

*Because life is good.*



October 12, 2015

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[CEQA.Guidelines@resources.ca.gov](mailto:CEQA.Guidelines@resources.ca.gov)

RE: Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft (2015)

Dear Director Alex:

These comments are submitted on behalf of the Center for Biological Diversity and Sierra Club (“Conservation Groups”) on the Proposed Updates to the California Environmental Quality Act (“CEQA”) Guidelines: Preliminary Discussion Draft 2015 prepared by the Office of Planning and Research (“OPR”). The Conservation Groups appreciate the work done by OPR to update the CEQA Guidelines in light of the passage of time and intervening case law elaborating upon CEQA’s requirements.

In striving for increased efficiency in review and improvement of substance under CEQA the revised guidelines should be careful to avoid contravening the statute and case law, which emphasizes the importance of information disclosure to the public and decision makers and avoiding or mitigating all significant effects wherever feasible. (Public Resources Code §§ 21002, 21002.1.) “The fundamental goals of environmental review under CEQA are information, participation, mitigation, and accountability.” (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 443–444.) Chief among CEQA’s purposes “is that of providing public agencies and the general public with detailed information about the effects of a proposed project on the environment.” (*San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal. App. 3d 61, 72.)

The comments detailed below focus on assuring that the proposed revisions to the Guidelines meet CEQA’s fundamental purposes of information disclosure, environmental protection and

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technical improvements. The comments are broken down into the sections provided by OPR in the discussion draft: efficiency improvements, substance improvements, and good governance. The comments also provide suggested edits to the guidelines, where applicable, with citations to the Public Resources Code and supporting case law.

## Efficiency Improvements

### Using Regulatory Standards in CEQA (§§ 15064, 15064.7)

If agencies are to use regulatory standards as thresholds of significance, they must demonstrate that adherence to the regulatory standard in the context of the project under consideration will reduce impacts to a less-than-significant level. (See e.g., *Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 956-57; *Californians for Alternatives to Toxics v. Dept. of Food & Agriculture* (2005) 136 Cal.App.4th 1, 16.) Moreover, such a demonstration—like any other significance determination—must be supported by substantial evidence. (CEQA Guidelines § 15064(f).)

Proposed amendments to Guidelines sections 15064 and 15064.7 are not entirely consistent with these principles. Nor are they entirely consistent with one another. Proposed new paragraph (2) in subdivision (b) of section 15064, for example, requires only that agencies “should” explain how compliance with a threshold indicates that an effect will be less than significant; in contrast, proposed subdivision (d) of section 15064.7 properly states that agencies “shall” explain how a particular environmental standard’s requirements will render impacts less than significant. The language should be mandatory in both cases. Moreover, the language should include an explicit requirement that these determinations be supported by substantial evidence.

Accordingly, we propose the following changes to the draft language for each section (additions double-underlined; deletions in ~~double-strikethrough~~):

§ 15064

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**(b)(1)**

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**(2) Thresholds of significance, as defined in Section 15064.7(a), may assist lead agencies in determining the significance of an impact. When relying on a threshold, the lead agency ~~should~~ shall explain how compliance with the threshold indicates that the project's impacts are less than significant. Any such explanation shall be supported by substantial evidence. A lead agency shall not apply a threshold in a way that forecloses consideration of substantial evidence showing that, despite compliance with the threshold, there may still be a significant environmental effect from a project.**

§ 15064.7

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**(d) Any public agency may adopt or use an environmental standard as a threshold of significance. In adopting or using an environmental standard as a threshold of significance,**

**a public agency shall explain how the particular requirements of that environmental standard will avoid or reduce project impacts, including cumulative impacts, to a less than significant level. Any such explanation shall be supported by substantial evidence. For the purposes of this subdivision, an “environmental standard” is a rule of general application that is adopted by a public agency through a public review process and that is all of the following:**

**(1) a quantitative, qualitative or performance requirement found in an ordinance, resolution, rule, regulation, order, or other environmental requirement of general application;**

