (a).) In using the word "normally," Guidelines section 15125, subdivision (a) (Guidelines section 15125(a)), "necessarily contemplates" that physical conditions at a point in time other than the two specified may constitute the appropriate baseline or environmental setting. (*Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 336 [118 Cal. Rptr. 3d 182] **[****65]** (*Cherry Valley*).)
[*470]

In *Communities for a Better Environment*, we emphasized that " 'the date for establishing a baseline cannot be a rigid one. Environmental

[3] Henceforth, all references to "Guidelines" are to the CEQA Guidelines in title 14 of the California Code of Regulations.

conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods.' " (*Communities for a Better Environment, supra, 48 Cal.4th at pp. 327–328*.) An agency's selection of a baseline is, fundamentally, a factual determination of how to realistically measure the physical conditions without the proposed project. (*Id. at p. 328*; see *Cherry Valley, supra, 190 Cal.App.4th at pp. 336–337*.) Although *Communities for a Better Environment* did not approve the use of projected future conditions as the sole baseline for evaluating environmental impacts, neither did it prohibit such use or otherwise impose restrictions on an agency's discretion to omit an existing conditions baseline. [4] This should **[***28]** be obvious from the fact that the decision is the only support the majority cites for its purported holding that an agency may base an EIR's impacts analysis exclusively on the **[****66]** conditions "*expected* to obtain"—i.e., *projected* to obtain—when a proposed project begins operating. (Lead opn., *ante*, at p. 453, italics added; see pt. II.B., *post*.) The important takeaway from *Communities for a Better Environment* is our recognition that, while flexibility in establishing a baseline must be allowed, the selected baseline must result in a reliable evaluation of a project's impacts.

Generally, an abuse of discretion is established under CEQA "if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (*§ 21168.5*.) Because the language of *Guidelines section 15125(a)* clearly contemplates that an agency may depart from the norm of an existing **[**522]** conditions analysis, **[****67]** the proper inquiry is whether the agency acted reasonably given the nature and circumstances of the project, and whether substantial evidence supports its selected alternative baseline as a realistic measure of the physical conditions without the proposed project that provides an impacts analysis allowing for informed decisionmaking and public participation. (*§ 21168.5*; see *Communities for a Better Environment, supra, 48 Cal.4th at pp. 315, 322*.) A reviewing court will "indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision." (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors (2001) 87 Cal.App.4th 99, 117 [104 Cal. Rptr. 2d 326]* (*Save Our Peninsula*).)
[*471]

"[A]s with all CEQA factual determinations," the selection of a baseline is a discretionary determination reviewed "for support by substantial evidence." (*Communities for a Better Environment, supra, 48 Cal.4th at p. 328*; see *Fat v. County of Sacramento (2002) 97 Cal.App.4th 1270, 1278 [119 Cal. Rptr. 2d 402]* [decision not to deviate from the norm also reviewed for substantial evidence].) Substantial evidence supporting a predicted baseline may consist **[****68]** of reasonable assumptions and expert evaluations that are supported by facts. (*§ 21080, subd. (e)(1)*; *Guidelines, § 15384, subd. (b)*; see *Eureka Citizens for Responsible Government v. City of Eureka (2007) 147 Cal.App.4th 357, 371–372 [54 Cal. Rptr. 3d 485]*; *Save Our Peninsula, supra, 87 Cal.App.4th at p. 120*.) The requirement that an agency's decision be supported by substantial evidence helps to ensure that a particular baseline will not be selected unless there is evidence of a solid and credible nature warranting its use.

During the lengthy administrative review process here, plaintiff Neighbors complained the EIR should have used a baseline of projected conditions in the year 2035 to allow for a proper evaluation of traffic congestion and air quality impacts. In filing this lawsuit, however, Neighbors switched tactics

[4] As the majority acknowledges, to the extent Court of Appeal decisions have held or suggested that sole use of a projected future conditions baseline is forbidden, they are wrong. (E.g., *Pfeiffer v. City of Sunnyvale City Council (2011) 200 Cal.App.4th 1552 [135 Cal. Rptr. 3d 380]*; *Madera Oversight Coalition, Inc. v. County of Madera (2011) 199 Cal.App.4th 48 [131 Cal. Rptr. 3d 626]*; *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council (2010) 190 Cal.App.4th 1351 [119 Cal. Rptr. 3d 481]*.)

and now claims the EIR is deficient in failing to use the regulatory baseline norm of the physical conditions existing "at the time the notice of preparation is published" (*Guidelines, § 15125(a)*), namely, a 2007 baseline. No deficiency appears.

[*29]** The EIR explicitly states that Expo Phase 2 is designed, inter alia, to "provide high-capacity transit service," to "[a]ccommodate existing population **[****69]** and employment growth and transit-supportive land use densities," to "[p]rovide an effective transit alternative to the current and expected increase in roadway congestion in the corridor," and to "[r]ealize environmental benefits associated with increased transit usage, such as improved air quality and energy efficiencies." Thus, unlike projects that are industrial or commercial in nature, Expo Phase 2 was conceived specifically to alleviate traffic congestion and improve air quality in full alignment with CEQA's objectives to enhance environmental quality and promote long-term protection of the environment. (See *§ 21001*; *Mountain Lion Foundation v. Fish & Game Com. (1997) 16 Cal.4th 105, 112 [65 Cal. Rptr. 2d 580, 939 P.2d 1280]*.)

As pertinent here, the EIR presented and relied upon state-of-the-art forecasting models that accounted for existing traffic conditions, approved population and employment growth projections, and resulting changes in traffic. These models project, among other things, that between 2005 and 2030, daily vehicle miles traveled within the study area will increase by 27 percent (31 percent to 32 percent during peak hours), and daily vehicle hours will increase by 74 percent (93 percent to 105 percent **[****70]** during peak hours). In light of this and other data, including the forecast that the transit system's **[*472]** opening day ridership in 2015 will be only 77 percent of the ridership in 2030, Expo Authority approved the EIR's exclusive use of a 2030 baseline to evaluate the traffic and air quality impacts that would be associated with the system's usage at that time. [5]

[523]** Significantly, no one here disputes the validity of the forecasting models and data used to project the physical conditions in 2030 or the accuracy of the EIR's analysis of the transit system's operational impacts using the 2030 baseline. As the EIR reflects, it evaluated the system's impacts on traffic utilizing an independently developed forecasting model [6] that has been subjected to extensive peer review and certified by the Federal Transit Administration for use in environmental documents. Notably, the model was updated and refined specifically for use in the EIR, in close coordination with that federal agency.

Likewise, there is no evidence that the 2030 baseline was selected to manipulate the analysis of traffic congestion and air quality impacts. As even Justice **[****72]** Werdegar acknowledges, use of the 2030 baseline resulted in an "extensive" and "detailed" analysis that demonstrates no grounds "to **[***30]** suppose the same analysis performed against existing traffic [and air quality] conditions would have produced any substantially different information." (Lead opn., *ante*, at p. 463.)

Indulging all reasonable inferences from the evidence that support Expo Authority's determinations and resolving all evidentiary conflicts in favor of its decision (*Save Our*

[5] Consistent with CEQA requirements, Expo Authority reviewed the EIR at issue and approved its evaluation of Expo Phase 2's potential impacts and possible alternatives with an *existing* conditions baseline on all other environmental topics, including the impacts during the projected four-year construction period (2011 through 2015). (*Guidelines, § 15125(a)*.) These topics included visual quality (aesthetics), biological resources (vegetation and wildlife), cultural resources (including archaeological and historical resources), paleontological resources, geology, soils, and seismicity, hydrology and water quality, land use and planning, noise and vibration, parks and community facilities, safety and security (including delay of emergency service vehicles when waiting for light-rail vehicles to cross an intersection), socioeconomics (including **[****71]** potential displacement and relocation of housing, residents, and businesses), and energy resources. Expo Authority also reviewed the potential hazardous materials or conditions that could be encountered, given the existing conditions.

[6] The Los Angeles County Metropolitan Transit Authority developed the model with data inputs from a regional travel demand model developed by the Southern California Association of Governments.

Peninsula, supra, 87 Cal.App.4th at p. 117), and for the reasons below, I conclude the agency did not abuse its discretion in forgoing an existing conditions baseline in favor of a 2030 baseline to measure Expo Phase 2's operational impacts.

Expo Phase 2 was specifically designed to alleviate expected increases in "roadway congestion" and to "realize environmental benefits … such as **[*473]** improved air quality" based on a 2030 transit planning horizon. Accordingly, Expo Authority could reasonably decide that an evaluation of the environmental conditions with and without the transit system in the year 2030, when the system will actually be operating, will allow for a meaningful understanding of its operational **[****73]** impacts on traffic and air quality. Certainly, the fact that state-of-the-art forecasting models predict substantial increases in the percentages of daily vehicle miles and vehicle hours from 2005 to 2030 provides ample basis for the agency's decision to dispense with an analysis based on 2007 traffic conditions which will no longer exist when the system is in operation. Given the uncontroverted expert projections showing that traffic conditions and congestion at the studied intersections will be worse in 2030 than in 2005 (and in 2007), it stands to reason that analyzing the system's operational impacts under the more-congested conditions of 2030 is not only realistic, but yields a more environmentally rigorous measure of such impacts than an analysis based on the outdated and less congested conditions existing in 2007. Selecting the 2030 planning horizon as representative of operational conditions is logical for the additional reason that, despite the system's anticipated opening date of 2015, ridership at that point is projected to be at only 77 percent of the capacity anticipated in 2030.

Moreover, as the validity of the forecasting models and the accuracy of the projected future **[****74]** conditions are not even in dispute, there can be no question that substantial evidence supported Expo Authority's predicted baseline. (Guidelines, § 15384, subd. (b); see Eureka Citizens for Responsible Government v. City of Eureka, supra, 147 Cal.App.4th at pp. 371–372; ***[**524]*** Save Our Peninsula, supra, 87 Cal.App.4th at p. 120.) Indeed, Justice Werdegar's prejudice analysis confirms that the EIR's assessment of Expo Phase 2's impacts, using the 2030 baseline, fulfilled the essential purpose of an EIR to provide the decision makers and the public in general with "detailed information about the effect which [the] proposed project is likely to have on the environment." (§ 21061; see § 21002.1, subd. (a).)

II.

Instead of applying a straightforward abuse of discretion analysis, the majority holds: "Projected future conditions may be used as the sole baseline for impacts analysis if their use in place of measured existing conditions—a departure from the norm stated in Guidelines section 15125(a)—is *justified by unusual aspects* of the project or the surrounding conditions. That the future conditions analysis would be informative is insufficient, but an agency *does have discretion* to completely **[****75]** omit an analysis of impacts on existing conditions when inclusion of such an analysis **[***31]** would *detract from an EIR's effectiveness as an informational document*, either because an analysis based on existing conditions would be *uninformative* or because it would be ***[*474]*** *misleading* to decision makers and the public." (Lead opn., *ante*, at pp. 451–452, italics added.) Applying these rigid limitations, the majority concludes Expo Authority abused its discretion in approving the EIR's sole use of a 2030 baseline to measure Expo Phase 2's impacts on traffic and air quality.

As explained below, the majority's analysis suffers from several significant flaws.

A. *The Majority's Restrictions Find No Support in CEQA and Are Contrary to Principles Governing Review of Agency Decisions*

First and foremost, the stated restrictions find no support in CEQA or its Guidelines. Apart from emphasizing Guidelines language stating that existing physical conditions will "normally" constitute the baseline for an impacts analysis (*Guidelines, § 15125(a)*) and that a lead agency should "normally" limit its examination to changes in the existing physical conditions (*Guidelines, § 15126.2, subd. (a)*), the majority offers no statutory **[****76]** or regulatory basis, and no evidence of legislative intent, reflecting that an agency has no discretion to omit an existing conditions analysis *unless such an analysis is so utterly devoid of value that it is uninformative or misleading*. Without more, it is a stretch to construe the bare language of the Guidelines in this manner. Nor are the Guidelines reasonably susceptible of a construction that bars an agency from selecting a projected future conditions analysis in lieu of an existing conditions analysis when the former (1) reflects a rational selection given the nature and circumstances of the project; (2) is realistic and furnishes substantial relevant information about a project's significant effects; and (3) otherwise allows for informed decisionmaking and informed public participation. [7]

In addition, the majority's restrictions do not align with the principle that an agency's selection of a baseline involves a discretionary determination of how to realistically measure a project's impacts. (See *Communities for a Better Environment, supra, 48 Cal.4th at pp. 327–328*.) When an agency reasonably relies on an alternative baseline, requiring an extra analysis with an existing conditions baseline is superfluous and runs counter to the CEQA principle that a reviewing court must defer to an agency's baseline selection when it is supported by the record, even if a different baseline would be equally reasonable—or perhaps even *more* reasonable—than the one selected. **[*475]** (See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 435 [53 Cal. Rptr. 3d 821, 150 P.3d 709]*; **[**525]** *Guidelines, § 15384, subd. (a)*.)

The majority's abuse of discretion analysis also ignores the basic precepts that a certified EIR is presumed adequate and that "the party challenging the EIR has the burden of showing otherwise." (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles (2007) 157 Cal.App.4th 149, 158 [68 Cal. Rptr. 3d 449]*; see *Save Our Peninsula, supra, 87 **[***32]** Cal.App.4th at p. 117*.) **[****78]** To wit, the majority finds the record lacking in substantial evidence justifying Expo Authority's decision to omit an analysis based on existing traffic congestion and air quality conditions. [8] Neighbors, however, never once contended during the administrative review process that the EIR was deficient for failing to use an existing conditions analysis. Although Neighbors's reply brief refers to other individuals who supposedly did so, none of the alleged comments or EIR responses thereto is included as part of the stipulated administrative record presented to the trial court or to this court. Hence, while the record's perceived inadequacy on this point comes as no surprise under the circumstances, what is startling is the majority's determination that the inadequacy inures to the benefit of the EIR's challenger.

Finally, the majority's gloss on *Guidelines section 15125(a)* is entirely unnecessary to advance the environmental goals of CEQA. This is so because any baseline analysis—whether it evaluates the so-called norm of conditions existing before project approval or the conditions projected to exist at some future point **[****79]** —cannot be illusory and instead must be realistic and supported by substantial evidence. (*§ 21168.5*; *Guidelines, § 15384*; see *Communities for a Better Environment,*

[7] The majority's citation to *Guidelines section 15126.6*, which requires an EIR to consider and discuss a range of reasonable alternatives to a proposed project, adds nothing to the analysis. In the majority's own words, the Guidelines "make[] clear that *normally* the baseline for determining a project's significant adverse impacts is *not* the same as the no project alternative." (Lead opn., *ante*, **[****77]** at p. 454, first italics added.)

[8] As explained, I conclude to the contrary. (See pt. I., *ante*.)

supra, 48 Cal.4th at p. 322.)

B. *The Majority's Analysis Creates Uncertainties Regarding CEQA Compliance and Will Increase Project Costs and Delays*

The majority's analysis also suffers from ambiguity on a number of levels. In particular, the majority fails to clarify whether its restrictions apply to all departures from the regulatory baseline norm. By its terms, *Guidelines section 15125(a)* designates only two environmental settings as the normal baseline: "at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced." The majority, however, identifies an alternative baseline based on a distinct third environmental setting—which it calls the "date-of-implementation baseline"—that reflects environmental conditions projected to exist "at the time **[*476]** the proposed project would go into operation." (Lead opn., *ante*, at p. 453.) As the majority sees it, an agency might use such a baseline to analyze impacts when a project is not scheduled to **[****80]** begin operations until years after the two events specified in *Guidelines section 15125(a)*. [9]

Although the majority finds that an agency has discretion to employ a date-of-implementation baseline, it fails to explicitly state whether or not its restrictions on agency discretion apply when such a baseline is selected. Logically, the restrictions should apply because the problems perceived by the majority regarding future **[***33]** conditions baselines in general would seem to apply equally **[****81]** to date-of-implementation baselines, particularly when a project takes several years to implement. (See lead opn., *ante*, at pp. 455–456 **[**526]** [criticizing use of predictive models to forecast future conditions, even though the validity and accuracy of the models used here are not disputed].)

Moreover, the term "date of implementation" is nowhere mentioned in *Guidelines section 15125(a)*, and the majority points to no other CEQA Guideline or statute providing a definition. While the majority offers its own definition of the term (the "environmental conditions that will exist when the project begins operations"; (lead opn., *ante*, at p. 452)), the absence of actual CEQA guidance on the issue creates uncertainty as to how much operation or implementation may be too much when determining the implementation date.

Despite all this ambiguity, the majority appears to contemplate that use of a date-of-implementation baseline falls squarely within the existing conditions default. (Lead opn., *ante*, at pp. 452–453.) But the language of *Guidelines section 15125(a)* is clear in designating only two environmental settings—both of which refer to physical conditions existing in the study area *prior to a project's* ***[****82]*** *approval*—as the normal baseline. Under the guise of construing the physical conditions in those two environmental settings as encompassing conditions predicted to exist years in the future when a project is scheduled to begin operations, the majority accomplishes two things: while adding language to restrict an agency's discretion to omit an existing conditions analysis, the majority redefines what the Guidelines mean by "existing conditions," so as to exempt this particular category of future conditions analysis from those restrictions. But that is not all—the majority further suggests that a date-of-implementation analysis is properly understood as **[*477]** including an analysis based on yet another distinct environmental setting not mentioned in *Guidelines section 15125(a)*, i.e., "impacts expected to occur during the project's early period

[9] In this case, for example, a so-called date-of-implementation baseline would have measured Expo Phase 2's predicted impacts on conditions projected to exist in 2015, a full eight years after the notice of preparation of an EIR was published in 2007. Although the majority essentially holds that use of a 2015 baseline would have been a reasonable and proper exercise of discretion (see lead opn., *ante*, at pp. 452–453, 460, 462), there is no indication that view was shared by any agency or member of the public participating in the administrative review process. And as previously noted, Neighbors complained during the review process that a 2035 baseline was required to accurately reflect the project's operational impacts.

of operation." (Lead opn., *ante*, at p. 453.) Although the judicial maneuvering on this point is creative, this court has no power to rewrite the Guidelines so as to make them conform to a presumed intention that is not expressed. (See *Vogel v. County of Los Angeles (1967) 68 Cal.2d 18, 26 [64 Cal. Rptr. 409, 434 P.2d 961]*.)

In any event, there is no need to rewrite *Guidelines section 15125(a)* **[****83]** to provide for ordinary discretionary use of a date-of-implementation baseline in lieu of an existing conditions baseline. Rather, consistent with the Guidelines' express contemplation that an existing conditions analysis is the norm but not mandatory, we should simply adhere to precedent recognizing that an agency enjoys discretion to select an alternative baseline that is reasonably suited to the nature of the project under environmental review and the totality of the circumstances under which the project is expected to occur. (See *Save Our Peninsula, supra, 87 Cal.App.4th at pp. 125–126* [where environmental conditions vary over time it may be necessary to consider conditions over a range of time periods; in some cases, conditions closer to the date of project approval, which may be years after environmental review is commenced, may be more relevant to the impacts determination]; see also *Communities for a Better Environment, supra, 48 Cal.4th at pp. 327–328* [quoting *Save Our Peninsula*].) Moreover, as with any analysis of impacts on projected future **[***34]** physical conditions, a date-of-implementation analysis must be realistic and supported by substantial evidence.

Another issue is that **[****84]** the majority's restrictions on the exercise of agency discretion appear rather difficult to meet. It is unclear how an agency might show that an existing conditions analysis would be "uninformative" or "misleading," without actually conducting such an analysis. (Lead opn., *ante*, at p. 452.) It is also unclear just how "unusual" the aspects of a project or the surrounding conditions must be in order for a departure from the baseline norm to be "justified." (Lead opn., ante, at p. 451.) Indeed, even though both the trial court and the Court of Appeal found substantial evidence supporting Expo Authority's use of a 2030 baseline instead of a 2007 baseline (as do I), the majority's finding to the contrary **[**527]** demonstrates how rigorous the burden is intended to be.

Finally, because the majority so narrowly circumscribes an agency's discretion to depart from the regulatory baseline norm, the burdens and delay associated with preparing and defending EIRs are likely to increase. That is, even though CEQA expressly permits use of an alternative baseline in lieu of an existing conditions baseline, and even though use of an alternative baseline, standing alone, would allow for informed decisionmaking and public participation, **[****85]** the EIR must also include an analysis of the project's **[*478]** impacts on existing conditions unless its inclusion actually diminishes the EIR's effectiveness as an informational document. The majority's imposition of this extra analytical requirement is wasteful and directly at odds with the dual legislative commands that courts shall not interpret CEQA or the Guidelines in a manner that imposes additional substantive requirements (*§ 21083.1*), and that agencies must not engage in unnecessary and costly administrative processes that do not materially improve public disclosure or informed decisionmaking (*§ 21003, subd. (f)*).

III.

In sum, it cannot be disputed that a lead agency's "determination of the proper baseline for a project can be difficult and controversial, particularly when the physical conditions in the vicinity of the project are subject to fluctuations …" or other significant changes. (*Cherry Valley, supra, 190 Cal.App.4th at p. 337*.) For all the reasons above, I conclude that an agency retains discretion to omit an analysis of a project's likely impacts with an existing conditions baseline, so long as the selected alternative of a projected future conditions baseline is supported **[****86]** by substantial evidence and results in a

realistic impacts analysis that allows for informed decisionmaking and public participation.

I further conclude that, given the nature and the circumstances of the light-rail project at issue, Expo Authority reasonably selected a 2030 baseline in lieu of an existing conditions baseline for measuring the project's operational impacts on traffic congestion and air quality. Finally, in light of the undisputed validity of the forecasting models used to predict the future traffic and air quality conditions, I also conclude that substantial evidence supports the 2030 baseline as a realistic baseline for analyzing the project's impacts.

