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From: Rodriguez, Michelle (Perkins Coie) <MichelleRodriguez@perkinscoie.com>
Sent: Thursday, March 15, 2018 4:07 PM
To: CEQA Guidelines@CNRA
Subject: Comments on Proposed Amendments to CEQA Guidelines Section 15125(a)
Attachments: Calfee_001.pdf

Please see the attached letter regarding the above subject.

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March 15, 2018

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VIA EMAIL: ceqa.guidelines@resources.ca.gov

Christopher Calfee, Deputy Secretary and General Counsel
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Re: Comments on Proposed Amendments to CEQA Guidelines Section 15125(a)

Dear Mr. Calfee:

Members of Perkins Coie's CEQA group – specifically, Julie Jones, Stephen Kostka, Barbara Schussman and Marc Bruner – submit the following comments on the Resources Agency's proposed amendments to CEQA Guidelines section 15125(a). These amendments are intended to implement recent case authority regarding the lead agency's choice of the baseline against which a project's environmental impacts will be compared. In most respects, the proposed amendments to section 15125(a) would accomplish that goal.

However, in their treatment of "historic conditions," subsections 15125(a)(1) and 15125(a)(2) would impose restrictions on lead agency discretion that are contrary to the case law and would create an internal inconsistency in the Guideline. The erroneous text was not included in OPR's August 11, 2015 Preliminary Draft Updates and is not addressed either by OPR's November 2017 explanatory notes on its Final Proposed Updates or by the Resources Agency's Initial Statement of Reasons for Regulatory Action. This text should be deleted to avoid imposing a new and unwarranted restriction on the lead agency's ability to use historic conditions as a CEQA baseline.

The proposed amended version of section 15125(a), with the erroneous text highlighted in bold, states:

(a) An EIR must include a description of the physical environmental conditions in the vicinity of the project. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. The description of the environmental setting shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives. The purpose of this requirement is to give the public and decision

makers the most accurate and understandable picture practically possible of the project's likely near-term and long-term impacts.

(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, or conditions expected when the project becomes operational, that are supported with substantial evidence. In addition, a lead agency may also use baselines consisting of both existing conditions and projected future conditions that are supported by reliable projections based on substantial evidence in the record.

(2) 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. Use of projected future conditions as the only baseline must be supported by reliable projections based on substantial evidence in the record.

The bold text should be deleted for the following reasons:

1. **Subsection (a)(1)**: In subsection (a)(1), the phrase “and where necessary to provide the most accurate picture possible of the project’s impacts” has been inserted as a special prerequisite to the lead agency’s ability to define existing conditions in terms of either historic or opening-day conditions. As stated, however, in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 455, and quoted in OPR’s November 2017 notes on its Final Proposed Updates (p. 92), *any* baseline a lead agency selects must strive to meet the goal of providing the most accurate picture possible of the project’s impacts. *Neighbors for Smart Rail* states: “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.” 57 Cal.4th at 455. The last sentence of the opening paragraph of proposed section 15125(a) makes exactly this point with respect to all baseline determinations. The bold text introduced into subsection (a)(1), on the other hand, treats this obligation as a heightened standard governing only the use of a historic conditions or opening day baseline. The latter idea

is found nowhere in *Neighbors for Smart Rail* or other case law, and should not be added to section 15125. This bold text should be deleted from subsection (a)(1).

2. Subsection (a)(2): The first reason the bold text in subsection (a)(2) should be deleted is that it would create inconsistent and confusing terminology when compared to subsection (a)(1). Subsection (a)(1) states that “a lead agency may define existing conditions by referencing historic conditions ... that are supported by substantial evidence.” This text is consistent with the case law, which treats a “historic conditions” baseline as one way of describing “existing conditions,” and holds that a lead agency’s selection of such a baseline is valid if it is supported by substantial evidence. *Association of Irrigated Residents v. Kern County Board of Supervisors* (2017) 17 Cal.App.5th 708, 727-729 (upholding lead agency’s selection of historic conditions baseline because it was supported by substantial evidence of past operational levels at oil refinery). *See also Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 328. The first sentence of proposed subsection (a)(2), however, treats a “historic conditions baseline” as an entirely different category from an “existing conditions” baseline, and would impose special restrictions on the use of a historic conditions baseline. The sentence states: “A lead agency may use ... a *historic 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 (emphasis added).” This text contradicts subsection (a)(1) and sows confusion where none exists in the case law.

More importantly, subsection (a)(1) would impose an unjustified new obstacle to a lead agency’s use of historic conditions in its baseline for CEQA review. *Neighbors for Smart Rail* holds that where a lead agency relies solely on a *future* baseline – *i.e.*, “conditions predicted to prevail in the more distant future, well beyond the date the project is expected to begin operation” – the agency “must justify its decision by showing an existing conditions analysis would be misleading or without informational value.” 57 Cal.4th at 453, 457. Nothing in *Neighbors for Smart Rail* or other case law states, or suggests, that this unique requirement should be extended to a lead agency’s election to use a historic conditions baseline.

Moreover, the policy concerns underlying the Supreme Court’s special rule for a CEQA analysis that relies solely on a future baseline do not apply to a CEQA analysis that uses a historic conditions baseline. First, the Court noted that a project’s short- and medium-term environmental impacts would not be accounted for in an EIR that used only the distant future as its baseline for environmental review. 57 Cal.4th at 455. Second, a future environmental baseline depends on predictive models, which may be inaccurate, as opposed to direct measurement of existing conditions. *Id.* A third and related concern is that decisionmakers and the public can more readily understand an existing conditions baseline and may not be technically equipped to assess the soundness of technical projections into the distant future. 57 Cal.4th at 456. None of these concerns applies to the use of a historic conditions baseline, which

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is an existing baseline that allows the lead agency to capture near-term and medium-term environmental impacts; relies on historic facts rather than predictive models; and is readily understandable by the public and decisionmakers.

Finally, the proposed imposition of this new hurdle to a lead agency's use of a historic conditions baseline is not only unsupported by case law; it is contradicted by the law, which holds that use of a historic conditions baseline is valid if it is supported by substantial evidence and that no additional requirements apply. Indeed, the court in *Association of Irrigated Residents, supra*, 17 Cal.App.5th at 730-731, quoting *Neighbors for Smart Rail*, squarely addressed the "strict test" created by that case for use of a future baseline and specifically held that test did not apply to an existing conditions baseline which incorporates historic conditions. As the court stated, the Supreme Court "intended a *future conditions* baseline to be subject to a more rigorous judicial scrutiny than the scrutiny applied to the choice of measurement for an *existing conditions* baseline, a choice that is a factual finding reviewed under the substantial evidence standard." (emphasis in original). The court further explained that "the stricter principles" that apply to future conditions baselines are not needed when a baseline relies on actual historical conditions. *Id.* at 731. In that situation, "the principles set forth in *Communities for a Better Environment* establish the substantial evidence standard as the applicable standard of judicial review." *Id.*

Accordingly, the Resources Agency should delete the phrase "either a historic conditions baseline or" from subsection 15125(a)(2), in order to avoid an inconsistency with subsection (a)(1), a conflict with controlling case law, and an unjustified burden on lead agencies' discretion to use historic conditions, supported by substantial evidence, when selecting a CEQA baseline.

Thank you for considering these requests.

Very truly yours,

Julie Jones
Stephen Kostka
Barbara Schussman
Marc Bruner



Julie Jones