**(2) adopted for the purpose of environmental protection;**

**(3) addresses the same environmental effect caused by the project; and,**

**(4) is designed to apply to the type of project under review.**

“Within the Scope” of a Program EIR (§ 15168)

The proposed amendments to section 15168 would specify that an agency determination as to whether a later activity is “within the scope” of a prior program Environmental Impact Report (“EIR”) is a factual determination to be reviewed for substantial evidence. The Supreme Court is currently considering a related issue in *Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.* (No. S214061): “When a lead agency performs a subsequent environmental review and prepares a subsequent environmental impact report, a subsequent negative declaration, or an addendum, is the agency’s decision reviewed under a substantial evidence standard of review (*Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385), or is the agency’s decision subject to a threshold determination whether the modification of the project constitutes a “new project altogether,” as a matter of law (*Save our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288)?”<sup>1</sup>

The Court of Appeal decision under review interpreted Guidelines section 15162. (See *Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.*, No. A135892 (unpubd.; filed Sept. 26, 2013).) The proposed amendments to paragraph (2) of subdivision (c) of section 15168 immediately follow an explicit cross-reference to section 15162. The Supreme Court’s resolution of the *Friends* case thus may have an important bearing on “within the scope” determinations made in reliance on section 15162. Accordingly, it may be premature to include language in the proposed Guidelines revisions that resolves this issue in favor of substantial evidence review in all cases.

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<sup>1</sup> California Supreme Court, *Issues Pending Before the California Supreme Court in Civil Cases* at 9 (Oct. 2, 2015), available at <http://www.courts.ca.gov/13648.htm>.

Finally, we propose some minor changes to existing provisions of section 15168 in order (a) to clarify an agency's responsibility to determine whether effects not examined in the program EIR are significant, and (b) to ensure that all relevant factors of section 15162 are considered in making a "within the scope" determination.

Accordingly, we propose the following changes to paragraphs (1) and (2) of subdivision (c) of section 15168 (additions double-underlined; deletions in ~~double-strikethrough~~):

(1) If a later activity would have effects that were not examined in the program EIR, a new initial study ~~would need to~~ must be prepared leading to either an EIR or a negative declaration. **That later analysis may be tiered from the program EIR as provided in Section 15152.**

(2) If the agency finds that ~~pursuant to Section 15162, no new significant effects could occur or no new mitigation measures would be required~~ none of the conditions described in Section 15162 would require the preparation of a subsequent EIR or subsequent negative declaration, and that neither a supplement to an EIR pursuant to Section 15163 nor an addendum pursuant to Section 15164 is required, the agency can approve the activity as being within the scope of the project covered by the program EIR, and no new environmental document would be required. ~~Determining that a later activity is within the scope of a program covered in the program EIR is a factual question that the lead agency determines based on substantial evidence in the record. Relevant factors that an agency may consider include, but are not limited to, consistency of the later activity with the type of allowable land use, overall planned density and building intensity, geographic area analyzed for environmental impacts, and description of covered infrastructure, as presented in the project description or elsewhere in the program EIR.~~

#### Using the Existing Facilities Exemption (§ 15301)

Proposed changes to Guidelines section 15301, substituting "historic" use for use "existing at the time of the lead agency's determination," rely on an inapplicable policy justification and do not accurately reflect case law governing use of "historic" conditions as a CEQA baseline.

First, the explanation for the proposed change states that using actual, existing conditions in determining applicability of this exemption would be "inconsistent with California's policy goals of promoting infill development." (Draft at p. 34.) CEQA case law is uniformly clear, however, that promoting policy goals is not relevant in baseline determinations. Certainly California has "policy goals" related to avoiding illegal or unpermitted development, yet courts have routinely rejected arguments that such development should be ignored in CEQA baseline determinations. (See, e.g., *Eureka Citizens for Responsible Govt. v. City of Eureka* (2007) 147 Cal.App.4th 357; 370-71; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1280; *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1452-1453.) CEQA already advances the state's infill policy goals through numerous exemptions and streamlining measures. Manipulating the applicable baseline to further this goal is both unnecessary and contrary to case law.