Cantil-Sakauye, C. J., and Chin, J., concurred.

LIU, J., Concurring and Dissenting.—I agree with the entirety of the court's well-reasoned opinion except for the conclusion that the error in the environmental **[***35]** impact report (EIR) was not prejudicial. On this record, I cannot confidently infer that the EIR's failure to measure impacts against a baseline of existing conditions did not deprive the public of relevant information about the project.

The court's lucid analysis of the California Environmental Quality Act (CEQA; *Pub. Resources Code, § 21000 et seq.*) and applicable regulations firmly supports **[****87]** its holding that existing conditions comprise the normal baseline for measuring environmental impacts and that an agency may forgo analyzing impacts against a baseline of existing conditions only "if such an **[*479]** analysis would be uninformative or misleading to decision makers and the public." (Lead opn., *ante*, at p. 453, fn. omitted.) Further, in light of *Communities for a Better Environment v. South Coast Air Quality Management Dist. (2010) 48 Cal.4th 310, 328 [106 Cal. Rptr. 3d 502, 226 P.3d 985]*, the court is correct that "an existing conditions analysis may take account of environmental conditions that will exist when the project begins operations; the agency is not strictly limited to those prevailing during the period of EIR preparation." (Lead opn., *ante*, at p. 452; see *id*. at p. 453 ["[A] date-of-implementation baseline does not share the principal problem presented by a baseline of conditions expected to prevail in the more distant future following years of project operation—it does not omit impacts expected to occur **[**528]** during the project's early period of operation."].)

Here, the Exposition Metro Line Construction Authority (Expo Authority) used a baseline of existing conditions to measure most of the predicted effects **[****88]** of the light-rail project, but it used a baseline of conditions projected to exist in 2030 to measure the project's expected impacts on traffic congestion and air quality. It is undisputed that the agency properly considered what the long-term impacts of the project would be in 2030. The issue is whether the agency properly considered those long-term impacts to the exclusion of any short-term impacts. In measuring traffic and air quality impacts solely against projected conditions in 2030, the EIR provided no analysis of such impacts against a baseline of existing conditions, including conditions in 2015 when the project is scheduled to begin operations.

As today's opinion explains: "Even when a project is intended and expected to improve conditions in the long term—20 or 30 years after an EIR is prepared—decision makers and members of the public are entitled under CEQA to know the short- and medium-term environmental costs of achieving that desirable improvement. These costs include not only the impacts involved in constructing the project but also those the project will create during its initial years of operation. Though we might rationally choose to endure short- or medium-term **[****89]** hardship for a long-term, permanent benefit, deciding to make that tradeoff requires some knowledge about the severity and duration of the near-term hardship." (Lead opn., *ante*, at p. 455.)

Here, there is "no substantial evidence supporting the Expo Authority's decision to omit an analysis of the project's traffic and air quality impacts on existing environmental conditions." (Lead opn.,

ante, at p. 460.) "By focusing solely on the project's operational impacts in the distant future, the EIR neglects to inform the public and decision makers explicitly of any operational impacts that could occur in the project's first 15 years of operation." (Lead opn., *ante*, at p. 461.) The fact "that project area population, traffic, and emissions of air pollutants are expected to continue increasing through **[***36]** and **[*480]** beyond 2030 does not justify the agency's failure to analyze operational impacts under earlier conditions. The expectation of change may make it important for the agency to *also* examine impacts under future conditions … , but it does not constitute substantial evidence supporting a determination that an existing conditions analysis would be uninformative or misleading." (*Id*. at p. 461.)

After reaching these conclusions, **[****90]** the court holds that the EIR's failure to measure traffic and air quality impacts against existing conditions was harmless in this case. The court reasons that the EIR's extensive analysis of traffic congestion against conditions projected to exist in 2030 "demonstrates the lack of grounds to suppose the same analysis performed against existing traffic conditions would have produced any substantially different information." (Lead opn., *ante*, at p. 463.) But the fact that the project in 2030 is expected to have only a small effect on traffic congestion when compared to conditions in 2030 provides no reason to think that the project in 2015, at the start of operations, would have no greater impact *when compared to conditions in 2015*.

The EIR compared measures of congestion in 2030 if the project is built to measures of congestion in 2030 if the project is not built. But the measures of congestion in 2030 if the project is not built reflect significant predicted increases in congestion due to population growth. Thus it is not surprising that the project is expected to have little impact on congestion in 2030 when measured against the heightened congestion expected in 2030. But that finding **[****91]** sheds no light on the extent or magnitude of the project's traffic impacts when it begins to operate in 2015, *before* the predicted increase in congestion due to population growth from 2015 to 2030. Without knowing how significant this transient impact on traffic congestion might be, how are the public and decision makers to decide whether the short-term pain is worth the long-term gain promised by the light-rail project?

It is not speculative to suggest that examining the project's impact on traffic congestion **[**529]** in 2015 would yield different results. When the project begins to operate, ridership is expected to be at 77 percent of its eventual level. During that initial period, there may be an influx of cars to areas around the new transit stations, as people come to ride the train. While it is reasonable to assume that the worsening of congestion solely due to population growth is a more or less linear process, it is also reasonable to posit that the increase in congestion if the project is built would take the shape of a curve, with an initial steep increase due to an influx of cars and riders that later tapers off as the public adjusts to the new system. At the very least, it is not **[****92]** implausible to think that things may get worse before they get better. As Neighbors for Smart Rail contends, focusing solely on impacts in 2030 may mask earlier effects: intersections that are projected to worsen to critical levels of congestion if the project is not built may reach those levels sooner if **[*481]** the project is built. Or maybe not—but either way, CEQA does not permit the agency to simply leave the public guessing.

The EIR's measure of air quality impacts suffers from the same problem. The EIR says the project, at full ridership, is expected to reduce vehicle miles traveled by 0.38 percent in 2030. The 0.38 percent figure reflects the differential between (a) vehicle miles driven in 2030 if the project is built and (b) vehicle miles driven in 2030 if the project is not built. From this, the court extrapolates that "the 77 percent **[***37]** initial ridership implies that initially the project will reduce vehicle miles traveled only by 0.29 percent." (Lead opn., *ante*, at

p. 464, fn. 11.) The court derives the 0.29 percent figure by comparing (a) vehicle miles driven in 2015 when the project begins operation with 77 percent ridership and (b) vehicle miles driven *in 2030* if the project **[****93]** is not built. The proper comparison, however, is the differential between (a) vehicle miles driven in 2015 when the project begins operation with 77 percent ridership and (b) vehicle miles driven *in 2015* if the project is not built. As with traffic congestion, there is reason to believe the project might actually increase vehicle miles driven in the short term, as new transit stations attract people from near and far to ride the light-rail. Further, without some analysis of the issue, we can only guess what portion of light-rail riders consists of people who would otherwise drive or ride cars to reach their destinations as opposed to new commuters who, but for the project, would not have traveled to their destinations at all, by car or otherwise.

For the reasons above, I respectfully disagree with the court's conclusion that the EIR's failure to measure traffic congestion and air quality impacts against a baseline of existing conditions "did not deprive agency decision makers or the public of substantial information relevant to approving the project." (Lead opn., *ante*, at p. 465.) In all other respects, I join the court's opinion.

Appellant's petition for a rehearing was denied September **[****94]** 18, 2013.

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Openlands, Midewin Heritage Ass'n v. United States DOT

United States District Court for the Northern District of Illinois, Eastern Division

June 16, 2015, Decided; June 16, 2015, Filed

No. 13 C 4950

Reporter
124 F. Supp. 3d 796 *; 2015 U.S. Dist. LEXIS 77508 **

OPENLANDS, MIDEWIN HERITAGE ASSOCIATION, and SIERRA CLUB, Plaintiffs, v. UNITED STATES DEPARTMENT OF TRANSPORTATION, et al., v. Defendants, and ILLINOIS DEPARTMENT OF TRANSPORTATION, INDIANA DEPARTMENT OF TRANSPORTATION, Defendant-Intervenors.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Administrative Record

Civil Procedure > Judgments > Summary Judgment > Motions for Summary Judgment

HN1[] **Judicial Review, Administrative Record**

In the administrative review context, a motion for summary judgment is simply the procedural vehicle for asking the judge to decide the case on the basis of the administrative record.

Administrative Law > Judicial Review > Standards of Review

HN2[] **Judicial Review, Standards of Review**

Under the Administrative Procedures Act (APA), a court will set aside agency action if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *5 U.S.C.S. § 706(2)(A)*. To make this determination, the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Where an agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, the agency has violated the standards of the APA. However, the court is not empowered to substitute its judgment for that of the agency.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN3[] **Environmental & Natural Resources, Environmental Impact Statements**

The National Environmental Policy Act requires

every federal agency to include an Environmental Impact Statement (EIS) in every recommendation or report on proposals for legislation or other major federal actions significantly affecting the quality of the human environment. *42 U.S.C.S. § 4332(C)*. An EIS shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. *40 C.F.R. § 1502.1*.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

HN4 **Environmental & Natural Resources, Environmental Impact Statements**

An Environmental Impact Statement (EIS) is comprised of various sections, including: (1) the purpose of and need for the proposed action; (2) the alternatives to the proposed action; and (3) the environmental consequences of the proposed action. *40 C.F.R. § 1502.10*. The purpose and need section shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action. *40 C.F.R. § 1502.13*. The alternatives section is the heart" of EIS and shall rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated. *40 C.F.R. § 1502.14(a)*. The environmental consequences section must discuss both direct and indirect effects of the proposed action and the possible conflicts between the proposed action and the objectives of Federal, regional, State, and local land use plans, policies and controls for the area concerned. *40 C.F.R. § 1502.16*.

Administrative Law > Agency Adjudication > Hearings > Evidence

Administrative Law > Judicial Review > Standards of Review

HN5 **Hearings, Evidence**

When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive. The agency is entitled to use its own methodology, unless it is irrational.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

HN6 **Environmental & Natural Resources, Environmental Impact Statements**

40 C.F.R. § 1508.8 defines "direct effects" as those which are caused by the action and occur at the same time and place.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN7 **Environmental & Natural Resources, Environmental Impact Statements**

The National Environmental Policy Act requires the Environmental Impact Statement to assess the indirect effects of a project, i.e., those which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable, including growth inducing effects and

other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. *40 C.F.R. § 1508.8*.

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

HN8[] **Reviewability, Reviewable Agency Action**

5 U.S.C.S. § 704 states that a final agency action is subject to Administrative Procedures Act review. As a general matter, two conditions must be satisfied for agency action to be considered final: First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. An action is final when the agency has completed its decisionmaking process, and the result of that process is one that will directly affect the parties.

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Judges: HON. JORGE ALONSO, United States District Judge.

Opinion by: JORGE ALONSO

Opinion

[*798] **MEMORANDUM OPINION AND ORDER**

Plaintiffs seek summary judgment on their claim that **[**2]** the Federal Highway Administration's Record of Decision and approval of the Tier 1 Final Environmental Impact Statement ("EIS") for the proposed Illiana Tollway violates the National Environmental Policy Act ("NEPA") and section 4(f) of the Transportation Act. For the reasons set forth below, the Court grants plaintiffs' motion.

Background

On June 8, 2011, the Federal Highway Administration ("FHWA") issued a notice of intent to prepare "a Tier One Environmental Impact Statement (EIS) . . . for the Illiana Corridor Project" with anticipated "termini [of] Interstate Highway 55 in Will County, Illinois and Interstate Highway 65 in Lake County, Indiana." *76 Fed. Reg. 33401*.[1]

[1] "For major transportation actions," FHWA is permitted to prepare the EIS in two tiers. *See 23 C.F.R. § 771.111(g)*. "The first tier EIS . . . focus[es] on broad issues such as general location, mode choice, and areawide **[**3]** air quality and land use implications of the major alternatives. The second tier . . . address[es] site-specific details on project impacts, costs, and mitigation measures." *Id.*

The Tier One study was conducted jointly by the FHWA, the Illinois Department of Transportation ("IDOT"), and the Indiana Department of Transportation ("INDOT") ("the Agencies"). (Defs. & Def.-Intervenors' Jt. Stmt. Material Facts ¶ 1.) The study area was "approximately 950 square miles in portions of Will and Kankakee counties in Illinois and Lake County in Indiana." *76 Fed. Reg 33401*.

After issuing the notice of intent, the Agencies received input from a variety of federal, state, and local stakeholders regarding the EIS. The stakeholders included the Illinois and Indiana metropolitan planning organizations ("MPOs"), state-created entities required by federal law to develop both long-range "transportation plans," with a planning horizon of at least twenty years, and short-range "transportation improvement programs," which are updated every four years, in "metropolitan areas of [a] State." *23 U.S.C. § 134(c)(1)*; *23 C.F.R. §§ 450.322(a)*, *450.324(a)*. Among the MPOs involved in the process were the Chicago Metropolitan Agency for Planning ("CMAP"), which is "responsible for developing and adopting a funding and implementation strategy for an integrated land use and transportation planning process for the northeastern Illinois region," and the Northwestern Indiana Regional Planning Commission ("NIRPC"), which is charged with "institut[ing] and maintain[ing] a comprehensive planning and programming process" for transportation, economic development, and environmental policy for northwestern **[**4]** Indiana. *See 70 Ill. Comp. Stat. 1707/15(a)*; *Ind. Code 36-7-7.6-12*.

When the notice of intent was issued, CMAP and NIRPC each had long-range transportation plans in place. CMAP's plan, called GO TO 2040, was based on a 2040 Forecast of Population, Households and Employment that reflected CMAP's policies for development in the region. *See http://www.cmap.illinois.gov/data/demographics/population-forecast* . Though CMAP had previously used market-based forecasts for its long-range planning, for GO TO 2040 it "chose . . . a policy-based plan (dealing with the investments and high-level choices that shape [the] region) **[*799]** as opposed to a land use plan (dealing with specific types of development in specific locations.)." (Defs. & Def.-Intervenors' Stmt. Facts., Ex. 5, AR4_000026; *id.*, Ex. 8, AR4_000417.) The CMAP GO TO 2040 forecast projects that the population of and employment in Will County will increase by 76% and 116.5%, respectively, between 2010 and 2040. *See http://www.cmap.illinois.gov/data/demographics/population-forecast* .

NIRPC's long-range plan projects that the Northwest Indiana region, comprised of Lake, Porter, and LaPorte counties, will see increases of 13% and 29%, respectively, in population and employment by 2040. *See http://www.nirpc.org/media/3136/crp_summary_finaldraft_compressed.pdf* .

The Agencies did not, however, use the MPOs' 2040 forecasts to prepare the EIS because, they said, the forecasts were based on "aggressive **[**5]** assumptions regarding infill, redevelopment & densification." (AR2_038304.) Instead, the Agencies used market-driven forecasts developed by consultants. (*See generally* AR1_001378-1466.) The Agencies' forecasts project that by 2040, the population of Will County will have grown by 102%, the population of Lake County will have grown by 26%, and the population of the study area as a whole will have grown by 176%. (AR2_018252.) The forecasts also project that by 2040, employment in Will County will have grown by 167%, employment in Lake County will have grown by 36%, and employment in the study area overall will have grown by 225%. (AR2_018257.)

In November 2011, the Agencies met with CMAP and NIRPC to discuss the forecasts. (*See* AR1_003752-54.) CMAP and NIRPC objected to the market-driven forecasts, explaining that their policy-driven forecasts envisioned "revitalization of the urban core" and "more development to existing communities." (AR1_003752.) CMAP did not

object to the Agencies' use of their own forecasts but asked them to prepare a "'policy based' forecast using CMAP's 2040 socioeconomic scenario" as well. (AR1_003753.)

In December 2011, CMAP submitted comments to IDOT on the proposed **[**6]** "Purpose and Need" section of the draft EIS ("DEIS") for the Illiana project:

> CMAP staff has worked closely with [IDOT] on this project, particularly regarding the population and employment forecasts that are being used in this study. For purposes of preparing revenue forecasts under market conditions, [IDOT] is basing its demand forecasts on an alternative geographic distribution of households and jobs that departs from those assumed under GO TO 2040. While CMAP understands the reasons behind this, we are asking that demand forecasts for the project also be prepared using GO TO 2040 assumptions to support current regional planning analyses and remain consistent with requirements of the National Environmental Policy Act.

(AR3_002569-70.) IDOT responded that "a refined project level forecast [was] being developed." (AR3_002571.)

After receiving input from a variety of stakeholders and analyzing dozens of potential corridor routes, the Agencies chose three potential corridors to analyze in the DEIS: A3S2 (the northernmost alternative that runs north of the Midewin National Tallgrass Prairie ("Midewin")), B3 (a corridor adjacent to the south side of Midewin), and B4 (a variation of B3 with **[**7]** a more southern terminus in Indiana). (*See* AR 1_000200-04.) However, in February 2012, before the DEIS was complete, the Agencies made "[t]he preliminary recommendation [that] . . . Alternative B3 . . . be carried forward as the finalist" for the Tier Two EIS. (AR3_035240.)

[*800] In March 2012, plaintiffs objected that the Agencies had "prematurely limit[ed] [their] analysis of reasonable alternatives by solely comparing the 'B3' route to a no action alternative in the upcoming EIS." (AR1_003707.) "By dismissing variations of northern alignments as a reasonable alternative," plaintiffs said, the Agencies "ha[d] not rigorously explored and objectively evaluated all reasonable alternatives." (*Id.*)

On March 14, 2012, CMAP told the Agencies:

> [W]e are concerned with the Preliminary Recommendation to carry forward only the B3 alternative . . . . The Purpose and Need Statement identifies the need to improve regional mobility and to address local system deficiencies. By choosing an alignment that is well south of any substantial development, while minimizing property impacts, the corridor has little positive effect on regional mobility and local system deficiencies. The screening results clearly showed that, as the location **[**8]** shifts south, travel performance decreases.
>
> Also, since it is assumed that this will be a toll facility of some type, the B3 alternative's decrease in performance not only fails to fully address the purpose and need, it also will likely not generate sufficient revenue to construct and maintain the facility.
>
> And finally, while considering quality of life in northeastern Illinois, GO TO 2040 seeks to direct investment toward strengthening existing communities, and finding opportunities to encourage new development and redevelopment in livable communities that are denser and designed for mixed uses. Focusing primarily on the B3 alternative may encourage future development outside existing communities. Continued analysis of alternative routes is necessary, to consider whether they can provide a focus for development and redevelopment within existing communities that is consistent with GO TO 2040.
>
> . . . . We would encourage the Illinois Department of Transportation to carry forward additional northern corridors through the Draft Environmental Impact Statement. That

> information will be pertinent both to the continuation of this current process and, ultimately, to how this project will be evaluated **[**9]** for potential inclusion in the prioritized, fiscally constrained major capital project that is part of GO TO 2040, the region's official long range plan.

(AR1_003729.)

In July 2012, the Agencies issued the DEIS, which states that the Illiana project will address "three principal needs": (1) "[i]mprove regional mobility"; (2) "[a]lleviate local system congestion and improve local system mobility"; and (3) "[p]rovide for efficient movement of freight." (AR1_008022.) These needs were based in part on the Illiana Corridor *Transportation System Performance Report* ("TSP"), which, in turn, is based on the Agencies' forecasts of population and employment growth. (*See* AR1_001378-1466, 008022; AR 2_018216.) As discussed above, the forecasts project that by 2040, the population of and employment in Will County will grow by 102% and 167%, respectively, and the population of and employment in the study area as a whole will grow by 176% and 225%, respectively. (AR2_018252, 018257.) These forecasts are the foundation for the DEIS' analysis of how building the Illiana corridor in one of the three "finalist" locations or not building it at all will impact the area. (*See, e.g.*, AR1_007993, 8004, 8015-40, 8163-64.)

In August 2012, **[**10]** NIPRC submitted the following comments on the DEIS to the Agencies:

> **[*801] 1.4 Project Need**
> Third paragraph:
>
> *The Study Area is expected to increase population by 176 percent and employment by 225 percent between 2010 and 2040. This strong population growth in the Study Area will result in increased local and regional traffic demands*.
> NIRPC deviates with the assumptions of population and employment growth in the study area. The study has relied on market-based forecasts of future population and employment for the purposes of estimating facility design requirements and toll revenue. NIPRC has indicated that the use of market-based forecasts may be useful for the development of the Illiana project's toll and facility design requirements, but the use of market-based forecasts is inconsistent with the 2040 Growth and Revitalization Vision that the Commission adopted in October, 2010. The distribution of regional growth as envisioned by the study team differs significantly form the distribution of growth in the 2040 Comprehensive Regional Plan for Northwest Indiana, which was adopted by NIRPC in June, 2011.
>
> In the Indiana portion of the study area, NIRPC has planned for a population growth of 19.8% **[**11]** and an employment growth of 27.9%. The limited growth assumed by NIRPC reflects issues of the protection of the rural character of the Indiana part of the study area, the need to prioritize reinvestment on the urban core communities on the Lake Michigan Shore and limited access to high quality fresh water from Lake Michigan in the study area.
> . . . .
>
> The Illiana study is based on the assumption of a 176 percent increase in population and a 225 percent increase in employment in the study area. If the official MPO [*i.e.*, NIRPC] forecasts were used instead of the consultant team's forecasts, there would be a basis to predict significantly less travel and traffic congestion in the study area, and the need for the project would be greatly diminished.

(AR2_005266.)

