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**TROUT UNLIMITED'S MISSION IS TO CONSERVE,
PROTECT AND RESTORE NORTH AMERICA'S
COLDWATER FISHERIES AND THEIR WATERSHEDS**

Testimony of
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State Water Resources
Control Board
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El Sur Ranch A030166



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Evaluation of Impacts

PTRA ≠ CEQA

- Public Trust Resources Assessment / Water Availability Analysis
 - Pre-Project baseline (evaluate full value of application or petition)
 - Senior rights and natural resources in cumulative effects
 - Always required
 - Baseline not disputed

- CEQA
 - Existing conditions baseline
 - Junior rights and future foreseeable diverters also included in cumulative effects
 - Sometimes required
 - Baseline frequently disputed



Examples of PTRA/WAA and Pre-Project Baseline

- WAA for El Sur Ranch
 - Full value of application (not increment beyond historic use)
- Water Code section 1259.2 Report (2010) (Exhibit 4)
 - Lists all pending water right applications and next steps
 - Describes PTRA as next step for many applications deemed CEQA exempt (see, e.g., A030860, A031091, A031255, etc)
- North Coast Instream Flow Policy (request for official notice)
 - Pre-project baseline for water diversions without regard to prior unauthorized operation (vast majority of pending applications)
 - Pre-project baseline for construction of dam allows mitigation for gravel and large woody debris, plus fish passage
 - Compare Task 3 Report (Scientific Basis) with SED



Where is the PTRA for this Project?

- Completion of PTRA frequently allows resolution of protests
 - TU, DFG, other protesters typically use PTRA as basis for terms and conditions
 - Even if CEQA baseline remains disputed, PTRA should be prepared
 - In this case, CEQA has significant other value
 - Cumulative effects
 - Growth inducing impacts
 - Alternatives and mitigation measures
 - Opportunity for public comment
- > SWRCB should prepare a new CEQA document with proper baseline to match PTRA



CEQA Basic Purposes

- An EIR's "purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before they are made.*" (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564) (emphasis in original).
- Identify ways that environmental impact(s) can be avoided or significantly reduced (PRC § 21002)
- Intent of CEQA is to "afford the fullest possible protection to the environment." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259)



Baseline Key Objectives

- The baseline must meet the following criteria to comply with CEQA:
 - It must accurately characterize the existing environment;

and

 - It must allow the agency to analyze and mitigate the full scope of a project's impacts



Baseline Does Not Include Project

- *Woodward Park Homeowners Ass'n v. City of Fresno* (2007) 150 Cal.App.4th 683, 707
 - EIR should “*compare what will happen if the project is built with what will happen if the site is left alone.*”
- By incorporating portions of the proposed project into the baseline, the agency in effect grants a unilateral exemption from CEQA for that activity. (See, e.g., *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 195-97)
- Baseline reflects existing condition, not future projections. (See *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351)



Baseline Can Be Flexible

- In certain situations, baseline conditions can fluctuate (e.g. water diversions over time).
- The agency can and should be flexible in establishing baseline.
- In certain circumstances, utilization of a historical average is appropriate.
- *See Communities for a Better Environment v. Southern California Air Quality Management District (2010) 48 Cal.4th 310, 328* (“Neither CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline.”)



Baseline Determination

Baseline	NOT Baseline
Existing Conditions	Proposed Project (and all component parts)



Baseline Determination: Ongoing Acts

Baseline	NOT Baseline
Existing Conditions	Proposed Project
<i>Activities That Will Continue Into The Future Regardless Of Project Approval</i>	<i>Activities That Will Continue Into The Future Only If Project Approved</i>



Baseline Determination: Previous Permits or CEQA Review

Baseline	NOT Baseline
Existing Conditions	Proposed Project
Activities That Will Continue Into The Future Regardless Of Project Approval	Activities That Will Continue Into The Future <i>Only If</i> Project Approved
<i>Ongoing Activities:</i> - <i>Previous Permits</i> - <i>Previous CEQA Review</i>	<i>Ongoing Activities:</i> - <i>Unauthorized</i> - <i>No Prior CEQA</i>



Baseline Determination: Historical Averaging

- Utilizing an historical average in baseline is appropriate where:
 - (1) The activity is already legally permitted; and/or
 - (2) The activity has already been subject to environmental review.

Examples:

- *Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238;
- *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307;
- *Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 118 Cal.Rptr.3d 182



Baseline Determination: Prior Illegal Acts

- California courts have allowed EIRs to incorporate prior illegal activity into the project baseline *only* under the following circumstances:
 - (1) The prior illegal activity resulted in permanent physical environmental damage; *and*
 - (2) The prior illegal activity either: (a) was subject to prior enforcement actions or (b) was/is subject to enforcement action by another agency; *and/or*
 - (3) The prior illegal activity already underwent CEQA environmental review.