Second, the proposed changes do not adequately reflect case law on the permissible use of “historic” activities as a baseline. As the Supreme Court recently affirmed, agencies must “employ a realistic baseline that will give the public and decision makers *the most accurate picture practically possible* of the project’s likely impacts.” (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 449 [emphasis added].) To this end, agencies have some latitude in determining how “existing physical conditions without the project *can most realistically be measured*,” including flexibility to depart from the normal rule that the existing setting is determined as of the exact time environmental analysis commences. (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 328 [emphasis added]; see CEQA Guidelines § 15125(a).) Put another way, this flexibility operates to ensure that agencies can ground their analyses in the most realistic picture possible of existing environmental conditions. (See *Save Our Peninsula Committee v. Board of Supervisors* (2001) 87 Cal.App.4th 99, 125-126 [recognizing conditions “as of the time the project is approved” may provide “a more accurate representation of the existing baseline against which to measure the impact of the project”].) Accordingly, an agency must provide substantial evidence to support its determination that “historic” rather than current uses provide a more realistic, informative baseline. (See *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 337-38 [upholding determination that groundwater pumping right was similar to recent historic use and provided more accurate picture of project’s actual effects than present conditions].)

The proposed changes to section 15301 fail to reflect either the purpose of or the limitations on using “historic” conditions as a baseline, as articulated in applicable case law. The section must be revised to ensure (a) that a “historic” baseline may be used only if the agency determines that use of the normal existing conditions baseline would be uninformative or misleading (see *Neighbors for Smart Rail, supra*, 57 Cal.4th at page 457); and (b) that an agency supports any such determination with substantial evidence.

Accordingly, we propose the following changes to the main body of section 15301 (additions double-underlined; deletions in ~~double-strikethrough~~):

Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of historic use beyond that existing at the time of the lead agency’s determination. The lead agency may consider historic use, as an alternative to use existing at the time of the lead agency’s determination, only if it determines that evaluating the project in relation to the use existing at the time of the lead agency’s determination would be uninformative or misleading. Any such determination must be supported by substantial evidence. The types of “existing facilities” itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. The key consideration is whether the project involves negligible or no expansion of an existing use.

## Updating the Environmental Checklist (Appendix G)

The Conservation Groups understand OPR's desire to simplify and shorten Appendix G, and in many respects, the draft changes do so without making substantive alterations. We have concerns, however, with some of the proposed changes.

Aesthetics: The proposed changes to the Aesthetics questions in section I of Appendix G (particularly renumbered subdivision (b)) focus primarily on conflicts with zoning ordinances and other regulations. There are at least two problems with this approach. First, CEQA is primarily concerned with actual physical impacts, not just consistency with other environmental standards. (*Cf. Martin v. City and County of San Francisco* (2005) 135 Cal.App.4th 392, 403 ["major statutory emphasis" is on "consequences resulting from physical impacts on the environment"].) We understand that aesthetic judgments can seem "exceedingly subjective." (Draft at p. 40.) But the proposed changes to renumbered subdivision (b) would lead agencies to focus narrowly on consistency with whatever aesthetic standards might happen to exist in a jurisdiction, perhaps even to the exclusion of other substantial evidence that a project will substantially degrade existing visual character or public views. This would not be consistent with case law governing the use of standards in environmental analysis. (*See e.g., Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1108-09.)