On August 28, 2012, CMAP submitted its comments on the DEIS to the Agencies:

> To maintain and strengthen our region's position as one of the nation's few global economic centers, GO TO 2040 recommends policies and investments that promote livability

> and sustainability. While acknowledging that some growth will occur on the outer fringes of our region, GO TO 2040 emphasizes the need to target investments whenever possible to foster growth **[**12]** in existing communities. We are concerned that the Illiana project's alternatives are not being evaluated using the CMAP forecasts developed for GO TO 2040. It is our understanding that the EIS process would also test potential alternatives using the CMAP forecasts, which have been developed through a cooperative, comprehensive planning effort and follow from a series of policy recommendations that have been approved by the CMAP Board and MPO Policy Committee. We encourage you to undergo this analysis for all of the alternatives under consideration. The comparative results for the three alternatives could be significantly different than those developed with the forecasts that you developed for this project.

(AR1_006152.)

On August 29, 2012, plaintiffs submitted written comments to the Agencies questioning the utility of B3 as the Illiana route:

> . . . . [W]hile the agencies agreed to several requests from stakeholders to include a northern route as part of their **[*802]** alternatives analysis, IDOT and INDOT have decided (again based on inadequate and missing information) that their originally prefererd [sic] B3 alternative still offers the best balance to meet the project's purpose and need. . . .
>
> However, **[**13]** it remains unclear what good an Illiana expressway along this southern route would serve. The B3 corridor would do little to address northern traffic congestion on I-80, and is the least effective alternative to address . . . intermodal truck traffic.
>
> The southern routes run contrary to both concerns raised by [CMAP] in the scoping process, and to . . . [NIRPC's] 2040 Comprehensive Regional Plan, which shows dramatically different predictions for Indiana growth in population and employment within the Illiana study area than the figures relied upon by IDOT and INDOT . . . .

(AR1_005150). Plaintiffs also asserted that the DEIS failed to adequately consider a number of environmental impacts, including those that would affect Midewin:

> Constructing Illiana south of Midewin will introduce intense noise, light, dust and pollution that will constrict and degrade the viable habitat for grassland birds, especially in cases where they need large expanses of prairie and grassland to thrive. The dramatic increase of truck traffic along Illinois 53 will further encroach upon this important bird habitat . . . . Birds either avoid areas near heavy use or are found in lower numbers. One study found that **[**14]** bird presence and breeding were reduced by 1200 meters from a road with heavy traffic volume. Another study shows that birds can be negatively impacted by traffic noise up to 1.2 miles from the road. . . . Birds communicate through auditory signals. If birds cannot discriminate between their own songs and background noise, it makes it more difficult for them to advertise locations of food and form pair bonds. . . .
>
> . . . .
>
> While the DEIS is correct in its assumption that certain grassland birds in the area would avoid the noise, light and air pollution from the roadway, this hardly means that the impact is not adverse. . . . To the contrary, removing or encroaching upon Midewin so that the birds no longer find areas habitable marks a significant impact, especially when Midewin has been preserved for the purpose of allowing these species the expanses they need to survive and nest. The Illiana should be viewed as contributing impacts to an already constrained landscape that is crucial for sustaining these grassland bird populations.

(AR1_005161.)

In October 2012, the Agencies announced their selection of Alternate B3 as the proposed site for the Illiana Corridor. (AR3_011164.)

On December **[**15]** 12, 2012, CMAP submitted comments on the Agencies' choice, reiterating its concern that "the Illiana project's alternatives [were] not being evaluated using CMAP forecasts developed for GO TO 2040." (AR3_003307). CMAP said it was "under the impression that the EIS process would also test potential alternatives using the CMAP forecasts," which "could significantly change the scoring of the alternatives for the performance measures used in the Preferred Corridor Report." (AR3_003307-08.)

On December 20, 2012, the agencies responded as follows:

> Coordination
>
> There appears to be some misunderstanding regarding past coordination efforts between our agencies, particularly with respect to the topic of forecasting. **[*803]** As documented in the November 21, 2011 meeting held with the Illiana team . . . , the rationale for our forecasting approach was discussed in depth. The meeting summary also reflects CMAP's concurrence with the Illiana team's forecasting approach, as well as our response to CMAP's request that the GO TO 2040 forecast also be used for the Illiana study. Since that time, there have been follow up meetings with CMAP staff . . . . Beyond these specific coordination efforts, CMAP was part **[**16]** of the project's Corridor Planning Group; CMAP staff attended these meetings, and asked these same questions, which were then responded to in this public forum. Moving forward, we are committed to working through these issues until they are fully resolved.
>
> Forecasts
>
> With respect to forecasts, as noted in the coordination meetings referenced above, there are a number of very important reasons why the Illiana team must use a "market based" forecast for NEPA studies, rather than simply using the GO TO 2040 forecast. This is consistent with the approach taken by IDOT, in consultation with CMAP and its predecessor agencies over the past 15 years on major corridor projects. Since the late 1990s, the courts have required a No Build/Build analysis that reflect [sic] actual development and travel behavior that result from a major new transportation project. Actual development is synonymous with market-driven economic forecasts and as such, they were developed for the Illiana Corridor Study. Market-driven economic forecasts are also needed for detailed NEPA level project development for design, environmental impact, and financial analysis. Market-driven economic forecasts are also being used by **[**17]** IDOT on other major projects and by the Illinois Tollway.
>
> . . . .
>
> The Illiana team is not using the CMAP GO TO 2040 policy-driven forecasts in the alternatives analysis in the EIS for several reasons. The use of two sets of forecasts will result in multiple sets of traffic forecasts and impacts that will confuse readers and potential investors should the project be financed through public private partnerships. The CMAP GO TO 2040 policy-driven forecasts do not reflect build conditions with an Illiana Corridor facility and other baseline projects, and a build condition is required for the analysis. Finally, actual growth in the region will occur based on jurisdictional local land use policies, which may not reflect or be consistent with CMAP policy-based forecasts. We have, however, included a discussion of the CMAP GO TO 2040 forecast in appendix E the DEIS.

(AR1_003741-42.)

On January 17, 2013, the FHWA approved the Tier One Final EIS and Record of Decision selecting Corridor B3 as the sole proposed site for further study. (AR1_000006-7.) With respect to CMAP's comments, the EIS says the following:

> CMAP submitted a letter with six comments regarding the project's Purpose and Need and consistency **[**18]** with the GO TO 2040 long-range comprehensive regional plan. Specifically, CMAP expressed concern that the project alternatives are not being evaluated using the CMAP forecasts developed for GO TO 2040. The agency expressed concerns about Corridor B3 and its likelihood to encourage growth that is not near existing development. . . .
> Response Summary:
>
> In response, it was stated that the Illiana Corridor project team coordinated with CMAP during Tier One to develop the Illiana Corridor study's 2040 market-based **[*804]** forecasts for use in developing traffic forecasts for design and financial analysis, rather than use of CMAP's policy-based GO TO 2040 forecasts. CMAP's policy-based forecasts do not account for an Illiana "build" scenario which is required by federal regulations. Per federal regulations, the forecasts must reflect the presence of the transportation network, in this case a "build" forecast scenario must be developed. . . .

(AR1_000809.) Moreover, the EIS concludes that the proposed Illiana corridor would not impact or "constructive[ly] use" the Midewin Tallgrass Prairie because: (1) "[f]ederal listed species within Midewin National Tallgrass Prairie are known to be located further north within the property **[**19]** away from the working alignment[] within Corridor B3 . . . , reducing the potential for proximity impacts"; and (2) "[i]mpacts from such sources as highway noise, air quality, and lighting from these corridors are not expected to be adverse since it is commonly believed that relatively mobile birds and wildlife would move away from such sources." (AR1_000550.)

Discussion[2]

The Court's determination of whether the Record of Decision ("ROD") and final EIS comply with NEPA and section 4(f) of the Transportation Act is governed by the Administrative Procedures Act ("APA"). *Ind. Forest Alliance, Inc. v. U.S. Forest Serv., 325 F.3d 851, 858 (7th Cir. 2003)*. ***HN2***[⬆] Under the APA, the Court will set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *5 U.S.C. § 706(2)(A)*. To make this determination, the Court must consider "'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Ind. Forest Alliance, 325 F.3d at 859* (quoting *Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)*; *see Sierra Club v. Marita, 46 F.3d 606, 619 (7th Cir. 1995)* ("Where an 'agency has relied **[**20]** on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is soimplausible that it could not be ascribed to a difference in view or the product of agency expertise,' the agency has violated the standards of the APA." (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)))*. However, "'[t]he court is not empowered to substitute its judgment for that of the agency.'" *Id.* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)*, *abrogated on other grounds, Califano v. Sanders, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192(1977))*.

HN3[⬆] NEPA requires every federal agency to include an EIS "in every recommendation or report on proposals for legislation [or] other major Federal actions significantly affecting the quality of the human environment." *42 U.S.C. § 4332(C)*. An EIS "shall provide full and fair discussion of significant

[2] Though plaintiffs have moved for summary judgment, ***HN1***[⬆] in the administrative review context, a "motion for summary judgment is simply the procedural vehicle for asking the judge to decide the case on the basis of the administrative record." *Hunger v. Leininger, 15 F.3d 664, 669 (7th Cir. 1994)*.

environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." *40 C.F.R. § 1502.1*. ***HN4***[⬆] An EIS is comprised of various sections, including: (1) the purpose of and need for the proposed action; (2) the alternatives to the **[*805]** proposed action; and (3) the environmental consequences of the proposed **[**21]** action. *40 C.F.R. § 1502.10*. The "purpose and need" section "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." *40 C.F.R. § 1502.13*. The "alternatives" section "is the heart" of EIS and shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." *40 C.F.R. § 1502.14(a)*. The environmental consequences section must discuss both direct and indirect effects of the proposed action and the "[p]ossible conflicts between the proposed action and the objectives of Federal, regional, State, and local . . . land use plans, policies and controls for the area concerned." *40 C.F.R. § 1502.16*.

Plaintiffs contend that the ROD and EIS do not justify the stated needs for the B3 Illiana Corridor, *i.e.*, to improve regional mobility, alleviate local system congestion and improve local system mobility, and provide for efficient movement of freight (AR1_000010), because those needs are derived from: (1) population forecasts that conflict with CMAP and NIRPC's forecasts and ignore relevant census data; and (2) baseline or "no build" forecasts that are, in reality, **[**22]** premised on the assumption that the project will be built.

The Agencies say they rejected CMAP and NIRPC's population forecasts because: (1) market-based forecasts "reflect actual development and travel behavior that result from a major new transportation project"; (2) "actual growth in the region will occur based on jurisdictional local land use policies, which may not reflect or be consistent with CMAP policy-based forecasts"; (3) the market-based forecasts are similar to those used by CMAP in transportation plans that pre-dated GO TO 2040; and (4) "[t]he use of two sets of forecasts [in the EIS] will result in multiple sets of traffic forecasts and impacts that will confuse readers and potential investors should the project be financed through public private partnerships." (AR1_003741-42; AR2_038304.)

Given the MPOs' legal mandate to develop long-range transportation plans for their areas and the influence they wield over local land use decisions through those transportation plans, it would seem unwise for the Agencies to reject the MPOs' population forecasts. But plaintiffs cite no authority requiring the Agencies to accept the MPOs' forecasts, and the question for the Court is not whether **[**23]** the Agencies' refusal to do so was unwise, but whether it was "arbitrary" or "capricious." *5 U.S.C. § 706(2)(A)*. Because the Agencies have articulated reasonable, if not persuasive, reasons for their decision not to use the MPOs' forecasts, that decision is not arbitrary within the meaning of the APA. *See Marsh, 490 U.S. at 378 (1989)* (***HN5***[⬆] "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.");

Sierra Club, 46 F.3d at 621 ("The [agency] is entitled to use its own methodology, unless it is irrational."); *Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 442 (5th Cir. 1981)* ("Proof on an issue such as the inaccuracy of population projections is inherently difficult because of the uncertainty in population projections; however, citing a conflicting projection does not prove the invalidity of another projection.").

Plaintiffs also argue that the Agencies' forecasts ignore data from the Census Bureau, which show that there was virtually no growth in Will County

between 2007 and 2013. (*See* Pls.' Mem. Supp. Summ. **[*806]** J., Ex. C.) The record, however, contains no support for this contention. The EIS and underlying documents repeatedly state that the Agencies used census data **[**24]** to determine historic population trends in the study area and to formulate the market-based forecasts of future growth. (*See, e.g.*, AR1_000247, 250, 256 (EIS stating that census data was used to investigate "current and historic population trends," "household income characteristics," and "housing characteristics and trends"); AR2 _018248, 018254 (TSP stating that census data was used "to investigate current and historic population trends in the study area counties," and to determine "total current employment"); AR1_001390, 001395 (Agencies' No Build Scenario document stating that information on historical growth and population trends was based on census data).) Moreover, the Agencies' population forecasts project growth over a thirty-year period, starting in 2010 and ending in 2040. The fact that there was little or no growth in Will County in the first few years of that period does not necessarily invalidate the thirty-year projection as a whole. It would, perhaps, have been more prudent for the agencies to acknowledge the fallow period and explain its effect, if any, on the overall forecast. But, prudent or not, the Agencies' failure to account explicitly for the lack of growth in **[**25]** the early part of the forecast period does not make the forecast arbitrary.

Plaintiffs' final contention is that the EIS' "no build" forecast is fatally flawed. That forecast is described in a document entitled Historic and Forecasted Growth of Employment and Population in the Extended Region of Chicago, Market-Driven versus Policy-Based Socio-Economic Forecasts (2010-2040), No-Build Illiana Expressway Scenario. (*See generally* AR1_001378-1466; *see also* AR1_000248 (EIS stating that "[p]opulation forecasts were reviewed . . . to determine the magnitude of growth projected in the Study Area . . . within the next 30 years, under the No-Action Alternative (*i.e.*, without the Illiana Corridor).").) After explaining the methodology used to create the forecast, the document projects that Will County will have a population of 1,366,456 and employment of 672,961, if the Illiana project is not built. (AR1_001417.) However, in the appendix pertaining to Will County, the document states:

> Over the next several decades there are, in planning and development, a number of significant projects which should benefit virtually all portions of Will County. Joining growth in the northwest corner, which currently is benefitting **[**26]** from O'Hare-related development, are:
> • Continued developments related to the extension of I-355 to I-80 in Homer and New Lenox Townships (primarily residential and retail).
> • Major multi-modal developments in Jackson, Joliet, Channahon and Wilmington Townships; and potentially, in Crete.
> • South Suburban Airport development in Monee, Crete, Will and Washington Townships.
>
> • *Potential construction of the Illiana Expressway connecting all the above projects — to one another — and to the national highway/rail/aviation network.*
> • Possible development of Metra's Southeast Service from Chicago to Crete.
>
> For these reasons, the Market-Driven expectations for Will County are excellent. Population is forecasted to increase to 1,366,456, by 2040; this is 12.2 percent higher than the CMAP forecast of 1,217,879. The Market-Driven employment forecast is 672,961 BEA jobs. This is approximately 28.4 percent higher **[*807]** than the CMAP 2040 employment forecast. . . .

(AR1_001428-29) (emphasis added).

The Agencies argue that this "two line[]" reference in the appendix cannot plausibly be read to suggest that their no build forecast, in fact, assumes that the project will be built. (Defs. & Def.-Intervenors' Opp'n **[**27]** Mot. Summ. J. at 34.) The Court

disagrees. The document plainly states that "[p]otential construction of the Illiana Expressway" is one of "the[] reasons" the "[p]opulation [of Will County] is forecasted to increase to 1,366,456, by 2040." (AR1_001429.) Because the record shows that the "no build" population forecast may or does include the "build" condition, the record does not support the EIS' statement that the purpose and need for the Illiana Corridor is to accommodate the anticipated population boom in Will County.

Moreover, the flawed "no build" forecast is the foundation for the Agencies' projection of future traffic in the study area and their conclusion that the existing roadways cannot adequately serve the future transportation needs. As the Agencies explain in the TSP:

> 1.5.4 2040 Travel Demand Forecasts
>
> Analytical studies of the transportation system using a travel demand forecasting model were conducted. Specifically, travel characteristics on the existing 2010 transportation system and the 2040 No Build Alternative were evaluated with the aid of the travel demand model, which forecasts travel patterns and origins and destinations of trips for the region and in the study area. . . .
>
> *Existing and* ***[**28]*** *projected future travel demand forecasts are prepared based on the 2010 and 2040 socio-economic forecasts*. The outputs from the travel demand forecasts are the basis for much of the transportation system performance analysis.
>
> 1.5.5 Transportation System Performance Analysis
>
> The information assembled and developed in the preceding tasks was then used to analyze the ability of the transportation system within the general study area to handle current and future travel demand. *This included the analysis of historical, current and projected 2040 socioeconomic and transportation system characteristics and performance*. Performance measures were developed and used to evaluate the adequacy and ability of the transportation system in accommodating current and future travel demand. . . . .
>
> 1.5.6 Transportation Needs Assessment
>
> *Based on the results of the transportation system performance analysis, transportation deficiencies and needs have been identified*. In addition, public and stakeholder input has been used to identify transportation deficiencies and need.

(AR1_000881-82 (emphasis added); *see* AR1_000111 (EIS projection that daily truck trips in the study area will increase by 193% from 87,800 **[**29]** in 2010 to 257,100 in 2040); AR1_000110 (EIS projection that truck hours of delay will increase by 442% from 480 in 2010 to 2,600 in 2040).) In short, the purpose and need for the Illiana Corridor identified in the EIS are derived directly from the faulty "no build" analysis. Because that analysis does not substantiate the purpose and need, the FHWA's approval of the ROD and final EIS is arbitrary and capricious and in violation of NEPA.

The flawed "no build" analysis also dooms the ROD and EIS' analysis of the direct effects of the proposed Corridor. *See* ***HN6*** [↑] *40 C.F.R. § 1508.8* (defining "direct effects as those "which are caused by the action and occur at the same time and **[*808]** place"). With respect to these impacts, the Agencies say:

> IL 53 is projected to carry 17,000 vehicles per day by 2040 in a "no build" scenario. The potential additional growth of traffic on IL 53 in the Midewin area with an Illiana Corridor build alternative varies from 0 to 11,000 vehicles per day (for a total of 17,000 to 28,000 vehicles per day) depending on the corridor location, connectivity of the Illiana Corridor to IL 53, and the application of tolling to the Illiana Corridor.

(AR1_007509.) As discussed above, however, it is not **[**30]** clear that the EIS contains a true "no build" analysis. Without such an analysis, it is impossible to determine the extent to which

building the Corridor will increase traffic on existing roads and the impact such increased traffic may have on the study area. Thus, absent a supported no build analysis, the EIS does not comply with NEPA's directive to analyze the project's direct impacts.

HN7[↑] NEPA also requires the EIS to assess the "indirect effects" of a project, *i.e.*, those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable," including "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.8. The EIS states that the B3 Corridor "falls within an area that is largely undeveloped," in which "[m]ore than 72 percent of streets and highways . . . are rural" and "approximately 62 percent of roadways (2,093 miles) are local or municipal streets." (AR1_000250, 322.) CMAP and NIRPC both commented that building the Illiana Corridor in such an area was likely to require **[**31]** the states and local communities to upgrade those roads:

> As stated in our letter commenting on Draft Tier I EIS, to maintain and strengthen our region's position as one of the nation's few global economic centers, GO TO 2040 recommends policies and investments that promote livability and sustainability. To achieve that, major transportation investments need to be positioned to foster growth in existing communities. CMAP has serious concerns that the preferred alternative, B3, will encourage growth that is not near existing development. This alignment will promote low-density development throughout the southern portion of Will County. And while B3 is noted to have the lowest impact on existing housing and might be the least costly in terms of property acquisition, the real costs to provide and maintain the necessary infrastructure to serve such development should be considered, because they will add significantly to the project costs and the overall development patterns.

(AR1_003739; *see* AR2_005269 (NIRPC commenting to INDOT that "[i]t is likely that the[] [rural] roads will need to be improved to accommodate the traffic induced by the Illiana; the cost of these improvements will be borne **[**32]** not by the private partner, but by the local and state governments.").) Yet the EIS does not suggest measures for mitigating these impacts or even acknowledge that they exist. (*See generally* AR1000606-63 (EIS discussion on indirect and cumulative impacts); *see also* AR3_002786 (FHWA intra-agency email stating that CMAP's comment about costs for additional infrastructure "demonstrates [the Agencies'] lack of consideration for secondary and cumulative impacts").)

The EIS also does not discuss the "[p]ossible conflicts between the proposed action and the objectives of . . . regional . . . land use plans," "any inconsistency **[*809]** [between] a proposed action [and] any approved . . . local plan," or "the extent to which the [Agencies] would reconcile [the] proposed action with the plan." 40 C.F.R. §§ 1502.16(c), 1506.2(d). The Agencies acknowledge that the market-based population forecasts that undergird their choice of B3 for the Illiana Corridor conflict with the policy-based forecasts contained in the MPOs' long-range transportation plans, which seek to limit outward growth. The Agencies do not, however, acknowledge that the growth induced by construction of the B3 corridor would also conflict with those plans. In fact, the only thing **[**33]** the EIS says with respect to the MPOs' transportation plans is: "At the regional level, CMAP's Go To 2040 — Comprehensive Regional Plan is for the future of the Chicago metropolitan area. In addition, the NIRPC approved its 2040 Comprehensive Regional Plan in June 2011. The regional plans establish a policy framework, while the authority for land use control remains at the municipal level." (AR1_000616.) Given the clear inconsistency between the MPOs' long-range plans and the proposed Illiana Corridor,

NEPA obligates the Agencies to address it and explain how they would "reconcile [the] proposed action with the plan[s]." 40 C.F.R. §§ 1502.16(c), 1506.2(d).

Plaintiffs also contend that the Agencies violated section 4(f) of the Transportation Act, which provides:

> [T]he Secretary [of the FHWA] may approve a transportation program or project . . . requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—
>
> (1) there is no prudent and feasible alternative to using **[**34]** that land; and
> (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

49 U.S.C. § 303(c). In this context, "use" includes "constructive use," 23 C.F.R. §§ 774.17, which "occurs when the transportation project does not incorporate land from a Section 4(f) property, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired." 23 C.F.R. § 774.15(a).