(1) The prior illegal activity resulted in permanent physical environmental damage

Examples:

- *Riverwatch v. County of San Diego* (1999) 76 Cal.App. 4th 1428 (permanent physical conditions from prior illegal sand mining and diking activities properly incorporated in baseline)
- *Fat v. County of Sacramento* (2002) 97 Cal. App. 4th 1270, 1281 (illegally constructed airport expansion part of baseline)
- *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 370 (allegedly illegally constructed playground included in baseline for evaluating impacts on the surrounding neighborhood)



(1) The prior illegal activity resulted in permanent physical environmental damage

Reasoning:

- > Permanent physical change is part of the existing environment
- > To ignore it would be to create an “illusory” set of baseline conditions, which would skew environmental review



(2) The prior illegal activity either:

(a) was subject to prior enforcement actions;

Example:

- *Fat v. County of Sacramento* (2002) 97 Cal.App. 4th 1270, 1281 (prior enforcement actions taken)

Or

(b) was/is subject to enforcement action by another agency.

Examples:

- *Riverwatch v. County of San Diego* (1999) 76 Cal.App. 4th 1428 (enforcement actions being undertaken by another agency)
- *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357 (illegality of pre-existing playground was question for enforcing agency)



(2) The prior illegal activity either:

Reasoning:

- > Approval agency should not interfere with matters under purview of enforcing agency
- > It would be difficult for the lead agency to determine the nature and scope of prior illegal activity



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(3) The prior illegal activity already underwent environmental review

Example:

- *Fat v. County of Sacramento* (2002) 97 Cal.App. 4th 1270, 1281 (historic levels of airport use properly included in baseline where previously subject to environmental review)

Reasoning:

- > CEQA does not require repetition of environmental analysis



Cases With Baselines That Incorporate Prior Illegal Activity

Case	Illegal activity: permanent physical change in the environment	Illegal activity: subject to prior enforcement action or enforcement by another agency	Illegal activity: subject to prior environmental review
<i>Riverwatch</i>	X	X	
<i>Eureka Valley</i>	X	X	
<i>Fat</i>	X	X	X
El Sur Ranch			



Current Baseline for El Sur Ranch DEIR

- Current baseline for DEIR includes future appropriative diversions at historical rates even though:
 - (1) The diversions are not permanent and caused no permanent harm; and
 - (2) They have never been previously authorized; and
 - (3) They have never undergone previous environmental review; and
 - (4) The Board has enforcement authority to end the diversion; and
 - (5) The diversion will not continue if the Board denies the application
- > *There has never been a decision that put future effects of ongoing operations in baseline under those circumstances*



Klamath Riverkeeper et al. v. DFG,
San Francisco Superior Court No. CPF-09-509915

- Decided April 20, 2011
- Directly analogous to present case
- Involved challenge to DFG Shasta Valley and Scott River Watershed-Wide Permitting Programs
- Programs geared to protect California Coho Salmon, listed as threatened under CESA on March 30, 2005



Klamath Riverkeeper et al. v. DFG, San Francisco Superior Court No. CPF-09-509915

- EIRs for Permitting Programs included historical and on-going future agricultural diversions into baseline
- Court invalidated baseline approach, because:
 - Ongoing agricultural diversions were illegal;
 - Agricultural diversions would be prohibited but for the Permitting Programs under review; and
 - DFG had enforcement authority to prohibit the illegal diversions



Klamath Riverkeeper et al. v. DFG, San Francisco Superior Court No. CPF-09-509915

- Court held:
 - “when a lead agency issues an EIR, it cannot include activities allowed by the agency’s complete non-enforcement into the baseline.”
 - “neither the Guidelines nor case law allows an EIR to set an illusory no-enforcement baseline that absorbs all ongoing illegal actions”



Klamath Riverkeeper et al. v. DFG,

San Francisco Superior Court No. CPF-09-509915

- Court relied on analogous case: *League to Save Lake Tahoe v. Tahoe Regional Planning Agency* (E.D. Cal. 2010) 739 F.Supp.2d 1260 (“*LSLT*”)
 - *LSLT* invalidated baseline for Environmental Impact Statement that included existing unpermitted buoys on Lake Tahoe, even though TRPA had enforcement authority to remove buoys
 - *LSLT* held, “[A]n agency may not escape its duty by ignoring that duty and then presenting the results as a *fait accompli* incorporated into an environmental baseline.” 739 F.Supp.2d at 1276



Recent Cases *Invalidating* Baselines that Incorporate Prior Illegal Activity

Case	Illegal activity: non-permanent physical change in the environment	Illegal activity: capable of being halted by lead agency enforcement action	Illegal activity: not analyzed in EIR/EIS as environmental impact
<i>Klamath Riverkeeper</i>	X	X	X
<i>LSLT</i>	X	X	X
El Sur Ranch	X	X	X



Correct Baseline for El Sur Ranch

Baseline	NOT Baseline
Permanent Physical Structures (Wells, Plumbing)	Future Appropriative Diversions (face value of permit)
Permanent Effects of Past Diversions	
Future Riparian Diversions	



Thank You

- Amanda Garcia
- Amy Bricker
- Rachel Hooper

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