Second, the revisions to renumbered subdivision (b) are underinclusive. Many cities and counties may have sophisticated design review ordinances and processes, but many others may not. State agencies—which often serve as CEQA lead agencies—do not operate pursuant to zoning ordinances and may not have any applicable regulations governing aesthetics. Indeed, joint powers agencies with cities or counties as members, and state agencies pursuing their own projects, may be exempt from local zoning controls. (*See, e.g., Zack v. Marin Emergency Radio Authority* (2004) 118 Cal.App.4th 617; *Regents of University of California v. City of Santa Monica* (1978) 77 Cal.App.3d 130; see also generally Gov. Code §§ 53090(a), 53091.) The proposed revisions to renumbered paragraph (b) could leave aesthetic impacts of these projects unaddressed.

Accordingly, we would recommend leaving the text of what is now subdivision (e) of section I of Appendix G unchanged.

Population and Housing: The proposed addition of the qualifier "unplanned" to subdivision (a) of section XIII of Appendix G is inconsistent with case law. Under the revised subdivision, only "unplanned" population growth would be evaluated for significance. This is contrary to the Court of Appeal's decision in *Environmental Planning and Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, in which the Court of Appeal held inadequate an EIR that purported to compare population growth under two general plan amendments to much higher "planned" population levels under the existing general plan.

Advising lead agencies that they need consider only “unplanned” population growth would effectively incorporate an improper environmental baseline into significance determinations.

Accordingly, we would recommend leaving the text of what is now subdivision (a) of section XIII of Appendix G unchanged.

Transportation: We generally support the shift from level-of-service and travel demand measure metrics to a focus on vehicle miles traveled that is proposed in subdivision (b) of renumbered section XVI of Appendix G. We understand that this proposed change is a “placeholder” pending completion of separate Guidelines revisions required pursuant to SB 743 (Draft at page 44), and we look forward to providing additional comments on further drafts of those revisions.<sup>2</sup>

Other aspects of the proposed revisions to the Transportation section, however, raise some concerns. In subdivision (a), for example, the proposed revisions focus on conflicts with a “plan, ordinance or policy” addressing circulation system performance and safety. This is appropriate as far as it goes, but again, focusing solely on conflicts with adopted standards does not ensure that all potentially significant impacts will be identified and addressed. We would recommend restoring to this subdivision some of the safety-related language proposed to be deleted from subdivision (f) (see below).

Proposed changes to subdivision (c) similarly represent a positive but insufficient step. While it is appropriate to ask whether a project will “substantially induce additional automobile travel,” the question limits this effect to only two possible causes (increasing capacity and adding new roadways). Many other kinds of projects (including commercial and residential developments) could substantially induce additional automobile travel without adding lanes or roadways to a transportation system. We would recommend deleting these limitations (as proposed below).

We propose the following changes to subdivisions (a) and (c) of renumbered section XVI of Appendix G (additions double-underlined; deletions in ~~double strikethrough~~):

a) Conflict with an ~~applicable~~ plan, ordinance or policy ~~establishing measures of effectiveness for the addressing the safety or~~ performance of the circulation system, including transit, roadways, bicycle lanes and pedestrian paths, or otherwise decrease the performance or safety of such facilities? ~~; taking into account all modes of transportation including mass transit and non-motorized travel and relevant components of the circulation system, including but not limited to intersections, streets, highways and freeways, pedestrian and bicycle paths, and mass transit?~~

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<sup>2</sup> Our organizations have expressed general support, as well as specific concerns, with respect to OPR’s preliminary draft proposal pursuant to SB 743. See Sierra Club California and Center for Biological Diversity, letter to Christopher Calfee, Governor’s Office of Planning and Research, Re: Preliminary Discussion Draft of Updates to the CEQA Guidelines Implementing Senate Bill 743 (Nov. 21, 2014).