> [The FWHA has] determined that a constructive use occurs when:
>
> (1) The projected noise level increase attributable to the project substantially interferes with the use and enjoyment of a noise-sensitive facility of a property protected by Section 4(f), such as: . . .
> (v) Viewing wildlife in an area of a wildlife and waterfowl refuge intended for such viewing.
> • . . .
>
> (5) The ecological intrusion of the project substantially diminishes the value of wildlife habitat in a wildlife and waterfowl refuge adjacent to the project, substantially interferes with the access to a wildlife and waterfowl refuge when such access is necessary for established wildlife migration or critical life cycle processes, **[**35]** or substantially reduces the wildlife use of a wildlife and waterfowl refuge.

23 C.F.R. § 774.15(e)(1)(v), (e)(5). Midewin is property subject to section 4(f):

> The largest public open space in northeastern Illinois, Midewin National Tallgrass Prairie is on land once used as the Joliet Army Arsenal Plant and is now managed for National Forest System purposes. Midewin National Tallgrass Prairie is partially open to the public for **[*810]** various recreational activities. The Midewin National Tallgrass Prairie's management plan indicates that the full property is designated a "prairie under construction." Since portions of the property are open for public recreational activities and areas are planned for future preservation and wildlife refuge, the Midewin National Tallgrass Prairie is considered protected by Section 4(f).

(AR1_000540.)

The ROD and EIS conclude that the B3 Corridor will not directly use Midewin. (*See* AR1_000550 ("Corridor[] B3 . . . would not directly impact southern portions of the Midewin National Tallgrass Prairie.").) But they only tentatively rule out constructive use:

> The Midewin National Tallgrass Prairie management plan indicates the area along IL-53 is located within a restoration management area. . . . Federal listed species within **[**36]** Midewin National Tallgrass Prairie are known to be located further north within the property away from the working alignment[] within Corridor B3 . . . , reducing the potential for proximity impacts. . . . Based on the

> information available at Tier One, a constructive use of this resource is not anticipated. The potential for a constructive use will be further analyzed in the Tier Two NEPA studies.

(*Id.*) In fact, the final EIS expressly states that the Agencies' determinations as to all 4(f) properties are preliminary:

> An evaluation of the proposed project's potential impacts to Section 4(f) properties is being conducted under *§ 774.7(e)*, which allows for a preliminary Section 4(f) approval for Tier One documents, provided that opportunities to minimize harm at subsequent stages are not precluded by decisions made in Tier One. Section 4(f) approval will be finalized in Tier Two. A preliminary Section 4(f) approval would be subject to a reevaluation if new or more detailed information becomes available during the Tier Two NEPA studies. Feasible and prudent avoidance alternatives, if any, should be identified, and all possible conceptual planning to minimize impacts will be discussed in the Tier One NEPA studies. Further evaluation of measures **[**37]** to minimize harm to Section 4(f) properties will also occur in the Tier Two NEPA studies.

(AR1_000536-37) Because the documents clearly state that the 4(f) determination with respect to Midewin is not final, it is not ripe for review under the APA. *See* ***HN8***[⬆] *5 U.S.C. § 704* (stating that "final agency action" is subject to APA review); *Bennett v. Spear, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)* ("As a general matter, two conditions must be satisfied for agency action to be considered 'final': First, the action must mark the consummation of the agency's decisionmaking process — it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.") (citations and quotations omitted); *Home Builders Ass'n of Greater Chi. v. U.S. Army Corps of Eng'rs, 335 F.3d 607, 614 (7th Cir. 2003)* (stating that an action is final when "the agency has completed its decisionmaking process, and . . . the result of that process is one that will directly affect the parties.") (quotations omitted).

Conclusion

For the reasons set forth above, the Court grants plaintiffs' motion for summary judgment [41] and declares that FHWA's approval of the Tier 1 final EIS and ROD for the proposed new Illiana Expressway was arbitrary and capricious and in violation of NEPA. Therefore, the **[**38]** Court remands the Tier 1 final EIS and ROD to the Agencies for further proceedings **[*811]** consistent with this Memorandum Opinion and Order. Moreover, the Court grants defendant's motion to strike [71] the letter submitted by plaintiff on April 13, 2015 [63] because it pertains to matters not at issue in this case and strikes as moot plaintiffs' motion to reassign [77]. This case is terminated.

SO ORDERED.

ENTERED: June 16, 2015

/s/ Jorge Alonso

HON. JORGE ALONSO

United States District Judge

End of Document

Protecting Arizona's Resources & Children v. FHA

United States Court of Appeals for the Ninth Circuit

October 19, 2017, Argued and Submitted, San Francisco, California; December 8, 2017, Filed

No. 16-16586, No. 16-16605

Reporter
718 Fed. Appx. 495 *; 2017 U.S. App. LEXIS 24856 **; 2017 WL 6146939

PROTECTING ARIZONA'S RESOURCES AND CHILDREN; FOOTHILLS COMMUNITY ASSOCIATION; FOOTHILLS CLUB WEST COMMUNITY ASSOCIATION; CALABREA HOMEOWNERS ASSOCIATION; SIERRA CLUB; PHOENIX MOUNTAINS PRESERVATION COUNCIL; DON'T WASTE ARIZONA, INC.; GILA RIVER ALLIANCE FOR A CLEAN ENVIRONMENT, Plaintiffs-Appellants, and GILA RIVER INDIAN COMMUNITY, Plaintiff, v. FEDERAL HIGHWAY ADMINISTRATION; KARLA PETTY, in her official capacity as the Arizona Division Administrator of the Federal Highway Administration; ARIZONA DEPARTMENT OF TRANSPORTATION, Defendants-Appellees. GILA RIVER INDIAN COMMUNITY, Plaintiff-Appellant, and PROTECTING ARIZONA'S RESOURCES AND CHILDREN; FOOTHILLS COMMUNITY ASSOCIATION; FOOTHILLS CLUB WEST COMMUNITY ASSOCIATION; CALABREA HOMEOWNERS ASSOCIATION; SIERRA CLUB; PHOENIX MOUNTAINS PRESERVATION COUNCIL; DON'T WASTE ARIZONA, INC.; GILA RIVER ALLIANCE FOR A CLEAN ENVIRONMENT, Plaintiffs, v. FEDERAL HIGHWAY ADMINISTRATION; KARLA PETTY, in her official capacity as the Arizona Division Administrator of the Federal Highway Administration; ARIZONA DEPARTMENT OF TRANSPORTATION, Defendants-Appellees.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [1]** Appeal from the United States District Court for the District of Arizona. D.C. Nos. 2:15-cv-00893-DJH, 2:15-cv-01219-DJH. Diane J. Humetewa, District Judge, Presiding.

Protecting Arizona's Res. & Children v. FHA, 2015 U.S. Dist. LEXIS 187483 (D. Ariz., July 28, 2015)

Disposition: AFFIRMED.

LexisNexis® Headnotes

Business & Corporate
Compliance > ... > Environmental
Law > Assessment & Information
Access > Environmental Impact Statements

HN1[] **Environmental & Natural Resources, Environmental Impact Statements**

An environmental impact statement (EIS) should briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action, *40*

C.F.R. § 1502.13. The Ninth Circuit provides agencies considerable discretion when defining the purpose and need of a project.

Business & Corporate
Compliance > ... > Environmental
Law > Assessment & Information
Access > Environmental Impact Statements

HN2[] Environmental & Natural Resources, Environmental Impact Statements

An environmental impact statement must analyze reasonable or feasible alternatives to the proposed freeway project. It is not required to consider an infinite range of alternatives.

Business & Corporate
Compliance > ... > Environmental
Law > Assessment & Information
Access > Environmental Impact Statements

HN3[] Environmental & Natural Resources, Environmental Impact Statements

A no-action alternative may consider the impact of continuing with the present course of action until that action is changed. Planning agencies may rely on state assessments in drafting an environmental impact statement, to generate growth predictions.

Business & Corporate
Compliance > ... > Environmental
Law > Assessment & Information
Access > Environmental Impact Statements

HN4[] Environmental & Natural Resources, Environmental Impact Statements

An environmental impact statement (EIS) must discuss the extent to which adverse effects can be avoided, and must include sufficient detail to ensure that environmental consequences have been fairly evaluated. However, an EIS need not discuss the potential environmental consequences of adverse effects that are remote or highly speculative.

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN5[] Administrative Proceedings & Litigation, Judicial Review

The appellate court gives deference to an agency's judgment when the agency undertakes technical scientific analysis.

Business & Corporate
Compliance > ... > Environmental
Law > Assessment & Information
Access > Environmental Impact Statements

HN6[] Environmental & Natural Resources, Environmental Impact Statements

An environmental impact statement should disclose any environmental effects that cannot be avoided and discuss the extent to which steps can be taken to mitigate adverse environmental consequences.

Business & Corporate
Compliance > ... > Environmental
Law > Assessment & Information
Access > Environmental Impact Statements

Transportation Law > Bridges & Roads

HN7[] Environmental & Natural Resources, Environmental Impact Statements

An agency's Section 4(f), *49 U.S.C.S. § 303*, evaluation shall include sufficient supporting documentation to demonstrate why there is no feasible and prudent avoidance alternative and shall summarize the results of all possible planning to minimize harm to the Section 4(f) property, 23

C.F.R. § 774.7(a).

Transportation Law > Bridges & Roads

HN8 **Transportation Law, Bridges & Roads**

All possible planning to minimize harm must be conducted for 4(f) compliance, *49 U.S.C.S. § 303(c)(2)*.

Counsel: For Protecting Arizona's Resources And Children, Foothills Community Association, Foothills Club West Community Association, Calabrea Homeowners Association, Sierra Club, Phoenix Mountains Preservation Council, Don't Waste Arizona, Inc., Gila River Alliance For A Clean Environment, Plaintiffs - Appellants: Howard M. Shanker, Attorney, The Shanker Law Firm Plc, Tempe, AZ.

For Gila River Indian Community, Plaintiff: Mary O'Grady, David B. Rosenbaum, Attorney, Osborn Maledon, PA, Phoenix, AZ.

For Federal Highway Administration, KARLA PETTY, in her official capacity as the Arizona Division Administrator of the Federal Highway Administration, Defendants - Appellees: Tyler Lynne Burgess, Trial Attorney, US Department of Justice, Washington, DC; Norman Louis Rave Jr., U.S. Department of Justice, Environmental Enforcement Section, Washington, DC; John Tustin, Trial Attorney, John Emad Arbab, Attorney, Rachel E. Heron, Andrew Christopher Mergen, Esquire, Attorney, U.S. Department of Justice, Environment & Natural Resources **[**2]** Division, Washington, DC.

For Arizona Department of Transportation, Defendant - Appellee: Edward V.A. Kussy, Counsel, Nossaman LLP, Washington, DC; David J. Miller, Esquire, Robert Donnelly Thornton, Esquire, Attorney, Nossaman LLP, Irvine, CA.

For Inter Tribal Association of Arizona, Tohono O'Odham Nation, Amici Curiae: Virjinya Torrez, Assistant Attorney General, Tohono O'odham Nation, Office of the Attorney General, Sells, AZ.

Judges: Before: W. FLETCHER and TALLMAN, Circuit Judges, and HOYT,** District Judge.

Opinion

[*499] MEMORANDUM*

Protecting Arizona's Resources and Children ("PARC"), additional advocacy groups, and the Gila River Indian Community ("GRIC") (hereinafter "Appellants") appeal the district court's order granting the Federal Highway Administration's, *et al.* (hereinafter "Appellees") motion for summary judgment. Appellants claim that Appellees' evaluation and subsequent approval of the Loop 202 South Mountain Freeway ("South Mountain Freeway") violates the National Environmental Policy Act ("NEPA") and Section 4(f) of the Department of Transportation Act. We have jurisdiction under *28 U.S.C. § 1291* and review the district court's order de novo. *See* Westlands Water Dist. v. U.S. Dep't of Interior, 376 F.3d 853, 865 (9th Cir. 2004). Our review of Appellees' compliance with NEPA and Section 4(f) of the Transportation Act is **[**3]** governed by the deferential standard of the *Administrative Procedure Act*, *5 U.S.C. § 701-06*. *See Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 858 (9th Cir. 2005)*. *Amici*'s argument for a "heightened standard of impact assessment because American Indian populations are affected" has been waived, as it was neither briefed nor raised by Appellants or Appellees. *See* Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169, 1176 n.8 (9th Cir. 2009).

HN1 An environmental impact statement ("EIS") should "briefly specify the underlying purpose and need to which the agency is

** The Honorable Kenneth M. Hoyt, United States District Judge for the Southern District of Texas, sitting by designation.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. Appellees' purpose and need statement examined projected population growth, housing demand, employment growth, transportation mileage, and transportation capacity deficiencies. These metrics were then used to establish the "underlying purpose and need" and to determine whether a previously proposed freeway was still necessary. *See* Honolulutraffic.com v. Fed. Transit Admin., 742 F.3d 1222, 1230-31 (9th Cir. 2014) (upholding a purpose and need statement based on objectives previously identified in a Transportation Plan). The Ninth Circuit provides agencies "considerable discretion" when defining the purpose and need of a project. Id. at 1230 (quoting *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt., 606 F.3d 1058, 1070 (9th Cir. 2010))*. Under this standard, Appellees' purpose and need statement complied with NEPA.

HN2[] An EIS must analyze reasonable or feasible alternatives to the proposed freeway **[**4]** project. City of Carmel-By-The-Sea v. U.S. Dept. of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997) (citing 40 C.F.R. § 1502.14(a)-(c)). It is not required to consider an infinite range of alternatives. *Id.* Appellees used a multivariable screening process to evaluate reasonable alternatives over the course of thirteen years. Appellees identified three alignment alternatives for the Western Section of the freeway, one alignment alternative for the Eastern Section of the freeway, and a no-action alternative for detailed study. Appellees utilized the "Modal Method" to evaluate each non-freeway alternative, ultimately concluding that the non-freeway alternatives would not address an adequate percentage of the transportation capacity need. When Appellees eliminated an alternative **[*500]** from detailed study they provided reasons for the elimination. 40 C.F.R. § 1502.14. We therefore conclude that Appellees' EIS complied with NEPA in its analysis of alternatives.

HN3[] A no-action alternative may consider the impact of "continuing with the present course of action until that action is changed." Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin., 126 F.3d 1158, 1188 (9th Cir. 1997) (quoting 46 Fed.Reg. 18026, 18027). Appellees' no-action alternative analysis assumed that "[e]xisting residential land use patterns and trends would be maintained," and then modeled the effects if the freeway were not built. *See* Carmel-By-The-Sea, 123 F.3d at 1162-63. Planning agencies may rely on state assessments **[**5]** in drafting an EIS, *see* Laguna Greenbelt, Inc. v. U.S. Dept. of Transp., 42 F.3d 517, 525-27 (9th Cir. 1994); HonoluluTraffic.com, 742 F.3d at 1231, to generate growth predictions. Appellees used a transportation planning report previously issued by the Maricopa County Association of Governments ("MAG"). The MAG report assumes some future expansion of highways, but does not explicitly rely on the "preferred alternative." Because Appellees explained the basis for their decision to rely upon the socioeconomic projections of the MAG report and disclosed their reliance on the projections, we conclude that their examination of the no-action alternative was not arbitrary or capricious. *See* Alaska Oil & Gas Ass'n v. Pritzker, 840 F.3d 671, 679 (9th Cir. 2016).

Though Appellees declined to analyze the potential impact of a hazardous materials spill, their discussion of hazardous spills was sufficient. HN4[] An EIS must "discuss the extent to which adverse effects can be avoided," and must include "sufficient detail to ensure that environmental consequences have been fairly evaluated." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351-52, 109 S. Ct. 1835, 104 L. Ed. 2d 351 (1989). However, an EIS need not discuss the potential environmental consequences of adverse effects that are remote or highly speculative. San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016, 1030 (9th Cir. 2006). Appellees determined that "the probability of a spill of hazardous cargo is low," and discussed the extent to which a hazardous spill could be avoided or mitigated. Appellees **[**6]** noted that

the potential for such an accident already exists for portions of the Phoenix metropolitan areas and is governed by existing regulations. Appellees outlined Arizona's Department of Transportation's ("ADOT") coordination with emergency services providers responsible for responding to such spills, and Appellees discussed ADOT's ongoing assessment and evaluation of hazardous material restrictions.

Appellees adequately considered the proposed freeway's potential impact on children's health. HN5[↑] We give deference to an agency's judgment when the agency undertakes "technical scientific analysis." Idaho Wool Growers Ass'n v. Vilsack, 816 F.3d 1095, 1107 (9th Cir. 2016). Appellees performed the conformity analyses mandated by the Clean Air Act, 42 U.S.C. § 7506(c), and concluded that the proposed freeway project would not exceed National Ambient Air Quality Standards ("NAAQS") standards throughout the Study Area. Because NAAQS are set at levels designed to protect sensitive populations, including children, Appellees concluded the South Mountain Freeway would cause no negative health impact on the general population in the Study Area. In coming to this conclusion, Appellees produced a full Air Quality Technical Report, and performed a quantitative "hot spot" analysis for particulate **[**7]** matter ("PM10") **[*501]** and carbon monoxide ("CO"). "The hot-spot analysis show[ed] that the Preferred Alternative would not cause new violations of the PM10 and CO NAAQS, exacerbate any existing violations of the standard, or delay attainment of the standards or any required interim milestones." Final Environmental Impact Statement ("FEIS") at 4-75 (citing 40 C.F.R. § 93.116(a)).

Appellees adequately analyzed Mobile Source Air Toxic ("MSAT") emissions, in compliance with NEPA. Appellees' MSAT analysis conformed to the FHWA's guidance for roadway projects. Appellees modeled MSAT emissions using the EPA's latest model, documented the Freeway Project's MSAT impacts in the Study Area and two subareas, and provided reasoning for their determination that an analysis of near-roadway emissions was not necessary.

Appellees adequately considered mitigation measures. HN6[↑] An EIS should disclose any environmental effects that cannot be avoided and discuss the extent to which steps can be taken to mitigate adverse environmental consequences. Laguna Greenbelt, 42 F.3d at 528 (9th Cir. 1994) (citing Methow Valley Citizens Council, 490 U.S. at 351-52). Appellees' FEIS proposes several project-specific mitigation measures to address any direct impacts, cumulative impacts, and secondary impacts from the freeway project. Chapter 4 of the **[**8]** FEIS discusses the South Mountain Freeway's potential impact on biological resources and the contiguous nature of the community. Appellees' FEIS proposes mitigation measures to reduce the amount of dust and noise pollution generated from the construction of the freeway project, including the use of watering trucks, windbreaks, dust suppressants and rubberized asphalt. The FEIS examines the wildlife located in the Study Area and discloses that the South Mountain Freeway will fragment the habitats of many species. The FEIS explains that the freeway project will enhance bridges and drainage structures to maintain wildlife connectivity in the affected area. The FEIS also examines the potential displacement of households and businesses, proposing, advisory services for displaced residents, rental assistance for eligible individuals, and land acquisition and relocation assistance pursuant to the Uniform Relocation Act, 42 U.S.C. §§ 4601, et seq., among other measures. "NEPA does not require a fully developed plan that will mitigate all environmental harm before an agency can act; NEPA requires only that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated." **[**9]** Laguna Greenbelt, 42 F.3d at 528 (citing Methow Valley Citizens Council, 490 U.S. at 352). The record thus does not bear out the contention that the fifteen percent design level hindered Appellees from sufficiently detailing and

discussing mitigating measures.

Appellees permissibly determined there was no feasible and prudent alternative to the South Mountain Park Preserve ("SMPP") route of the project, in compliance with Section 4(f). ***HN7***[⬆] An agency's Section 4(f) evaluation "shall include sufficient supporting documentation to demonstrate why there is no feasible and prudent avoidance alternative and shall summarize the results of all possible planning to minimize harm to the Section 4(f) property." *23 C.F.R. § 774.7(a)*. Chapter 5 of the FEIS identifies the Section 4(f) properties within the Study Area, describes alternatives that avoid the Section 4(f) properties aside from the SMPP, and concludes that all alternatives avoiding the SMPP are not feasible or prudent. The FEIS further concludes that the no-action alternative will **[*502]** not meet the freeway project's purpose and need and, as a result, is not prudent. *HonoluluTraffic.com, 742 F.3d at 1232* (quoting *23 C.F.R. § 774.17*) (explaining that an alternative is not prudent if, among other things it compromises the project's ability to address the purpose and need to an unreasonable degree). The FEIS determines that alternatives north of South Mountain, **[**10]** including US 60 extension to 1-10, US 60 extension to I-17, and I-10 spur, would adversely affect portions of I-10, US 60, SR 101L, and SR 202L and would cause extensive displacement, in addition to not meeting the project's purpose and need. It concludes that alternatives south of GRIC land, including the SR 85/I-8 alternative, were neither feasible nor prudent because of their connecting distance from downtown Phoenix. Finally, because about two-thirds of the Riggs Road alternative would cut through GRIC land and GRIC would not allow development on its land, the FEIS determines the Riggs Road alternative is neither feasible nor prudent.

Appellees conducted planning to minimize harm to the SMPP, related cultural resources, and the GRIC well sites. ***HN8***[⬆] "[A]ll possible planning to minimize harm" must be conducted for 4(f) compliance. *49 U.S.C. § 303(c)(2)*. The record bears out that Appellees' fifteen percent design completion did not hinder them from conducting such necessary planning. Chapter 5 of the FEIS details measures to minimize harm to the SMPP, including fencing off sacred areas, providing an alignment for community access, and consulting with GRIC members during the design phase to continue to attempt to **[**11]** reduce the SMPP land needed for the South Mountain Freeway. Appellees also document that they entered into a Programmatic Agreement that documents "legally binding commitments to the proper treatment and management of cultural Section 4(f) resources and by Section 106" of the *National Historic Preservation Act*. *See HonoluluTraffic.com, 742 F.3d at 1234* (citing *73 Fed.Reg. 13368*-01, 13379-80 (2008) (recommending such an agreements as "appropriate and desirable")).

Finally, the FEIS contains a thorough discussion of the South Mountain Freeway's potential impacts to GRIC groundwater wells. Appellees included in the design and construction contract a binding agreement that requires the contractor to "avoid and preserve the GRIC well properties, GRIC's legal access to GRIC well properties, and the water, wells, pipes, and ditches located therein." Further, pursuant to *23 C.F.R. §§ 771.129* and *771.130*, Appellees may re-evaluate and, if necessary, prepare a supplemental EIS if any alterations to the freeway alignment due to avoidance of the wells would result in significant environmental impacts that were not previously evaluated.

AFFIRMED.

End of Document

Sierra Club v. United States DOT

United States District Court for the Northern District of Illinois, Eastern Division

January 16, 1997, Decided ; January 27, 1997, DOCKETED

No. 96 C 4768

Reporter
962 F. Supp. 1037 *; 1997 U.S. Dist. LEXIS 738 **; 44 ERC (BNA) 1659

SIERRA CLUB, ILLINOIS CHAPTER, a California Not-for-Profit Corporation; SOUTH CORRIDOR AGAINST THE TOLLWAY, INC., an Illinois Not-for-Profit Corporation; ENVIRONMENTAL LAW AND POLICY CENTER OF THE MIDWEST, an Illinois Not-for-Profit Corporation; and BUSINESS AND PROFESSIONAL PEOPLE FOR THE PUBLIC INTEREST, an Illinois Not-for-Profit Corporation, Plaintiffs, v. U.S. DEPARTMENT OF TRANSPORTATION, FEDERICO PENA, Secretary, U.S. Department of Transportation; FEDERAL HIGHWAY ADMINISTRATION; RODNEY SLATER, Administrator, Federal Highway Administration, MICHAEL A. COOK, Illinois Division Administrator, Federal Highway Administration; KIRK BROWN, Secretary, Illinois Department of Transportation; and JULIAN D'ESPOSITO, Chairman, Illinois State Toll Highway Authority, Defendants.

Disposition: **[**1]** Plaintiffs' motion for summary judgment granted, and defendants' motion for summary judgment denied. Judgment entered in favor of plaintiffs Sierra Club, South Corridor Against the Tollway, Inc., Environmental Law and Policy Center of the Midwest, and Business and Professional People for the Public Interest and against defendants United States Department of Transportation, Federico Pena, Federal Highway Administration, Rodney Slater, Michael Cook, Kirk Brown, and Julian D'Esposito.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Summary Judgment, Opposing Materials**

A movant is entitled to summary judgment under *Fed. R. Civ. P. 56* when the record indicates there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The court considers the record as a whole

and draws all reasonable inferences in the light most favorable to the party opposing the motion.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN2[] **Standards of Review, Abuse of Discretion**

Under the Administrative Procedure Act, the court can set aside an agency's decision only if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *5 U.S.C.S. § 706(2)(A)*. A court cannot substitute its judgment for that of the agency. The burden of proof is on the plaintiffs to demonstrate that the agency's decision was improper. Nonetheless, deference does not shield an agency action from a thorough, probing, in-depth review. An agency violates the Administrative Procedure Act if it relies on factors Congress did not intend for it to consider, fails to examine an important aspect of the problem, offers an explanation for its decision that contradicts the evidence before the agency, or is so implausible that it cannot be attributed to a product of agency expertise.

Administrative Law > Judicial Review > Reviewability > Standing

Civil Procedure > ... > Justiciability > Standing > General Overview

HN3[] **Reviewability, Standing**

In order to have standing, plaintiffs must demonstrate the actual or imminent invasion of a concrete and particularized legally-protected interest, an "injury in fact," a causal connection between the defendant's actions and the injury, and a likelihood that the injury is redressable by a favorable court decision.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN4[] **Environmental & Natural Resources, Environmental Impact Statements**

The National Environmental Policy Act (NEPA) represents a broad commitment to protect the environment. To meet this commitment, NEPA dictates a set of procedures that requires agencies to disseminate all relevant environmental information and to take a "hard look" at the environmental consequences of any major federal action. The primary vehicle for the "hard look" is the environmental impact statement. The impact statement must rigorously explore and objectively evaluate all reasonable alternatives to the proposed action. *40 C.F.R. § 1502.14(a)*. It must describe the environmental impact of the proposed action. *40 C.F.R. § 1502.16*. NEPA prescribes procedures but does not dictate any particular substantive outcome.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN5[] **Environmental & Natural Resources, Environmental Impact Statements**

When there is incomplete or unavailable information as to the impact of a proposed action, and that information is essential to make a reasoned choice among alternatives, the National Environmental Policy Act requires an agency to make clear in the final impact statement that the study was not undertaken and that there are reasons the study was not undertaken. 40 C.F.R. § 1502.22.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN6[] **Environmental & Natural Resources, Environmental Impact Statements**

The National Environmental Policy Act does not require an agency to use the best scientific methodology available.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN7[] **Environmental & Natural Resources, Environmental Impact Statements**

Information about the growth inducing impact of tollroad construction is crucial to a reasoned conclusion as to alternatives and that the final impact statement was at least required to explain in some meaningful way why such a study was not possible. 40 C.F.R. § 1502.22.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN8[] **Environmental & Natural Resources, Environmental Impact Statements**

A final impact statement must identify the primary and secondary environmental impact of constructing a highway. 40 C.F.R. §§ 1502.16(a)-(b), 1508.8.

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Charters

Business & Corporate Compliance > ... > Real Property Law > Zoning > Historic Preservation

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > US Federal Maritime Commission

HN9[] **Air & Space Transportation, Charters**

Section 4(f) of the Transportation Act prohibits the Secretary of Transportation from approving any project requiring use of a public park, recreation area or any significant historic site unless there is no prudent and feasible alternative to using that land and the project includes all possible planning to minimize harm to the protected land. *49 U.S.C.S. § 303*.

Counsel: For SIERRA CLUB ILLINOIS CHAPTER, A California Not-for-Profit Corporation, plaintiff: Robert Louis Jones, Jr.,

Business & Professional People for the Public Interest, Chicago, IL. Robert Scott Michaels, Environmental Law & Policy Center, Chicago, IL. Howard Alan Learner, Environmental Law and Policy Center of the Midwest, Chicago, IL. For SOUTH CORRIDOR AGAINST THE TOLLWAY, INC., an Illinois Not-for-Profit Corporation, plaintiff: Robert Louis Jones, Jr., (See above). Robert Scott Michaels, (See above). Howard Alan Learner, (See above). For ENVIROMENTAL LAW AND POLICY CENTER OF THE MIDWEST, an Illinois Not-for-Profit Corporation, plaintiff: Robert Louis Jones, Jr., (See above). Robert Scott Michaels, (See **[**2]** above). Howard Alan Learner, (See above). For BUSINESS AND PROFESSIONAL PEOPLE FOR THE PUBLIC INTEREST, an Illinois Not-for-Profit Corporation, plaintiff: Robert Louis Jones, Jr., (See above). Robert Scott Michaels, (See above). Howard Alan Learner, (See above).

For UNITED STATES DEPARTMENT OF TRANSPORTATION, defendant: Matthew David Tanner, United States Attorney's Office, Chicago, IL. For KIRK BROWN, Secretary, Illinois Department of Transportation, defendant: Paul W. Schroeder, Vicki A O'Meara, Jones, Day, Reavis & Pogue, Chicago, IL. For JULIAN D'ESPOSITO, Chairman, Illinois State Toll Highway Authority, defendant: Paul W. Schroeder, (See above). Vicki A O'Meara, (See above).

Judges: Suzanne B. Conlon, United States District Judge

Opinion by: Suzanne B. Conlon

Opinion

[*1039] MEMORANDUM OPINION AND ORDER

The Illinois chapter of Sierra Club ("Sierra Club") and several other not-for-profit corporations (collectively "plaintiffs") sue a number of federal and state transportation agencies and officials (collectively "defendants"), alleging that defendants have failed to comply with the National Environmental Policy Act ("NEPA") (Count I), *42 U.S.C. §§ 4321-4370*, and section 4(f) of the Transportation **[**3]** Act ("section 4(f)") (Count II), *49 U.S.C. § 303*, in the planning of a 12.5 mile new toll highway ("tollroad") in Will County, Illinois. [1] **[*1040]** Plaintiffs seek declaratory judgment that the Federal Highway Administration's ("FHWA") approval of the project was unlawful. Plaintiffs also seek remand of the case for further review by FHWA. The parties have filed cross-motions for summary judgment.

BACKGROUND

The following facts are undisputed except where otherwise noted. The proposed tollroad is a 12.5 mile multi-lane, divided highway that would extend Interstate 355 from its current southern terminus at Interstate 55 near Bolingbrook, Illinois to Interstate 80 near New Lenox, Illinois, about 25 miles southwest of Chicago. Pl. 12(M) P 19. The tollroad would pass through Will County and parts of suburban Cook and DuPage Counties. Id.

Construction of the tollroad would have some impact on wetlands, **[**4]** forest preserve areas, wildlife habitats, farmland, wildlife migration, runoff, noise, and air quality. Id. P 21; Def. 12(N)(3)(a) P 21. The tollroad would also affect numerous natural, scenic and historical sites, such as the Keepataw Forest Preserve, Black Partridge Forest Preserve, Lustron House, the Illinois and Michigan Canal, Centennial Trail, and Lamont Woods Forest Preserve. Id. P 22. The parties dispute the extent of any direct and indirect harm that would result from the construction of the tollroad.

NEPA and section 4(f) require an environmental impact statement and a section 4(f) evaluation of

[1] The parties have stipulated to a dismissal of Count III, which asserts a claim under the Clean Air Act.

projects such as the tollroad. On July 26, 1994, FHWA and the Illinois Department of Transportation ("IDOT") completed a draft environmental impact statement and section 4(f) evaluation ("draft impact statements"). Id. P 23. FHWA and IDOT circulated the draft impact statements for public comment and received numerous responses. Id.

Several of the responses raised questions about the draft impact statements' discussion of alternatives to construction and of the impact of the proposed construction. Id. The parties dispute the extent to which the final environmental **[**5]** impact statement and section 4(f) evaluation ("final impact statement") corrected any deficiencies noted by the comments and whether the final impact statement complies with NEPA and section 4(f).

In June 1995, IDOT and FHWA released a supplement to the draft impact statements. Id. P 24. IDOT and FHWA received comments on the supplement that raised questions about the statements' treatment of alternatives to construction and the impact of the proposed construction. Id. The parties dispute the extent to which the final impact statement incorporated the concerns reflected in the public comments.

In February 1996, IDOT and FHWA issued the final impact statement. Def. 12(M) P 15. It states that the purpose of the tollroad is "to provide a north/south transportation corridor linking Interstate Route 55 and Interstate Route 80 thereby providing a more efficient and better balanced transportation system that addresses existing and projected transportation demands within Will County and the region." Id. P 17. In particular, the final impact statement identifies existing transportation problems such as the need to: (1) improve local travel; (2) accommodate increasing freight demand; **[**6]** (3) relieve congestion at critical locations on the interstate system; (4) provide a north-south transportation corridor; (5) accommodate shifting locations of employment; and (6) enhance community linkage. Id. P 18. The final impact statement also asserts that the tollroad would meet projected increased transportation demands. Id. P 26.

Plaintiffs deny that any evidence exists to support the final impact statement's claims as to existing needs and argue that projected needs are improperly based on population forecasts that assume construction of the tollroad. Pl. 12(N)(3)(a) PP 19-27. Plaintiffs point out, and defendants admit, that defendants used a single unvarying land use, population and employment forecast for analyzing all alternatives, including the no action alternative. Pl. 12(M) P 39. The forecast assumes transportation facilities will be developed to meet the needs of an increasing population. Id. P 40; Def. 12(N)(3)(a) P 40. Thus, plaintiffs argue that the final impact statement's discussion of alternatives to construction, **[*1041]** Def. 12(M) P 30, was not legally sufficient. Pl. 12(N)(3)(a) P 30; Pl. 12(N)(3)(b) PP 1-7. Moreover, plaintiffs assert that the analysis **[**7]** of the environmental impact of construction, Def. 12(M) PP 58, 68, was not legally sufficient. Pl. 12(N)(3)(a) PP 30, 58, 68.

On April 16, 1996, FHWA approved the final impact statement in its Record of Decision ("FHWA's decision"). Pl. 12(M) P 26. On May 3, 1996, plaintiffs and several other organizations formally requested reconsideration of FHWA's decision. Id. P 27. FHWA denied reconsideration in a letter dated May 8, 1996. Id.

The Northeastern Illinois Planning Commission is the region's official land use and demographic forecasting agency; its earlier population and employment estimates for the tollroad corridor are expressly relied on in the final impact statement. Id. P 28. In June 1996, the Northeastern Illinois Planning Commission publicly released a draft document entitled "I-355 Heritage Corridor Cumulative Impact Assessment". Id.; Def. 12(N)(3)(a) P 28. The Northeastern Illinois Planning Commission draft report suggests that population and employment estimates in its previous reports underestimated the growth that would occur in Will County following construction of the tollroad. Id. P 29. In response to this report,

plaintiffs submitted a second **[**8]** request for reconsideration to FHWA. Pl. 12(M) P 31. FHWA denied that request on July 3, 1996. Id. P 32. Plaintiffs now seek review of FHWA's decision under the Administrative Procedure Act.

DISCUSSION

I. SUMMARY JUDGMENT STANDARD

HN1[] A movant is entitled to summary judgment under Rule 56 when the record indicates there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Unterreiner v. Volkswagen of America, Inc., 8 F.3d 1206, 1209 (7th Cir. 1993). The court considers the record as a whole and draws all reasonable inferences in the light most favorable to the party opposing the motion. Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239, 1242 (7th Cir. 1992). This case is particularly ripe for summary judgment, as the administrative record sets forth all facts necessary for a decision.

The standard of review in this case is narrow. HN2[] Under the Administrative Procedure Act, this court can set aside FHWA's decision only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance **[**9]** with law. . . ." *5 U.S.C. § 706(2)(A)*. This court cannot "substitute its judgment for that of the agency." Sierra Club v. Marita, 46 F.3d 606, 619 (7th Cir. 1995) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971)). Moreover, the burden of proof is on the plaintiffs to demonstrate that FHWA's decision was improper. Id. Nonetheless, deference does not "shield [an agency] action from a thorough, probing, in-depth review." Id. (quoting Overton Park, 401 U.S. at 415). An agency violates the Administrative Procedure Act if it relies on factors Congress did not intend for it to consider, fails to examine an important aspect of the problem, offers an explanation for its decision that contradicts the evidence before the agency, or is so implausible that it cannot be attributed to a product of agency expertise. Id. (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)).

II. STANDING

Defendants contend plaintiffs lack standing to bring this suit. HN3[] In order to have standing, plaintiffs must demonstrate "the actual **[**10]** or imminent invasion of a concrete and particularized legally-protected interest (an 'injury in fact'), a causal connection between the defendant's actions and the injury, and a likelihood that the injury is redressable by a favorable court decision." 46 F.3d at 611 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)). Defendants contend plaintiffs have failed to show an injury in fact because they have not shown how their members will be injured if relief is not granted.

[*1042] In response, plaintiffs submit ten affidavits from members of their organizations asserting that the proposed tollroad would harm their use and enjoyment of the land. These assertions are sufficient to show an imminent injury in fact. Id. (the Sierra Club's use and enjoyment of the land creates a concrete and legally cognizable claim; the Sierra Club has standing on behalf of its members) (citing Sierra Club v. Morton, 405 U.S. 727, 734-35, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972); Hunt v. Washington Apple Advertising Commn., 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977)). As defendants do not contest the other elements of the standing **[**11]** test, dismissal on jurisdictional grounds is unwarranted.

III. THE NATIONAL ENVIRONMENTAL POLICY ACT

HN4[] NEPA represents a broad commitment to protect the environment. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348, 104 L.

Ed. 2d 351, 109 S. Ct. 1835 (1989). To meet this commitment, NEPA dictates a set of procedures that requires agencies to disseminate all relevant environmental information and to take a "hard look" at the environmental consequences of any major federal action. *Id. at 350*.

The primary vehicle for the "hard look" is the environmental impact statement. *City of Angoon v. Hodel, 803 F.2d 1016, 1020 (9th Cir. 1986)*, cert. denied, *484 U.S. 870, 98 L. Ed. 2d 148, 108 S. Ct. 197 (1987)*. The impact statement must "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. *40 C.F.R. § 1502.14(a)*. Moreover, it must describe the environmental impact of the proposed action. *40 C.F.R. § 1502.16*. NEPA prescribes procedures but does not dictate any particular substantive outcome. *Robertson, 490 U.S. at 350*.

Plaintiffs argue that the final impact statement does not satisfy NEPA's requirements for **[**12]** two reasons. First, plaintiffs assert that the final impact statement does not adequately consider possible alternatives to construction of the tollroad. Second, plaintiffs allege the final impact statement does not adequately consider the environmental consequences of the tollroad.

A. DISCUSSION OF ALTERNATIVES

Plaintiffs argue that the final impact statement's analysis of alternatives is inadequate because: (1) the stated purpose of the project is so narrow that only the tollroad could satisfy it; (2) there is no rational basis for analyzing any alternatives to the tollroad; and (3) the final impact statement's rejection of alternatives is too brief. While plaintiffs' first argument is not persuasive, their other two allegations are convincing.

With respect to the first argument, plaintiffs claim an agency cannot define its objectives so narrowly that only the proposed action satisfies the objectives. Otherwise, the agency could circumvent NEPA's requirement that an agency undertake a careful consideration of alternatives. See, e.g., *Citizens Against Burlington, Inc. v. Busey, 290 U.S. App. D.C. 371, 938 F.2d 190, 196* (D.C. Cir.), cert. denied, *502 U.S. 994, **[**13]** 116 L. Ed. 2d 638, 112 S. Ct. 616 (1991)*.

Plaintiffs argue that some of the stated objectives in the final impact statement are excessively narrow. For example, the final impact statement asserts that the project's objectives include: (1) providing a "north-south transportation corridor linking Interstate Route 55 and Interstate Route 80", and (2) completing a project that has been "an element of regional and county transportation plans for over thirty years." HY 3-01310-11. Plaintiffs are correct that these goals could only be satisfied by the proposed tollroad.

Defendants respond that the final impact statement also relies on broader objectives when analyzing and ultimately dismissing various alternatives to construction. The final impact statement relies on objectives such as the need to: (1) improve local travel; (2) accommodate increasing freight demand; (3) relieve congestion at critical locations on the interstate system; (4) provide a north-south transportation corridor; (5) accommodate shifting locations of employment; and (6) enhance community linkage. Def. 12(M) P 18. Numerous alternatives could satisfy **[*1043]** some of these objectives. For example, a rail system could alleviate **[**14]** many of the identified problems to some degree. The final impact statement simply concludes that such alternatives do not meet the objectives as well as the tollroad. Id. Given that the rejection of alternatives was based in large part on these broader and more general objectives, this court cannot conclude that the final impact statement's description of objectives is excessively narrow.

Plaintiffs' second argument is that even if the final impact statement's description of the project's purposes is not excessively narrow, the general objectives upon which defendants rely are not supported by the available evidence. As a result, plaintiffs argue that there was no rational basis for

analyzing alternatives to the tollroad. Specifically, plaintiffs point out that defendants relied on a single population forecast and that the forecast was used to analyze the build *and* no-build scenarios.

Plaintiffs' argument is persuasive. Highways create demand for travel and expansion by their very existence. *Swain v. Brinegar, 517 F.2d 766, 777 (7th Cir. 1975)*; Def. 12(M) P 86. However, the final impact statement in this case relies on the implausible assumption that the same level of **[**15]** transportation needs will exist whether or not the tollroad is constructed. In particular, the final impact statement contains a socioeconomic forecast that assumes the construction of a highway such as the tollroad and then applies that forecast to both the build and no-build alternatives. The result is a forecast of future needs that only the proposed tollroad can satisfy. As a result, the final impact statement creates a self-fulfilling prophecy that makes a reasoned analysis of how different alternatives satisfy future needs impossible.

Defendants respond that they unsuccessfully attempted to implement the kind of study suggested by plaintiffs and that such a study was not possible. HY 1-01160. However, ***HN5***[⬆] when there is incomplete or unavailable information as to the impact of a proposed action, and that information is essential to make a reasoned choice among alternatives, NEPA requires an agency to make clear in the final impact statement that the study was not undertaken and that there are reasons the study was not undertaken. *40 C.F.R. § 1502.22*. Here, unlike a case such as *Marita, 46 F.3d at 623 (7th Cir. 1995)*, the final impact statement does not indicate that this information **[**16]** is missing or that obtaining this information is infeasible or exorbitantly expensive.