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c) ~~Result in a change in air traffic patterns, including either an increase in traffic levels or a change in location that results in substantial safety risks?~~ Substantially **induce additional automobile travel** ~~by increasing physical roadway capacity in congested areas (i.e., by adding new mixed flow lanes) or by adding new roadways to the network?~~ **increase hazards due to a design feature (e.g., sharp curves or dangerous intersections) or incompatible uses (e.g., farm equipment)?**

#### Remedies and Remand (New Section 15234)

As embodied in the preliminary discussion draft the new Guideline section 15234 overstates the propriety of issuing a limited writ of mandate as authorized by CEQA. While *Neighbors for Smart Rail* affirmed Public Resources Code section 21168.9, in stating that “[i]nsubstantial or merely technical omissions are not grounds for relief” it also went on to affirm the principle in Public Resources Code 21005(a) that 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.” (*Neighbors for Smart Rail*, 57 Cal. 4th 439, 463 [citations omitted].) The proposed Guideline section must not overstate the ability of the court to issue a limited writ in contravention of CEQA. It is important to recognize that the Supreme Court found in *Neighbors for Smart Rail* that the project would have a favorable impact on both traffic and air quality impacts. (*Neighbors for Smart Rail*, 57 Cal. 4th 439, 463-464.) Thus, where leaving the project approvals “operative” will not prejudice future mitigation measures or alternatives and the “environment will be given greater protection” a decision limiting the issuance of a writ is appropriate. (*POET, LLC v. State Air Resources Bd.* (2013) 218 Cal. App. 4th 681, 762.) However, that determination should only be made “in extraordinary cases” such as those necessary to protect the environment. (*Id.* at 761.) “The more common alternative is for the court to exercise its discretionary authority under section 21168.9, subdivision (a)(2) by suspending the operation of the regulation, ordinance or program.” (*Id.*) The structure and language of the new guideline inverts the common and extraordinary outcomes.

It is well settled that CEQA requires “public agencies to ascertain the environmental consequences of a project before giving approval to proceed.” (*Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549, 564- 565; *LandValue 77, LLC v. Board of Trustees of California State University* (2011) 193 Cal.App.4th 675, 683; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1221; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 672.) An EIR that purports to analyze the impacts of a project after it has already been approved would violate this core requirement of CEQA. “[U]nless a public agency can shape the project in a way that would respond to concerns raised in an EIR, or its functional equivalent, environmental review would be a meaningless exercise.” (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 117.)

The CEQA process should inform “whether or not to start the project at all, not merely to decide whether to finish it.” (*Natural Resources Defense Council v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 271; *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 135-136.) An EIR that purports to analyze the environmental impacts of a project that has already been

approved is void on its face. “[A]n agency has no discretion to define approval so as to make its commitment to a project precede the required preparation of an EIR.” (*Save Tara*, 45 Cal.4th at 132.) Preparing such an EIR would confuse the public and decisionmakers, giving them false hope that the review process meant something substantive and that their contributions mattered. Such an EIR would thwart CEQA’s core goals of informed public participation and informed decisionmaking.

A CEQA writ must void any approvals that commit an agency to a definite course of action that has not been subjected to proper environmental review under CEQA. (*Save Tara, supra*, 45 Cal.4th at 138 [“agencies must not ‘take any action’ that significantly furthers a project ‘in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project.’” [quoting Guidelines § 15004(b)(2)(B)].) Just as an “agency has no discretion to define approval so as to make its commitment to a project precede the required preparation of an EIR” (*Save Tara, supra*, 45 Cal.4th at 132), so too a court does not have the discretion to order such an illusory EIR to be prepared.

It is therefore critical that any equitable remedy fashioned by the court should not prejudice CEQA’s fundamental principles to disclose, avoid, and mitigate environmental impacts prior to project approval and that any remedy that allows a project to remain operative must only occur in *extraordinary circumstances* where it will afford greater environmental protection. *POET*, 218 Cal. App. 4th at 761. To do less would incentivize project proponents to push forward with project approvals that will result in environmental harm before the whole of the project’s impacts can be analyzed and subsequently preclude alternatives and mitigation measures to reduce environmental impacts.