HN6[⬆] NEPA, of course, does not require an agency to use the best scientific methodology available. Id. Thus, this court cannot conclude, as plaintiffs urge, that the final impact statement must contain a socioeconomic forecast that reflects the growth inducing effect of the tollroad. Rather, this court merely holds that ***HN7***[⬆] information about the growth inducing impact of tollroad construction is crucial to a reasoned conclusion as to alternatives and that the final impact statement was at least required to explain in some meaningful way why such a study was not possible. *40 C.F.R. § 1502.22*; cf. *Laguna Greenbelt, Inc. v. U.S. Dept. of Transp., 42 F.3d 517, 526-27 (9th Cir. 1994)* (suggesting that a final impact statement cannot rely on a single socioeconomic forecast unless the statement relies on existing needs or explains why an alternative study is not possible); *Seattle Audubon Society v. Espy, 998 F.2d 699, 704 (9th Cir. 1993)* (an impact statement, which did not address in any meaningful way the uncertainties of the evidence it relied on, must undertake further study or explain why such **[**17]** study is not necessary or feasible). See generally, Dinah Bear, Using the National Environmental Policy Act to Protect Biological Diversity, *8 Tul. Envtl. L.J. 77, 93 (1994)* ("the requirements of *Section 1502.22*, which have received little attention since the controversial 'worst case' amendment of 1986, should be used in the event of new and evolving scientific theories"). Accordingly, the final impact statement does not adequately justify its reliance on projected needs and thus fails to observe procedures required by law. *5 U.S.C. § 706(2)(D)*. Moreover, FHWA's decision, which does not require defendants to produce an appropriate socioeconomic forecast or to explain adequately why such a forecast is not possible, **[*1044]** was arbitrary and capricious. *5 U.S.C. § 706(2)(a)*.

Defendants respond that even if the final impact statement should not have relied on a single population forecast, the tollroad still is the most effective way to satisfy *existing* transportation needs. Indeed, a reliance on existing needs is legally sufficient, even if the analysis of future needs is flawed. *Laguna, 42 F.3d at 526*; *Piedmont Heights Civic Club, Inc. v. Morehead, 637 F.2d 430, 442 (5th **[**18]** Cir. 1981)*; *National Wildlife Federation v. Lewis, 519 F. Supp. 523, 533-34 (D. Conn. 1981)*.

Plaintiffs reply that there is no evidence to support

defendants' assertions as to current needs. Defendants identify six current needs, including the need to: (1) improve local travel; (2) accommodate increasing freight demand; (3) relieve congestion at critical locations on the interstate system; (4) provide a north-south transportation corridor; (5) accommodate shifting locations of employment; and (6) enhance community linkage. Def. 12(M) P 18.

With respect to local travel and the need for community linkage, the final impact statement asserts that the growing regional population needs another way to cross the Des Plaines River because of increased travel times on local roads. Def. 12(M) PP 19, 23. However, plaintiffs correctly point out that the final impact statement contains no analysis that indicates how or to what extent the tollroad will improve travel times. Moreover, the claim that local travel times need to be improved is inconsistent with defendants' claim that the tollroad does not depend on current road congestion in Will County for its existence. Def. Resp. to Pl. 12(N)(3)(b) **[**19]** P 1. Finally, FHWA itself stated that, "if [the tollroad is] going to reduce travel time then additional documentation would be needed in the final impact statement to support that claim." HY-1-01412. The final impact statement does not contain any such documentation, so there is no evidence of a need to improve local travel or enhance community linkage, and there is no evidence that the tollroad will alleviate any local transportation problems that do exist. Because this essential information is absent, the final impact statement does not provide a basis for analyzing alternatives as to these current needs. *40 C.F.R. § 1502.14*.

With respect to regional transportation, the need for a north-south corridor, and the need to accommodate shifting locations of employment, defendants have provided evidence of a substantial increase in the number of jobs in suburban areas and a concomitant increase in vehicular trips to those locations. HY 3-01312-13. However, plaintiffs correctly point out that the final impact statement fails to analyze how and to what extent the tollroad would correct this problem. As mentioned above, FHWA has acknowledged that additional documentation is needed in **[**20]** order to demonstrate that the tollroad will improve travel times. This information is essential to determining whether the tollroad, as opposed to various alternatives, will meet current needs. *40 C.F.R. § 1502.14*.

With respect to freight demands, plaintiffs correctly point out that this need is supported by a chart that shows national highway trends but fails to identify any needs in northeastern Illinois. Moreover, the final impact statement does not explain how the tollroad would alleviate any excessive freight demands that do exist. The final impact statement fails to explain why such a study, which is essential to determining whether the tollroad will meet current needs, was not undertaken. Accordingly, this justification for the tollroad is also legally insufficient. Id.

Without justifying these current needs and without justifying projected needs, it becomes impossible to assess any of the possible alternatives. *40 C.F.R. § 1502.14(a)*. Accordingly, FHWA's decision on this point cannot be upheld. *5 U.S.C. §§ 706(2)(A)* and *(D)*.

Finally, plaintiffs argue that defendants failed to take a hard look at alternatives because the final impact statement's discussion of the alternatives **[**21]** is too brief and conclusory. Defendants respond that a final impact statement need not provide a detailed analysis of unreasonable alternatives, *40 C.F.R. § 1502.14(a)*; *North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1542-43 [*1045] (11th Cir. 1990)*. Defendants argue that the final impact statement explains why each alternative was ultimately unreasonable given the needs of the project. However, as discussed above, the final impact statement does not include sufficient information to justify the purposes and needs it identifies. Thus, this court lacks sufficient information to determine

whether the alternatives were in fact unreasonable and deserved such a cursory dismissal.

In short, the final impact statement fails to provide the necessary studies (or explain why such studies were not undertaken) to justify the current and projected needs of the project. As a result, the final impact statement does not provide enough information to make a reasoned decision as to possible alternatives. Accordingly, defendants must either conduct additional studies or explain why the studies are not possible.

B. DISCUSSION OF IMPACT

Plaintiffs' next argument is that the final impact statement **[**22]** fails to analyze the environmental impact of the tollroad with respect to air pollution and future development associated with the tollroad.

Both parties agree that ***HN8***[↑] a final impact statement must identify the primary and secondary environmental impact of constructing a highway. *40 C.F.R. §§ 1502.16(a)-(b)*, *1508.8*. The final impact statement does in fact identify the environmental impact of the tollroad, including proposed land-use changes, conversion of agricultural lands, development of certain facilities, possible urban sprawl, and development of tollroad interchanges. Def. 12(M) P 77. While plaintiffs are correct that defendants do not describe the impact in considerable detail, plaintiffs do not cite any authority that suggests defendants must do more than identify the potential environmental impact. The only cases plaintiffs cite involve final impact statements that completely failed to identify environmental consequences. *Coalition for Canyon Preservation v. Bowers, 632 F.2d 774, 783 (9th Cir. 1980)*; *City of Davis v. Coleman, 521 F.2d 661, 675 (9th Cir. 1975)*. Thus, the final impact statement in this case is not analogous. Accordingly, the final impact statement's discussion **[**23]** of the direct and secondary impact of construction is adequate, albeit cursory. *Iowa Citizens For Environmental Quality v. Volpe, 487 F.2d 849, 853 (8th Cir. 1973)*.

Alternatively, plaintiffs argue that the final impact statement does not adequately analyze the air pollution impact of the proposed tollroad because it does not quantify the tollroad's ozone-producing effect. Indeed, an impact statement is incomplete without an analysis of the effect the tollroad will have on the production of ozone in the region. *40 C.F.R. § 1502.16*. Recognizing this need, defendants respond that they have in fact conducted such an analysis. IT/SP 1-00354.

Defendants' study, however, is inadequate for two reasons. First, it was not incorporated into the final impact statement. By itself, this flaw makes defendants' analysis inadequate. See, e.g., *Sierra Club v. Marsh, 976 F.2d 763, 770 (1st Cir. 1992)* (citations omitted). Failing to incorporate the study into the final impact statement deprives the public and other participants in the process of the opportunity to comment on it. Id.

Second, the study relies on only one socioeconomic forecast in examining the effect construction would **[**24]** have on ozone production. As a result, the study does not accurately depict the true ozone-producing effect construction of the tollroad would have. Accordingly, defendants must either prepare a study that explicitly compares ozone production with and without the tollroad or explain why a study is not possible. *40 C.F.R. § 1502.22*. FHWA's decision, which does not provide a justification for the absence of such a study, fails to observe procedures required by law. *5 U.S.C. § 706(2)(D)*. Moreover, its decision in this regard was arbitrary and Capricious. *5 U.S.C. § 706(2)(a)*.

With respect to particulate matter pollution, plaintiffs have not substantiated their claim that defendants were required to undertake a study with respect to this pollutant. Plaintiffs commit two sentences of their motion for summary judgment to this proposition but provide no support for the **[*1046]** argument. There is no basis to conclude that defendants' failure to undertake such a study was arbitrary or capricious.

IV. ADEQUACY OF THE 4(F) EVALUATION

HN9[↑] Section 4(f) of the Transportation Act prohibits the Secretary of Transportation from approving any project requiring use of a public park, recreation area **[**25]** or any significant historic site unless: "(1) there is no prudent and feasible alternative to using that land; and (2) the . . . project includes all possible planning to minimize harm" to the protected land. *49 U.S.C. § 303*. Both parties admit that section 4(f) is implicated in this case. Pl. 12(M) P 42. The question is whether there are any prudent or feasible alternatives to construction of the tollroad.

Defendants argue that the final impact statement's analysis of alternatives was adequate because none of the alternatives met the transportation needs identified in the final impact statement. However, for the reasons explained above, the needs identified in the final impact statement have not been adequately justified and thus cannot serve as the basis for finding alternatives imprudent. Accordingly, the final impact statement fails to satisfy section 4(f) of the Transportation Act.

V. REFUSAL TO RECONSIDER

Plaintiffs argue that defendants' failure to consider new information supplied in the Northeastern Illinois Planning Commission's draft report was arbitrary and capricious. This draft report indicates that the population forecast used in the final impact statement **[**26]** underestimated the development that would occur in the corridor as a direct result of construction of the tollroad.

As the discussion above makes clear, defendants must either provide additional studies to justify their conclusions as to ozone production and the purposes of the project or explain why such studies are not possible. That analysis would necessarily include the type of information contained in the Northeastern Illinois Planning Commission's draft report. While that analysis need not necessarily include the information in the draft report, it must include an analysis of a similar kind or explain why an analysis is not possible. [2]

Environmental laws are not arbitrary hoops through which government agencies must jump. The environmental regulations **[**27]** at issue in this case are designed to ensure that the public and government agencies are well-informed about the environmental consequences of proposed actions. The environmental impact statements in this case fail in several significant respects to serve this critical purpose.

CONCLUSION

Plaintiffs' motion for summary judgment is granted, and defendants' motion for summary judgment is denied. Judgment is entered in favor of plaintiffs Sierra Club, South Corridor Against the Tollway, Inc., Environmental Law and Policy Center of the Midwest, and Business and Professional People for the Public Interest and against defendants United States Department of Transportation, Federico Pena, Federal Highway Administration, Rodney Slater, Michael Cook, Kirk Brown, and Julian D'Esposito. Defendants are directed either to produce studies justifying their conclusions as to the proposed tollroad's purposes and as to ozone production or explain why such critical studies are not possible.

ENTER:

Suzanne B. Conlon

United States District Judge

January 16, 1997

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[2] The court notes, however, that the very fact that the Northeastern Illinois Planning Commission has now developed a draft report, which describes the sizable impact that the tollroad would have on the region, strongly suggests that such a study is possible.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to a hearing before the Court. The issues have been heard **[**28]** and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of plaitniffs Sierra Club, South Corridor Against the Tollway, Inc., Environmental Law and Policy Center of the Midwest, and Business and Professional People for the Public Interest and against defendants United States Department of Transportation, Federico Pena, Federal Highway Administration, Rodney Slater, Michael Cook, Kirk Brown, and Julian D'Esposito.

January 16, 1997

Date

End of Document

Laguna Greenbelt v. United States Dep't of Transp.

United States Court of Appeals for the Ninth Circuit

September 13, 1994, Argued, Submitted, Pasadena, California ; December 2, 1994, Filed

No. 94-55757

Reporter
42 F.3d 517 *; 1994 U.S. App. LEXIS 36265 **; 94 Daily Journal DAR 18253

THE LAGUNA GREENBELT, INC., a California Non-Profit Corporation; THE LAGUNA CANYON CONSERVANCY, a California Non-Profit Corporation; STOP POLLUTING OUR NEWPORT, a California Non-Profit Corporation; SAVE OUR SAN JUAN, a California Non-Profit Corporation, Plaintiffs-Appellants, v. UNITED STATES DEPARTMENT OF TRANSPORTATION; SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION; FEDERAL HIGHWAY ADMINISTRATION; ADMINISTRATOR OF THE FEDERAL HIGHWAY ADMINISTRATION; REGIONAL ADMINISTRATOR, REGION IX, OF THE FEDERAL HIGHWAY ADMINISTRATION; SAN JOAQUIN HILLS TRANSPORTATION CORRIDOR AGENCY, Defendants-Appellees.

Subsequent History: [1]** As Amended on Denial of Rehearing December 20, 1994.

Prior History: Appeal from the United States District Court for the Central District of California. D.C. No. CV-93-00499-LHM. Linda H. McLaughlin, District Judge, Presiding.

Original Opinion Previously Reported at: *1994 U.S. App. LEXIS 33707*.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN1[] **Environmental & Natural Resources, Environmental Impact Statements**

The California Environmental Quality Act (CEQA), *Cal. Pub. Res. Code § 21000 et seq.*, is California's version of the National Environmental Policy Act (NEPA), *42 U.S.C.S. § 4321 et seq.*, and requires an environmental impact report (EIR) rather than an environmental impact statement (EIS).

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Civil Procedure > Appeals > Standards of Review > De Novo Review

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

Environmental Law > Assessment & Information Access > Environmental Assessments

Transportation Law > Bridges & Roads > US Federal Highway Administration

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > US Federal Maritime Commission

HN2[] Environmental & Natural Resources, Environmental Impact Statements

The court of appeals reviews de novo a district court's determination that the environmental impact statement (EIS) complies with the National Environmental Policy Act (NEPA), 42 U.S.C.S. § 4321 et seq., and that no supplemental environmental impact statement (SEIS) was required. The court of appeals also reviews de novo a district court's determination that the Federal Highway Administration (FHA) complied with section 4(f) of the Transportation Act, *49 U.S.C.S. § 303(c)*.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN3[] Environmental & Natural Resources, Environmental Impact Statements

The National Environmental Policy Act (NEPA), 42 U.S.C.S. § 4321 et seq., does not mandate particular substantive results, but instead imposes only procedural requirements. Thus, in considering a challenge under NEPA, a court of appeals may not substitute its judgment for that of the agency concerning the wisdom or prudence of a proposed action. Under the "rule of reason," the courts of appeal determine whether the environmental impact statement (EIS) contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences by making a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation.

Administrative Law > Judicial Review > Administrative Record > General Overview

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN4[] Judicial Review, Administrative Record

The environmental impact statement (EIS) required by the National Environmental Policy Act (NEPA), 42 U.S.C.S. § 4321 et seq., must discuss alternatives to the proposed action. *42 U.S.C.S. § 4332(2)(C)(iii)*. NEPA's implementing regulations require that the EIS rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated. 40 C.F.R. § 1502.14(a).

Environmental Law > Natural Resources &

Public Lands > National Environmental Policy Act > General Overview

HN5[] Natural Resources & Public Lands, National Environmental Policy Act

The concept of alternatives in an environmental impact statement (EIS) is bounded by some notion of feasibility. The range of alternatives that must be considered in the EIS need not extend beyond those reasonably related to the purposes of the project.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN6[] Environmental & Natural Resources, Environmental Impact Statements

The National Environmental Policy Act (NEPA), 42 U.S.C.S. § 4321 et seq., does not require a court of appeals to decide whether an environmental impact statement (EIS) is based on the best scientific methodology available or to resolve disagreements among various experts.

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN7[] Assessment & Information Access, Environmental Assessments

In determining whether the National Environmental Policy Act (NEPA), 42 U.S.C.S. § 4321 et seq., has been violated, the courts of appeal must look to the ultimate harm NEPA seeks to prevent: the risk of damage to the environment that results if the agency fails to properly and thoroughly evaluate the environmental impacts of a proposed project. Thus, even where there is a violation of NEPA's procedural requirements, relief will not be granted if the decision-maker was otherwise fully informed as to the environmental consequences and NEPA's goals were met.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN8[] Environmental & Natural Resources, Environmental Impact Statements

An environmental impact statement (EIS) must include a detailed statement regarding any adverse environmental effects that cannot be avoided. *42 U.S.C.S. § 4332(2)(C)(ii)*. Implicit in this requirement is an understanding that the EIS will discuss the extent to which steps can be taken to mitigate adverse environmental consequences. Omission of a reasonably complete discussion of possible mitigation measures would undermine the action-forcing function of the National Environmental Policy Act (NEPA), 42 U.S.C.S. § 4321 et seq., and prevent the agency and interested parties from properly evaluating the severity of the adverse effects. However, NEPA does not require a fully developed plan that will mitigate all environmental harm before an agency can act; NEPA requires only that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN9[] Environmental & Natural Resources, Environmental Impact Statements

Regulations promulgated under the National Environmental Policy Act (NEPA), 42. U.S.C.S. § 4321 et seq., provide that an environmental impact statement (EIS) shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. 40 C.F.R. § 1502.15.

Administrative Law > Judicial Review > Administrative Record > General Overview

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN10[] Judicial Review, Administrative Record

The National Environmental Policy Act (NEPA), 42 U.S.C.S. § 4321 et seq., regulations require preparation of a supplemental environmental impact statement (SEIS) if, among other things, there are significant new circumstances or information relevant to environmental concerns that bear on the proposed actions or its impacts. 40 C.F.R. § 1502.9(c)(1).

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > US Federal Maritime Commission

Governments > Public Improvements > Bridges & Roads

Transportation Law > Bridges & Roads > US Federal Highway Administration

HN11[] Water Transportation, US Federal Maritime Commission

Section 4(f) of the Transportation Act, *49 U.S.C.S. § 303(c)*, prohibits the Federal Highway Administration (FHA) from approving any project that requires the use of publicly owned parkland, recreation areas, or wildlife and waterfowl refuges of national, state, or local significance unless (1) there is no prudent and feasible alternative to using such land and (2) the project includes all possible planning to minimize harm to the parkland. *49 U.S.C.S. § 303(c)*.

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > US Federal Maritime Commission

Governments > Public Improvements > Bridges & Roads

HN12[] Water Transportation, US Federal Maritime Commission

Section 1065 of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, 105 Stat. 2005-2006, exempts certain parks in the vicinity of the San Joaquin Hills transportation corridor from the requirements of section 4(f), *49 U.S.C.S. § 303(c)*. Section 1065 provides that section 4(f) shall not be applicable to public park, recreation area, wildlife and waterfowl

refuge (collectively referred to as "parkland") (1) that are acquired by a public entity after a governmental agency's approval of a state or federal environmental document established the location of a highway adjacent to the parklands; or (2) where the planning or acquisition documents for the parklands specifically referred to or reserved the specific location of the highway. Pub. L. No. 102-240, § 1065(a).

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > US Federal Maritime Commission

Governments > Public Improvements > Bridges & Roads

Transportation Law > Bridges & Roads > General Overview

HN13[] **Water Transportation, US Federal Maritime Commission**

Section 4(f) of the Transportation Act, *49 U.S.C.S. § 303(c)*, applies to constructive use as well as actual use of parkland. Constructive use of park land occurs when a road significantly and adversely affects park land even though the road does not physically use the park.

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John J. Flynn III, Robert D. Thornton, Nossaman, Guthner, Knox & Elliott, Irvine, California, for defendant-appellee San Joaquin Hills Transportation Corridor Agency.

Judges: Before: Wilfred Feinberg, [*] Mary M. Schroeder, and Alex Kozinski, Circuit Judges.

Opinion

[*521] ORDER AND AMENDED OPINION

PER CURIAM:

The Laguna Greenbelt, Inc., The Laguna Canyon Conservancy, Stop Polluting Our Newport, **[**2]** and Save Our San Juan are four non-profit community organizations (collectively "Laguna") that appeal the district court's grant of summary judgment in favor of the U.S. Department of Transportation, the Federal Highway Administration (FHA), and the San Joaquin Hills Transportation Corridor Agency (TCA). Laguna contends that the FHA violated the National Environmental Policy Act (NEPA), *42 U.S.C. § 4321 et seq.*, by approving the Environmental Impact Statement (EIS) for the tollroad and by failing to prepare a Supplemental Environmental Impact Statement (SEIS) to address the effect of wildfires that broke out in the Laguna Greenbelt region after the EIS was approved. Laguna further contends that the FHA violated section 4(f) of the Transportation Act, *49 U.S.C. § 303(c)*, which governs the use of parkland for transportation projects.

BACKGROUND

Tollroad Description and Location

The San Joaquin Hills transportation corridor, as approved by the FHA, is a proposed 17.5 mile highway that will run parallel to the Pacific coastline from Newport Beach to San Juan Capistrano, California, where it will connect with **[**3]** Interstate 5. The corridor is the first

[*] The Honorable Wilfred Feinberg, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

highway of its type in California to be financed without any federal funding and with limited state funding. It will operate as a tollroad only until construction bonds are paid off. The federal appellees' interest in the project arises solely from the highway's connection with Interstate 5.

The tollroad is designed to relieve traffic congestion and high levels of air emissions on the freeway system and on local arterial highways in south Orange County. Between 1950 and 1989, the population of Orange County grew by 2.1 million, while only four miles were added to the freeway system in the 16 years preceding 1990. The tollroad will consist of six general use lanes, two high occupancy vehicle lanes for buses and carpools, and a median varying from 88 to 116 **[*522]** feet wide for future rail transit use. A five-foot chain-link fence will run the tollroad's entire length, hindering movement across the road by most wildlife species. Grading for the tollroad will cut a strip up to 1,300 feet wide in places and require movement of over 40 million cubic yards of earth, significantly altering the topography and appearance of the land.

Laguna Greenbelt

Approximately **[**4]** five miles of the tollroad (the middle section) will bisect a 16,000 acre undeveloped area in the San Joaquin and Sheep Hills of coastal Orange County called the Laguna Greenbelt. The tollroad will also use 1.7 acres of the University of California, Irvine Ecological Reserve (the "reserve"). The Greenbelt is the last significant open space in Orange County and possesses ecological, recreational and scenic value. It consists of parks, recreational areas and wildlife preserves, and encompasses eight coastal canyons, a permanent stream and the only natural lakes in Orange County. The Greenbelt includes a stand of coastal sage scrub, which serves as a habitat for the Coastal California Gnatcatcher (a species of bird listed as threatened under the Endangered Species Act), as well as for several sensitive species currently or previously under review for listing, including the Coastal Cactus Wren, the California Mastiff Bat, the San Diego Coast Horned Lizard and the Orange-Throated Whiptail Lizard. Rare or endangered plants, such as Orange County Turkish Rugging and Many-Stemmed Dudleya, have also been found in the region.

Approval Process

Since at least 1976, Orange County and the cities **[**5]** along the proposed corridor route have evaluated transportation options in the region and included the corridor in their long-range planning documents. Some parklands were planned and acquired in transactions that reserved the corridor right of way or required dedication of land for the corridor.

Three state Environmental Impact Reports (EIR) were prepared prior to the joint federal EIS/state EIR at issue here. [1] In response to the third state EIR, the cities of Newport Beach and Irvine proposed reducing the number of lanes from 12 to a maximum of eight, including high occupancy vehicle lanes, and reserving space in the median for rail transit. The proposal was adopted.

In September 1990, a draft of the EIS and section 4(f) analysis at issue here was released for public comment. The Environmental Protection Agency (EPA) gave the document a low rating for **[**6]** failure to provide enough information to adequately assess significant environmental impacts. The U.S. Fish & Wildlife Service (FWS) and the California Coastal Commission also criticized the document. In response, the FHA engaged in further consultation with the agencies, including additional assessments of the air quality and growth-inducing effects of the corridor, the biological impact of the corridor on a pair of Least Bell's vireos (an endangered bird species) and the implementation of wetlands mitigation measures. After another public

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[1] ***HN1***[↑] The California Environmental Quality Act (CEQA), *Cal. Pub. Resources Code § 21000 et seq.*, is California's version of NEPA and requires an EIR rather than an EIS.

comment period, the FHA approved the final EIS, the section 4(f) analysis, and the tollroad in a July 6, 1992 Record of Decision. The FHA subsequently consulted with the FWS on two additional bird species - the gnatcatcher and cactus wren.

Court Review

In January 1993, Laguna filed a complaint for declaratory and injunctive relief in the district court, challenging the FHA decision to approve the tollroad. [2] Shortly thereafter, TCA sold $ 1.2 billion in revenue bonds and notified its contractor to proceed with final plans for construction. Laguna moved for a temporary restraining order and a preliminary injunction, which the district court **[**7]** **[*523]** granted, prohibiting any activity in connection with construction of the corridor in the Laguna Greenbelt and in the reserve. [3]

In October 1993, wildfires swept through the Laguna Greenbelt region. The district court postponed proceedings to allow the FHA to address this issue. The FHA reinitiated consultation on the gnatcatcher and cactus wren, **[**8]** obtained other evaluations, and, on March 7, 1994, issued a Memorandum of Record concluding that an SEIS was not necessary to address the effect of the wildfires on the tollroad's environmental impacts. The district court granted Laguna leave to amend its complaint to challenge that decision.

The district court eventually granted the FHA's and TCA's motions for summary judgment, denied Laguna's motion for summary judgment, dissolved its preliminary injunction, and denied a stay. We, however, enjoined construction activities in the Laguna Greenbelt and the reserve pending disposition of this appeal. We later granted the parties' stipulation to modify the injunction to permit certain salvage and surveying activities.

DISCUSSION

I

Standard of Review

HN2[↑] We review de novo the district court's determination that the EIS complies with NEPA and that no SEIS was required. *Oregon Envtl. Council v. Kunzman, 817 F.2d 484, 493 (9th Cir. 1987)*. We also review de novo the district court's determination that the FHA complied with section 4(f) of the Transportation Act. *See Arizona Past & Future Found., Inc. v. Lewis, 722 F.2d 1423, 1425-26 (9th Cir. 1983)*. **[**9]**

II

Environmental Impact Statement

Laguna challenges the EIS for failing to: (a) analyze all reasonable alternatives to the tollroad; (b) disclose the growth-inducing impacts of the tollroad; (c) accurately analyze the need for the tollroad, the air quality and traffic impacts of the tollroad, and the "no project" alternative to the tollroad; (d) disclose the impact of the tollroad on the reserve; (e) disclose the effectiveness of mitigation measures discussed in the EIS; and (f) use a rational and consistent definition of the project and its affected environment in analyzing the tollroad's impacts.

Before we turn to consider each of these contentions, we note that ***HN3***[↑] NEPA does not mandate particular substantive results, but instead

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[2] State court actions challenging state or local agency approval of the joint EIS/EIR under state law and one other federal action challenging FWS approval of the corridor, *Natural Resources Defense Council v. U.S. Dept. of Interior,* No. SA-CV-93-999-LHM (C.D. Cal. filed Sept. 29, 1993), have also been filed.

[3] The district court enjoined construction only as to the one-third section of the tollroad that bisects the Greenbelt and the portion of the tollroad that uses the reserve. Construction began in September 1993 and has continued throughout this litigation on the remaining two-thirds of the tollroad. According to TCA, over $ 200 million has been spent thus far.

imposes only procedural requirements. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558, 55 L. Ed. 2d 460, 98 S. Ct. 1197 (1978)*. Thus, in considering a challenge under NEPA, "[we] may not substitute [our] judgment for that of the agency concerning the wisdom or prudence of a proposed action." *Kunzman, 817 F.2d at 492*. **[**10]** Under our "rule of reason," we determine "'whether the [EIS] contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences' by making 'a pragmatic judgment whether the [EIS's] form, content and preparation foster both informed decision-making and informed public participation.'" *Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1356 (9th Cir. 1994)* (quoting *California v. Block, 690 F.2d 753, 761 (9th Cir. 1982))*.

A. Discussion of alternatives

Laguna contends that the EIS's presentation and evaluation of alternatives set forth insufficient information to satisfy the requirements of NEPA.

1. Number of alternatives

First, Laguna contends the EIS violates NEPA by discussing only three alternatives for the tollroad project: the proposed corridor, one other "build" alternative, and **[*524]** the "no-build" or no project alternative. [4] ***HN4***[↑] The EIS required by NEPA must discuss alternatives to the proposed action. *42 U.S.C. § 4332(2)(C)(iii)*. NEPA's implementing regulations require that the EIS "rigorously explore and objectively evaluate **[**11]** all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." *40 C.F.R. § 1502.14(a)*.

Here, the EIS discusses in detail two build alternatives: the proposed corridor, AR 30:012818-49, 875-77, and a second option following the same alignment and having the same general lane configuration, but differing somewhat in its operation and method of connecting with Interstate **[**12]** 5, AR 30:012818, 850-51, 875-77. [5] The EIS also discusses a third option, the no-build alternative. AR 30:012851, 875.

In addition, the EIS discusses six categories of alternatives that were evaluated in earlier environmental documents or in the course of the joint EIS/EIR but were eliminated from more detailed analysis and ultimately rejected. AR 30:012851-75, 30:013055-68. [6] All were rejected as not feasible or failing to meet the project's objective of reducing traffic congestion and air emissions. For example, with respect to alternatives **[**13]** that would do more than simply alter the route of the proposed tollroad, carpools and high occupancy vehicle lanes were found incapable of accommodating traffic demand or eliminating the need for the corridor. AR 30:012854-55. Widening of existing highways in the region was found to have adverse impacts on adjacent routes and on the community. AR 30:012857-63.

[4] Laguna also contends that the FHA at the outset deliberately determined to defer to TCA's preferred alternative for the tollroad, choosing to focus only on minor adjustments in the tollroad's alignment and on the no-build alternative. This argument is based on an internal FHA memorandum dated seven years before the draft EIS was even released. *See* Administrative Record (AR) 1:000015. Thus, it goes only to the FHA's intention or predisposition in drafting the EIS. It is irrelevant where, as here, the EIS itself ultimately satisfies the requirements of NEPA.

[5] Laguna refers to the second build alternative as a massive 10-14 lane highway set up as a "straw man" to make the proposed tollroad appear reasonable and environmentally superior by comparison. The second build alternative, however, is described throughout the EIS as having the same lane configuration as the proposed tollroad - six general use lanes plus two high occupancy vehicle lanes. Only at one map cited by Laguna is it described as having 10-14 lanes. *See* AR 30:012841.

[6] Laguna contends that reliance on prior state environmental documents was improper because the federal agency must analyze the environmental impacts and alternatives under NEPA. However, NEPA mandates state and federal coordination of environmental review. *See 40 C.F.R. § 1506.2(b)*. Here, the absence of a more thorough discussion in the EIS of alternatives that were discussed in and rejected as a result of prior state studies does not violate NEPA.

Thus, the EIS discusses in detail all the alternatives that were feasible and briefly discusses the reasons others were eliminated. This is all NEPA requires - there is no minimum number of alternatives that **[**14]** must be discussed. *See, e.g.,* Tongass Conservation Society v. Cheney, 288 U.S. App. D.C. 180, 924 F.2d 1137, 1140-42 (D.C. Cir. 1991) (upholding EIS where 13 of 14 sites eliminated with only brief discussion because only one site feasible).

2. Range of alternatives

Second, Laguna contends the EIS fails to consider a broad range of other alternatives that were reasonable. However, ***HN5***[⬆] the concept of alternatives is "bounded by some notion of feasibility." Vermont Yankee, 435 U.S. at 551. The range of alternatives that must be considered in the EIS need not extend beyond those reasonably related to the purposes of the project. City of Angoon v. Hodel, 803 F.2d 1016, 1021-22 (9th Cir. 1986).

Here, Laguna contends the EIS ignored a smaller, four-lane alternative that included special pricing mechanisms to reduce traffic congestion, an alternative which was proposed during the comment period by its expert, Dr. Gordon Fielding. *See* AR 32:013598-99. However, Fielding's proposal was addressed in the EIS, in response to his comments. AR 34:014764-65. **[**15]** The EIS explains that Fielding's proposal was rejected because a four lane highway would not meet the project's goal of reducing traffic congestion, **[*525]** even if Fielding's special pricing mechanisms were used. [7] Thus, Fielding's proposal was properly rejected as not reasonably related to the purposes of the project. *See, e.g.,* North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1541-43 (11th Cir. 1990) (upholding EIS that failed to include detailed discussion of infeasible rail-only alternative).

Laguna also contends the EIS should have considered whether a highway could be designed that had the proposed tollroad's operational characteristics but incorporated bridges, tunnels, split levels, and other options to minimize the tollroad's environmental impacts. **[**16]** *Cf.* Coalition for Canyon Preservation v. Bowers, 632 F.2d 774, 783-84 (9th Cir. 1980) (EIS for highway-widening to four lanes inadequate for failure to discuss two lane alternative that was reasonable and obvious because it was the original proposal and would have spared parkland). An EIS need not consider every conceivable alternative, however, nor remote and speculative alternatives whose effects cannot be readily ascertained. *See* Vermont Yankee, 435 U.S. at 551.

Here, Laguna's suggestions are not reasonable or obvious. For example, Laguna contends the FHA should have investigated reducing the size of the tollroad's median, thus narrowing the tollroad and possibly limiting encroachment on parkland. The size of the median was chosen to accommodate rail transit. Because of rail's positive environmental attributes, it would not be reasonable to eliminate availability of the median for potential rail transit. Moreover, Laguna's contention that this would save parkland is speculative at best.

Laguna further contends the FHA did not consider a proposal to bridge every canyon along the route with **[**17]** elevated highway segments to permit wildlife corridors. *See* AR 33:014291. The FHA did respond to this comment, however, *see* AR 34:014840-46, and additional wildlife crossings were incorporated into the final design. *Id.*

Thus, while Laguna points to some alternatives that might have been considered or discussed more fully, the "detailed statement of alternatives cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable." Vermont Yankee, 435 U.S. at 551 (internal quotation marks omitted). The record reflects that the EIS contains a reasonably thorough

[7] The EIS also considered and rejected another down-sized alternative as not suitable, AR 30:012863, and the proposed tollroad itself incorporates a reduction in the number of lanes in response to comments on the draft EIS, AR 29:012282-89.

discussion of alternatives satisfying the goals of the project.

B. Growth-inducing impacts of the tollroad

Laguna contends that the discussion of growth-inducing impacts in the EIS sets forth insufficient information to satisfy the requirements of NEPA. *See* 40 C.F.R. §§ 1502.16(a) & (b), 1508.8(b) (EIS must discuss direct and indirect effects on environment; indirect effects include growth inducing effects and other effects relating to induced changes in the pattern of land use, population density or growth **[**18]** rate). Specifically, Laguna contends the EIS's conclusion that the tollroad will not influence growth in Orange County is misleading because it is based on local planning documents that assume the existence of the tollroad.

The discussion and documentation in the EIS, however, support the EIS's conclusion that the tollroad will not affect the amount and pattern of growth in Orange County. The EIS relied upon evidence that Orange County has already experienced substantial growth, and that the county is expected to continue to grow in the future, although at a declining rate. AR 31:013173. The record shows that 98.5% of all land in the project's "area of benefit" is already accounted for by either existing or committed land uses not contingent on construction of the corridor. AR 31:013180. [8]

[19]** **[*526]** The cases Laguna cites in support of its contention, Coalition for Canyon Preservation, 632 F.2d at 782 & n.3 (EIS violates NEPA where it contains unsupported, conclusory statement that pollution would increase with or without project), and City of Davis v. Coleman, 521 F.2d 661, 674-77 (9th Cir. 1975) (failure to prepare EIS violates NEPA where agency simply stated highway was accessory to inevitable industrial development), are inapposite. We have distinguished these cases where, as here, an EIS's discussion of growth-inducing impacts was reasonably thorough. *See* Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1461-62 (9th Cir. 1984), *cert. denied, 471 U.S. 1108 (1985)*.

While there are weaknesses in the EIS's analysis of growth-inducing impacts, [9] these weaknesses do not prevent us from concluding that the discussion of growth-inducing impacts in the EIS easily meets our "rule of reason." *See* Salmon River, 32 F.3d at 1356. **HN6**[↑] NEPA does not require us to decide whether an EIS is based on the best scientific methodology available or to resolve **[**20]** disagreements among various experts. *See* Kunzman, 817 F.2d at 496. While Laguna may disagree with the EIS's substantive conclusion regarding growth-inducing impacts, the EIS's discussion of those impacts was reasonably thorough.

C. Need for tollroad, air quality and traffic

impacts, and no-build alternative

Laguna claims that the EIS contains insufficient data and analysis regarding **[**21]** the need for the tollroad, its air quality and traffic impacts, and alternatives to the project. Laguna contends that the EIS's analysis of these issues is flawed because it purports to reflect a comparison between the environment with and without the tollroad through the year 2010, but in fact does not allow for the alternative that the tollroad will not be built. *See* 40

[8] Laguna disputes this, contending that development agreements or other entitlements merely authorize development, and do not require or guarantee it, and that developers may not go through with plans if the tollroad is not built. This argument is not supported by the record.

[9] For example, Laguna is correct that the EIS's conclusions regarding the amount and pattern of growth in Orange County were based on planning documents that assume the corridor would be built. The EIS also acknowledges that the corridor has already affected growth in Orange County, since it was identified on the Master Plan of Arterial Highways in 1976 and subsequently incorporated into local planning documents. Finally, the EIS admits that the corridor may affect the rate, if not the amount and pattern, of growth in Orange County by permitting development to proceed more quickly. *See* AR 31:013181.

C.F.R. § 1502.14 (EIS must present environmental impacts of proposed project in comparative form, sharply defining issues and providing clear basis for choice among options).

Laguna contends that the traffic projections used in the EIS fail to provide a true comparison with the no project alternative because they assume the corridor will be in operation by 1995, resulting in projections of congestion and air pollution that can only be relieved by the project itself. *But see* AR 30:012806-07 (Table 1.3.A - Existing and Estimated 2010 Traffic on I-405, SR-1, and I-5 With and Without the Corridor); AR 30:012810-11 (Table 1.3.C - Existing and Estimated Traffic on Selected Arterial Highways With and Without the Corridor); AR 30:012808-12 (discussion of roadway capacity deficiencies addressing existing and future **[**22]** traffic with and without Corridor). Specifically, Laguna contends the traffic projections are flawed because they are based on population and housing data that assume existence of the tollroad. The record reveals that the Orange County Preferred 1988 Population and Employment Projections (OCP-88) were used to formulate the traffic projections for 1995 and 2010 discussed in the EIS, and the OCP-88 states as a general assumption that operation of the corridor will begin by 1995. *See* AR 31:013148; *see also* AR 31:013173 ("all projections and forecasts from both Orange County and [the Southern California Association of Governments] reflect construction of the Corridor").

Nevertheless, the FHA did not violate NEPA by relying on the OCP-88. *See Stop H-3 Ass'n,* 740 F.2d at 1464-65 (EIS can rely on official demographic projections for the region at issue, even where projections subsequently revised downward). The need for the corridor is based on existing as well as future traffic congestion, AR 30:012808-09, and the county's population probably will grow in the coming years even without the **[*527]** corridor, *see* AR 31:013173 (population increased by 2.1 **[**23]** million from 1950 to 1989 with little highway improvement); *see also* Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 442 (5th Cir. 1981) (EIS based on high population projections upheld; current as well as future need for highway was shown and all parties anticipated some population growth). Thus, we conclude that this aspect of the EIS complies with NEPA as well.

D. Disclosure of tollroad's impact on the University

of California, Irvine Ecological Reserve

Laguna next contends that the EIS does not disclose that 1.7 acres of the reserve will be taken for tollroad right-of-way. [10] The closest the EIS comes to disclosing use of 1.7 acres of the reserve is: (1) a statement that "impacts to current [University land] uses would be limited to the intrusion of the Corridor's alignment (approximately 200-300 feet) onto UCI property near the Bonita Canyon Reservoir," AR 30:013082; (2) a similar statement made in response to a comment that "the purpose of going onto UCI property is to reduce impacts to wetlands," AR 35:015197; and (3) the listing of the University among agencies from which permits and approvals would have to be obtained, AR **[**24]** 30:012787.

The EIS also discusses the corridor's impact on University land generally, without specifically describing the taking of a portion of the reserve. *See* AR 30:013032 (discussing impacts to plant communities). Various comments on the EIS by University spokespersons and the public, along with TCA's responses to them, all of which were circulated to the public, also allude to taking of the reserve. *E.g.,* AR 32:013603-04 (MacMillen letter); AR 32:013641-44 (Schwartz letter); AR 33:014286-98 (Bowler letter); AR 34:014862-63

[10] Laguna also contends the EIS makes affirmative misrepresentations about the use of the reserve. This contention is based on a misreading of the record. For example, where the EIS claims that "existing UCI land uses are not located near the Corridor," it is clear that the EIS is discussing developed land use, not the reserve. *See* AR 30:013082.

(responses).

While none of these citations mentions the reserve by name or describes the 1.7 acre parcel, this technical non-disclosure **[**25]** does not require reversal. HN7[] In determining whether NEPA has been violated, we must look to the ultimate harm NEPA seeks to prevent: the risk of damage to the environment that results if the agency fails to properly and thoroughly evaluate the environmental impacts of a proposed project. *See, e.g.,* Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989). Thus, even where there is a violation of NEPA's procedural requirements, relief will not be granted if the decision-maker was otherwise fully informed as to the environmental consequences and NEPA's goals were met. *See, e.g.,* Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1023 (9th Cir. 1980).

The non-disclosure here did not frustrate NEPA's goal of ensuring that relevant information is available to the wider audience participating in agency decision-making. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 104 L. Ed. 2d 351, 109 S. Ct. 1835 (1989). It is clear that members of the public had sufficient information regarding the tollroad's impact on the reserve to submit comments upon it; **[**26]** the FHA in turn was informed about the impact on the reserve before it made its final decision. In addition, this litigation itself has offered further opportunities for public involvement in the education of agency decision-makers, curing defects that might have existed in the EIS. *Cf.* Hon. James L. Oakes, *The Judicial Role in Environmental Law,* 52 N.Y.U. L. Rev. 498, 515-16 (1977) (judicial review under NEPA is one part of ongoing political process in which all sides can seek to influence outcomes through multiplicity of channels). Failure of the EIS to disclose accurately the tollroad's impacts on the reserve does not constitute reversible error here.

E. Effectiveness of mitigation measures

Laguna contends that the information provided in the EIS on mitigation measures and their likely efficacy fails to satisfy the requirements of NEPA. Specifically, Laguna **[*528]** claims the EIS fails to disclose clearly enough that measures to mitigate the adverse environmental impacts of the tollroad may not be effective, therefore misleading the reader about the extent of harm caused by the tollroad.

HN8[] An EIS must include a detailed statement regarding any adverse **[**27]** environmental effects that cannot be avoided. *42 U.S.C. § 4332(2)(C)(ii)*. Implicit in this requirement is an understanding that the EIS will discuss the extent to which steps can be taken to mitigate adverse environmental consequences. Methow Valley Citizens Council, 490 U.S. at 351-52. Omission of a reasonably complete discussion of possible mitigation measures would undermine the action-forcing function of NEPA and prevent the agency and interested parties from properly evaluating the severity of the adverse effects. *Id. at 352*.