### New Section 15234. Remand

**(a) ~~Not every violation of CEQA is prejudicial requiring rescission of project approvals. Noncompliance with the information disclosure provisions of CEQA, which precludes relevant information from being presented to the public agency, or noncompliance with substantive requirements of CEQA, normally constitutes a prejudicial abuse of discretion, regardless of whether a different outcome would have resulted if the public agency had complied with CEQA. Courts may fashion equitable remedies in CEQA litigation. If a court determines that a public agency has not complied with CEQA, and that absent extraordinary circumstances noncompliance was shall be deemed a prejudicial abuse of discretion, and the court shall issue a peremptory writ of mandate requiring the agency to:~~**

**(1) void the project approval; in whole, or in extraordinary circumstances in part as described in subparagraph b;**

**(2) ~~except as provided in subparagraph b suspend any project activities that preclude consideration and implementation of mitigation measures and alternatives necessary to comply with CEQA; or and~~**

(3) take specific action necessary to bring the agency's consideration of the project into compliance with CEQA.

(b) In extraordinary circumstances courts may fashion equitable relief under CEQA. Following a determination described in subdivision (a), an agency may proceed with those portions of the challenged determinations, findings, or decisions for the project or those project activities that the court finds:

(1) are severable;

(2) will not prejudice the agency's compliance with CEQA's full information disclosure and substantive mandates as described in the court's peremptory writ of mandate;

(3) will not foreclose the consideration of alternatives to the proposed project;

(4) will not adversely affect the environment; and

~~(3)~~(5) otherwise comply ~~complied~~ with CEQA.

(c) An agency may also proceed with a project, or individual project activities, during the remand period where the court has exercised its equitable discretion in extraordinary circumstances to leave project approvals in practical effect during that period because where the environment will be given a greater level of protection if the project is allowed to remain operative than if it were inoperative during that period.

~~(d) As to those portions of an environmental document that a court finds to comply with CEQA, additional environmental review shall only be required as required by the court consistent with principles of res judicata. In general, where a court has required an agency to void its approval of the project, the agency need not expand the scope of analysis on remand beyond that specified by the court, except under the circumstances described in section 15088.5. In general, where a court has not required an agency to void its approval of the project, the agency need not expand the scope of analysis on remand beyond that specified by the court, except under the circumstances described in Section 15162.~~

#### **AUTHORITY:**

Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21005, 21168.9; *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal. 4th 439; *Preserve Wild Santee v. City of Santee* (2012) 210 Cal. App. 4th 260; *Golden Gate Land Holdings, LLC v. East Bay Regional Park Dist.* (2013) 215 Cal. App. 4th 353; *POET, LLC v. State Air Resources Board* (2013) 218 Cal. App. 4th 681; *Silverado Modjeska Recreation and Parks Dist. v. County of Orange* (2011) 197 Cal. App. 4th 282.

## Substance Improvements

### Analysis of Energy Impacts section (Section 15126.2)

The proposed revisions include an important clarification of the need to analyze a project's energy impacts. Because "lead agencies have not consistently included [energy] analysis in their EIRs" it is important that guidance and clarifications in the guidelines be explicit. (*California Clean Energy Committee v. City of Woodland* (2014) 225 Cal. App. 4th 173, 209.) Under CEQA, "effects" or "impacts" include "[i]ndirect or secondary effects which are caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable." (CEQA Guidelines § 15358(a).) Thus, in the analysis of all of a project's construction and operation phases, including transportation, related energy use must be properly accounted for.

The explanation of the proposed amendments provides that the third sentence "signals that the analysis of energy impacts may need to extend beyond building code compliance." As the explanation correctly observes, building code compliance alone is not necessarily determinative of whether a project is wasteful. There may be additional feasible opportunities, such as incorporation on on-site generation or inclusion of Electric Vehicle charging in multi-unit residential, mixed use, or commercial developments that can further reduce unnecessary energy consumption. However, even though similar language has long been part of Appendix F, many EIRs continue to rely only on building code compliance as the full extent of their energy analysis. Specifying building code compliance in the actual guideline will better effectuate its intent and help avoid this practice.

**(b) Energy Impacts. The EIR shall include an analysis of whether the project will result in significant environmental effects due to wasteful, inefficient, or unnecessary consumption of energy. This analysis should include the project's energy use for all project phases and components, including transportation-related energy, during construction and operation. In addition to ~~project design~~ building code compliance, other relevant considerations may include, among others, the project's size, location, orientation, equipment use and any renewable energy features that could be incorporated into the project. (Guidance on information that may be included in such an analysis is presented in Appendix F.) This analysis is subject to the rule of reason and shall focus on energy demand that is caused by the project.**

## Technical Improvements

### Baseline (Section 15125)

While some of the proposed revisions to Guidelines section 15125 appear to reflect case law adequately, other revisions do not. Of particular concern are references to using "historic"

conditions as a baseline (paragraph (1) of subdivision (a)) and overbroad references to “a different baseline” (paragraph (2) of subdivision (a)).

Our concerns are very similar to those raised with respect to the existing facilities exemption (see pages 4-5, *supra*), and we incorporate that discussion by reference here. Ensuring merely that historic conditions are supported by substantial evidence is insufficient; what is needed, rather, is substantial evidence that historic conditions offer the most realistic picture practically possible of existing environmental conditions without the project. (See *Neighbors for Smart Rail, supra*, 57 Cal.4th at p. 449.) Absent such a finding, lead agencies and project applicants may find themselves tempted to dig into the past in search of a “historical” baseline that casts their projects in a more favorable light by comparison, regardless of whether those historical conditions could ever be expected to recur, much less realistically depict “existing physical conditions” as the controlling cases demand.

An approach more consistent with the case law would be to evaluate use of a historic conditions baseline according to the rubric announced in *Neighbors for Smart Rail* for evaluating the use of projected future environmental conditions. Because a historic conditions baseline also represents a deviation from the norm, it could be justified by the lead agency on the basis of substantial evidence showing that due to unusual aspects of the project, use of presently existing conditions as a baseline would be uninformative or misleading. (*Id.* at pp. 451, 457.)

Moreover, the reference to an agency’s ability to choose “a different baseline” in paragraph (2) of subdivision (a) is overbroad. The case law recognizes certain very limited alternatives to the normal existing conditions baseline as of the time environmental analysis commences: (a) projected future conditions, if justified according to the principles announced in *Neighbors for Smart Rail*; and (b) historic conditions, if those conditions provide the most accurate picture possible of “existing physical conditions.”

We recommend the following changes to proposed paragraphs (1) and (2) of subdivision (a) of section 15125 (additions double-underlined; deletions in ~~double-strikethrough~~):

15125

(a)

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**(1) Generally, the lead agency should describe physical environmental conditions 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. Where existing conditions change or fluctuate over time, and where necessary to provide the most accurate picture practically possible of the project’s impacts, a lead agency may define existing conditions by referencing historic conditions that are supported with substantial evidence. In addition to existing conditions, a lead agency may also use a second baseline consisting of projected future conditions that are supported by reliable projections based on substantial evidence in the record.**

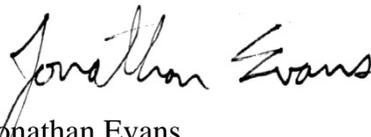
**(2) ~~If a~~ A lead agency may use either a historic conditions baseline or a projected future conditions baseline as the sole baseline for analysis only if it demonstrates with substantial evidence that use of existing conditions would be either misleading or without informative value to decision-makers and the public, ~~it may use a different baseline.~~ Use of projected future conditions must be supported by reliable projections based on substantial evidence in the record.**

Thank you for your attention to these comments. Please do not hesitate to contact Kevin Bundy (ph: 510-844-7113, [kbundy@biologicaldiversity.org](mailto:kbundy@biologicaldiversity.org)) or Jonathan Evans (ph: 510-844-7118, [jevans@biologicaldiversity.org](mailto:jevans@biologicaldiversity.org)) with any questions.

Sincerely,



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Sierra Club California