However, NEPA does not require a fully developed plan that will mitigate all environmental harm before an agency can act; NEPA requires only that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated. *Id.*; *see also* Communities, Inc. v. Busey, 956 F.2d 619, 625-26 (6th Cir.) (EIS lacking complete remediation plan adequate where sufficient investigation was conducted to identify mitigation alternatives and make **[**28]** reasonable estimate of cost), *cert. denied, 121 L. Ed. 2d 332, 113 S. Ct. 408 (1992)*; Citizens Against Burlington, Inc. v. Busey, 290 U.S. App. D.C. 371, 938 F.2d 190, 205-06 (D.C. Cir.) (agency not required to finish mitigation studies or execute mitigation plans before project begins), *cert. denied, 116 L. Ed. 2d 638, 112 S. Ct. 616 (1991)*.

The EIS contains a reasonably complete discussion of potential mitigation measures. Laguna concedes that the EIS proposes re-planting coastal sage scrub, AR 30:013045, 49, and using several bridges to maintain wildlife corridors, AR 30:012790, 013046-47. Indeed, the EIS includes a long

discussion of environmental impacts and potential mitigation measures. AR 30:012955-013147. The EIS also discloses that mitigation measures may not be totally successful. It states as to habitat revegetation that complete mitigation "would be difficult due to the large size of the impacted area and poor likelihood of successful regeneration," and that the loss of certain habitats "will only be partially mitigated." AR 30:013041. **[**29]** The EIS also states that maintenance of wildlife corridors "will help" alleviate impacts, AR 30:013044, but acknowledges unavoidable adverse impacts, AR 30:013054. As to wetland mitigation measures, the EIS states that "most mitigation projects in the vicinity of the Corridor have not been established for a long enough period to determine whether they will ultimately be successful." AR 30:013069. Under *Methow Valley Citizens Council,* this discussion of mitigation measures was reasonably thorough and sufficient, and thus satisfies NEPA. [11]

[30]** *F. Definition of the project and its*

affected environment

Laguna contends that the EIS's varying descriptions of the project's area of impact violate NEPA's requirement of fair and adequate disclosure.

HN9[↑] Regulations promulgated under NEPA provide that the EIS "shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration." *40 C.F.R. § 1502.15*. Laguna does not contend there is a legal requirement that the EIS use the same description throughout. Rather, its argument is based on *Sierra Club v. Sigler, 695 F.2d 957, 975-83 (5th Cir. 1983)*, where an EIS that failed to analyze all adverse impacts or cumulative **[*529]** effects of related projects was found to have resulted in a skewed cost-benefit analysis of the project at issue. Laguna argues that use of an inconsistent definition here resulted in a misleading analysis of the positive and negative effects of the tollroad.

Laguna contends that the EIS describes the area affected by the tollroad as "within 440 yards of either side of the center of the tollroad's alignment" and analyzes the environmental impacts of the tollroad only with respect to **[**31]** this area. This method of analysis, Laguna contends, disregards the width of the grading strip at a particular location, the location's sensitivity, and other construction impacts extending beyond the actual grading strip and the 880 yard area, thus minimizing the harmful effects of the tollroad. Laguna further contends that the EIS fails to adhere to this narrow definition throughout its discussion of the tollroad's environmental impacts, using a much larger description of the project area to analyze the tollroad's positive air quality and traffic effects. Because this larger area includes other proposed highway improvements in the region, Laguna argues, the positive effects of the tollroad are maximized.

Laguna's assertion that the tollroad's positive effects on air quality and traffic conditions are analyzed using a regional description is correct. *See* AR 30:012806 n.1. Laguna is also correct that the EIS focuses on an area approximately one quarter mile wide on either side of the proposed corridor centerline in its discussion of certain biological impacts. *See* AR 30:012909. However, the EIS also discusses the corridor's negative impacts on biological resources in an area **[**32]** beyond the half mile area of impact. For instance, the EIS discusses impacts in 12 wildlife movement corridors within and outside the area, AR 30:012932-34, and it discusses the tollroad's effects

[11] Laguna also contends the EIS improperly contains assurances that mitigation will succeed which are not based on scientific evidence or studies, violating NEPA regulations that require the EIS to be supported by evidence that agencies have made the necessary environmental analyses, *40 C.F.R. § 1500.2(b)*, and provide that in evaluating adverse impacts in an EIS, the agency shall make clear where information is incomplete or unavailable, *40 C.F.R. § 1502.22*. The cases Laguna cites, however, do not involve mitigation measures and thus do not support the argument that scientific uncertainties in mitigation measures must be discussed. We hold they need not.

on plant communities in the San Joaquin Hills, AR 30:013031-32. Thus, the EIS discusses negative impacts on biological resources in a cumulative and regional way as well, and therefore does not present a skewed analysis. *Cf.* Sigler, 695 F.2d at 975-83.

The district court correctly reasoned that for some environmental effects (such as wetlands impacts), a smaller area of impact may need to be considered, whereas for others (such as wildlife movement or air quality), a larger area should be studied. We conclude that the EIS's method of describing the tollroad's area of impact resulted in a reasoned analysis of the available data. *See* Kunzman, 817 F.2d at 496.

III

Supplemental Environmental Impact Statement

Laguna contends that the FHA violated NEPA by deciding not to prepare an SEIS after the October 1993 fires in the Laguna Greenbelt region.

HN10[↑] NEPA regulations require preparation of an SEIS if, among other things, there are **[**33]** significant new circumstances or information relevant to environmental concerns that bear on the proposed actions or its impacts. 40 C.F.R. § 1502.9(c)(1); Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989).

Here, the FHA took the requisite hard look at environmental consequences after the fire. The FHA reinitiated consultation with a coordinating agency, the FWS, on the gnatcatcher and cactus wren, resulting in a new Biological Opinion. *See* Supplemental Administrative Record (SAR) 19-54. The FHA also relied on the expertise of a second agency, the Army Corps of Engineers, which reaffirmed the project's runoff management plan and erosion control measures. *See* SAR 290-92. TCA's biological consultants, LSA Associates, prepared and submitted a report to the FHA. SAR 266-288 (Review of Potential Fire Effects). After reviewing these and other documents, the FHA issued its Memorandum of Record, concluding that the fire had not resulted in any new significant impacts not addressed in the previously approved EIS. SAR 5-17. Thus, it is apparent that, in so doing, the FHA **[**34]** relied on substantial technical expertise possessed by two federal agencies charged with responsibility for the respective sectors of the affected environment. *See* Oregon Natural Resources Council, 490 U.S. at 376-77.

[*530] Laguna's contention that the FHA failed to consider the combined effects of the tollroad and the wildfires on the amount and nature of runoff into downstream water resources is unpersuasive. The Memorandum of Record acknowledges that the fire altered the potential for erosion and runoff in the San Joaquin Hills and that there would be more runoff as a result of the fire. SAR at 9-10. The Army Corps of Engineers determined that existing erosion control measures described in the EIS would be adequate to address the increased runoff. SAR 290-92. [12] Furthermore, a post-fire study of erosion control concluded that because the fire had removed vegetation in the affected drainage areas, there would be an overall increase in the amount of runoff from the burned areas and thus the impact of corridor construction on total runoff would be proportionately smaller. SAR 266-88. The corridor's incremental effect on the downstream **[**35]** water resources would actually be reduced from that analyzed in the EIS. *Id.* The FHA's determination, based on these technical findings, that the tollroad would not have a previously unconsidered effect on erosion and runoff was not arbitrary or capricious. *See* Oregon Natural Resources Council, 490 U.S. at 377.

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[12] In addition, the Corps conditioned its final approval on mitigation measures providing runoff and erosion control appropriate to conditions as they exist at the time of construction. *Id.* Thus, vegetation in the burned area may have had a chance to grow back, lessening erosion and runoff, by the time the Corps issues its final approval.

Laguna's second contention, that the FHA improperly concluded that existing mitigation measures were sufficient to address the fire's effect on biological resources, is similarly unpersuasive. Fires are natural occurrences in the Laguna Greenbelt area. The EIS takes the occurrence of fire into account and **[**36]** existing mitigation measures in the EIS consider the possibility of fire. In addition, the FHA reinitiated consultation with the FWS as to the gnatcatcher and cactus wren, the only species that had previously warranted study. Because analysis of these factual issues requires a high level of technical expertise, "we must defer to the informed discretion of the responsible federal agencies." *Id.* (internal quotation marks omitted). The decision not to prepare an SEIS was not arbitrary or capricious, *id. at 377-78*, and we will not set it aside.

IV

Section 4(f) Claims

Laguna contends that the FHA failed to comply with section 4(f) of the Transportation Act, *49 U.S.C. § 303(c)*, regarding the use of various parklands for the tollroad, including 1.7 acres of the reserve and 23 individual park properties.

HN11[⬆] Section 4(f) of the Transportation Act prohibits the FHA from approving any project that requires the use of publicly owned parkland, recreation areas, or wildlife and waterfowl refuges of national, state, or local significance unless (1) there is no prudent and feasible alternative **[**37]** to using such land and (2) the project includes all possible planning to minimize harm to the parkland. *49 U.S.C. § 303(c)* (formerly codified at *49 U.S.C. § 1653(f)*).

In 1991, Congress enacted ***HN12***[⬆] section 1065 of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, 105 Stat. 2005-2006, which exempts certain parks in the vicinity of the San Joaquin Hills transportation corridor from the requirements of section 4(f). Section 1065 provides that section 4(f):

> shall not be applicable to public park, recreation area, wildlife and waterfowl refuge (collectively referred to . . . as "parkland") -
>
> (1) that are acquired by a public entity after a governmental agency's approval of a State or Federal environmental document established the location of a highway adjacent to the parklands; or
>
> (2) where the planning or acquisition documents for the parklands specifically referred to or reserved the specific location of the highway.

Pub. L. No. 102-240, § 1065(a). Section 1065 was enacted "in recognition of unique circumstances in Orange County, California, including a comprehensive **[**38]** land use planning process **[*531]** [and] the joint planning of thousands of acres of parklands with the locations of the proposed highway improvement." *Id.* § 1065(c).

A. The University of California, Irvine Reserve

Laguna contends that the district court erred by finding that the 1.7 acres of the reserve that will be used for the tollroad were exempt from section 4(f) under section 1065 of ISTEA.

In 1989, the University adopted a long range development plan and accompanying EIR. In these documents, the University designated a parcel of approximately 60 acres to be set aside as an open space ecological reserve. AR 61:026785, 842. These documents and accompanying maps clearly refer to the proposed tollroad running along the south-southwest edge of the campus adjacent to the reserve. AR 61:026784, 797, 830; 243:099060. The plan anticipated that the tollroad would improve access to the campus from nearby coastal communities and reduce regional traffic congestion likely to result from the plan. AR 61:026810, 868; 243:099228. The record shows that the planning documents for the reserve referred to the location of the tollroad, and thus that the reserve is exempt

from section 4(f) under the **[**39]** second condition of section 1065.

Laguna contends that the planning documents do not "specifically refer to or reserve the specific location of the highway" as required by section 1065. It argues that the planning documents contemplated the tollroad as an off-site facility and did not specifically identify the location of the tollroad which requires destruction of a portion of the reserve. Laguna correctly points out that the maps in the plan and accompanying EIR show the tollroad located outside the campus running along the south-southwest perimeter of the campus. The TCA, however, submitted public comments to the University regarding the location of the tollroad depicted in the plan. The TCA pointed out that the location depicted by the University, which avoided encroachment onto University property, might not be feasible, and that it might be necessary to select an alternate location which would require taking a portion of University property in order to avoid taking sensitive wetlands. AR 248:100870. The University publicly responded that it was strongly committed to working closely with TCA to develop an alternative route, using University property if necessary, to minimize overall **[**40]** environmental impact. AR 247:100535. Because the planning documents together with the accompanying public comments and responses specifically refer to the location of the tollroad, including the alignment using University property, we agree with the district court's conclusion that the reserve is exempt from section 4(f) under section 1065. [13]

B. Other parkland properties

Laguna contends that 23 parkland properties will be used or impacted by the tollroad and that each of these parklands must be analyzed under the stringent requirements of section 4(f). Laguna contends that the district court erred **[**41]** in determining that ten of these properties were exempt from section 4(f) under section 1065, and that the district court erred when it failed to address the remaining 13 properties at all.

1. The ten properties analyzed by the district court

In the EIS, the FHA identified ten properties that potentially would be used or constructively used by the tollroad. AR 31:013262-70. [14] In the Record of Decision, the FHA determined that these properties **[*532]** were exempt from section 4(f) under section 1065 of ISTEA. AR 4:001388. The district court also concluded that these properties were exempt under section 1065. Laguna argues that the district court erred by concluding that these ten properties were exempt from section 4(f).

[42]** The district court concluded that nine of the properties were exempt under the first condition of section 1065 because they were acquired after the Orange County Board of Supervisors, in November 1979, approved EIR 267 and established the alignment of the tollroad. Laguna contends this conclusion is erroneous because EIR 267 did not establish a specific alignment but merely reviewed numerous alternative alignments and stated that the location of the tollroad alignment had not yet been determined and that further refinement would be necessary.

While EIR 267 evaluated numerous alternative alignments, the Orange County Board of Supervisors, in approving EIR 267, expressly adopted the recommendations and findings of the Orange County Planning Commission which identified the preferred route. AR 5:001422-24.

[13] Even if the reserve hadn't been exempted from section 4(f) by ISTEA, we would have to affirm the district court's ruling on this issue for an entirely independent reason. The FHA correctly determined that section 4(f) is inapplicable here, since the reserve does not function primarily as a "park, recreation area, or wildlife . . . refuge" within the meaning of ***49 U.S.C. § 303(c)***.

[14] The ten potentially used properties are: Northwest Park; Oso Creek Corridor Open Space; Niguel Equestrian Trail; County of Orange Bicycle Trail No. 72; Aliso/Wood Canyons Regional Park; Aliso Creek Trail System; Sycamore Hills Open Space; Laguna Laurel Dedication Areas; Crystal Cove State Park; and Bommer Canyon Park.

This preferred alignment is, for all relevant purposes, the present alignment of the corridor in regard to its relationship to the park properties. Thus, the county's approval of EIR 267 established the location of the tollroad adjacent to the parklands sufficient to meet the requirements of section 1065. The record shows that nine of the ten properties were acquired after the approval **[**43]** of EIR 267 in 1979, and Laguna does not seriously dispute this finding. [15] Accordingly, we agree with the district court that these nine properties are exempt from section 4(f) under the first prong of section 1065.

The last property addressed by the district court is the Sycamore Hills Open Space. The court determined that the planning and acquisition documents for this property refer to or reserve the location of the **[**44]** tollroad, and thus that the property is exempt under the second prong of section 1065. Laguna contends that the documents which identify the tollroad are merely general plans and do not specifically refer to or reserve the specific location of the tollroad sufficient to meet the requirements of section 1065. The planning and acquisition documents and maps for the Sycamore Hills Open Space, however, all refer to the specific location of the tollroad. AR 31:013267, 313-14; 212:087631; 206:085396-98; 213:087953-59, 969-70; 213:087632-53; 201:083141-49. These documents are sufficient to meet the requirements of the second prong of section 1065. We therefore affirm the district court's conclusion that all ten properties are exempt under section 1065 of ISTEA.

2. The remaining 13 properties

Laguna contends that the district court erred by failing to address its section 4(f) claims regarding 13 other park properties. In the EIS, the FHA found that the tollroad would not actually or constructively use 12 of these 13 properties. In the district court, Laguna did not challenge the FHA's "no use" determination for eight of these 12 properties, and it may not do so for the first time on appeal.

[45]** Laguna did raise challenges regarding the remaining five properties in the district court, and the district court failed to address these challenges. Nevertheless, we may affirm on any ground supported by the record. *Alexander v. City and County of San Francisco, 29 F.3d 1355, 1359 (9th Cir. 1994)*. Accordingly, we now turn to Laguna's claims regarding these properties.

In the EIS, the FHA determined that certain properties would not be used by the tollroad and therefore did not require any section 4(f) analysis. AR 31:013250-60. Laguna **[*533]** challenged the FHA's "no use" determination for four properties: three bike trails and a public park, [16] arguing that the tollroad will actually or constructively use the properties.

HN13[↑] Section 4(f) applies to constructive use as well **[**46]** as actual use of parkland. *Sierra Club v. Department of Transportation, 948 F.2d 568, 573 (9th Cir. 1991)*. "Constructive use of park land occurs when a road significantly and adversely affects park land even though the road does not physically use the park." *Id.*

Here, the project will result in the following impacts on the four properties challenged by Laguna: construction of an overpass over one bike trail; widening of an existing highway bridge over one bike trail; relocation of one bike path within the designated right of way for the bike path; and

[15] These nine properties are: Northwest Park (acquired 1992) (AR 31:013262-63; 254:102789-97); Oso Creek Corridor Open Space (acquired 1984) (AR 212:087631.1-31.14); Aliso/Wood Canyons Regional Park and Aliso Creek Trail System (acquired 1980) (AR 31:013277-78; 205:084540-96); Niguel Equestrian Trail (acquired 1985) (AR 195:081003-16.2); Bicycle Trail No. 72 (acquired 1987) (AR 219:090659-60); Laguna Laurel Dedication Areas (acquired 1991) (AR 31:013268; 253:102449-715); Bommer Canyon Park (acquired 1981) (AR 207:085777-862); and Crystal Cove State Park (acquired Dec. 1979) (AR 31:013284; 209:086276).

[16] Arroyo Trabuco Equestrian Trail/County of Orange Bicycle Trail No. 81; County of Orange Bicycle Trail No. 66; Bonita Creek Park; and San Diego Creek/Santa Ana Heights Equestrian Trail/County of Orange Bicycle Trail No. 40.

location of the corridor adjacent to the park. We have reviewed the findings of the FHA as set forth in the EIS regarding the tollroad's impact on these four properties. See AR 31:013253-58. We agree with the FHA's conclusion that the project will not substantially impair the current features, activities and attributes of these parklands. Accordingly, we uphold the FHA's determination that these properties will not be actually or constructively used and therefore that section 4(f) does not apply to these properties.

The last property at issue is the Rancho Viejo Bicycle Trail. It is not disputed that **[**47]** this property will be actually used by the tollroad. AR 31:013262. The FHA performed a section 4(f) analysis regarding this property and concluded that there was no prudent and feasible alternative and that all possible planning to minimize harm had been performed. AR 31:013270-71; 4:001389.

We have reviewed the FHA's section 4(f) analysis to determine whether the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Stop H-3 Ass'n,* 740 F.2d at 1449. We hold that the FHA properly concluded that there were no prudent and feasible alternatives to using this property and that the project includes all possible planning to minimize harm. *See 49 U.S.C. § 303(c)*. We therefore affirm the judgment of the district court on all of Laguna's section 4(f) claims.

CONCLUSION

The judgment of the district court is AFFIRMED. This court's injunction is dissolved upon issuance of the mandate.

ORDER

Appellants' petition for rehearing is denied. This court's injunction is dissolved forthwith. Appellants' suggestion for rehearing en banc will be considered in due course.

The opinion **[**48]** filed on December 2, 1994 is hereby amended as follows at page 14798 of the slip opinion:

By adding, after the second paragraph, the following paragraph: "Laguna further contends the FHA did not consider a proposal to bridge every canyon along the route with elevated highway segments to permit wildlife corridors. *See* AR 33:014291. The FHA did respond to this comment, however, *see* AR 34:014840-46, and additional wildlife crossings were incorporated into the final design. *Id.*"

And by deleting, at the end of what has now become the fourth paragraph, the "*Id.* (internal quotation marks omitted)." citation and substituting the following citation and sentence: " *Vermont Yankee, 435 U.S. at 551* (internal quotation marks omitted). The record reflects that the EIS contains a reasonably thorough discussion of alternatives satisfying the goals of the project."

End of Document

Transportation Research Board
Summer 2018 Conference

The No Build Baseline Panel

Hypotheticals

Case Study # 1: Long Planned Project in Rapidly Urbanizing Area

New 15-mile highway. The project has long been a "fiscally constrained" project in the regional transportation plan and local land use plans. Local land use agencies approved extensive new development in the project area consistent with the land use plans, but the land use approvals are not conditioned on completion of the highway.

Over 90% of the land in the project area is either already developed or has development rights that are vested under state law. The MPO's demographic projections for the regional transportation plan assume the growth reflected in the local land use plans. The MPO demographic projections are the same with and without the project.

The study area currently experiences significant congestion and traffic delays on the existing transportation network.

Case Study # 2: Determining What the Baseline SE Data Represents & How to Use It

The project is a twenty-two mile limited access toll road radiating out from a urban center in an area with above average population growth.

Regional socioeconomic data (population and employment figures) developed by the local Metropolitan Planning Organization (MPO) is available, as are future growth estimates provided by several local government organizations.

- Traffic forecasting input to assess alternatives' ability to meet need and purpose.
- Land use input to compare future indirect and cumulative impacts of alternatives.

Does the data represent a build or no-build scenario?

- MPO data shows future population and employment distributed across area.
- MPO data shows future population and employment clustered at intervals.

The MPO publishes new data between publication of the draft and final SEIS.

Case Study # 3a: Understanding & Disclosing Underlying Assumptions

Tier 1 Corridor EIS on rural edge of metropolitan area. MPO developed "policy-based" projections that assumes limited growth in project area. By contrast, "market-based" projections assumed much higher levels of growth in the project area.

The market-based projections were used to develop both the build and no-build forecasts, projections of future traffic in the study area, and in justifying the purpose & need.

Documentation in the record demonstrates that the no-build baseline was developed at least in part on the assumption that potential construction of the highway would connect several projects to one another and to the transportation network.

Case Study # 3b: Understanding & Disclosing Underlying Assumptions

ROD for 20-mile limited access bypass project relied on SE data developed by local MPO. Project staff asked MPO whether data represented build or no-build.

"TAZ socioeconomic forecasts for the No Build scenario did not include the Monroe Connector. MUMPO confirmed our assumption regarding the reasonableness of the 2030 TAZ forecasts for use as a No-Build basis."