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Re: Draft Environmental Impact Report for El Sur Ranch Water Right Application No. 30166

Dear Mr. Murphey:

This firm represents Trout Unlimited in its review of the draft environmental impact report ("DEIR") for Water Right Application No. 30166 (the "Project"). The Project proposes to issue an appropriative water right permit to the El Sur Ranch (the "Ranch") to divert a maximum of 1,615 acre feet per year from the Big Sur River, via two existing wells located in Andrew Molera State Park. As your agency is aware, the Ranch has been illegally diverting nearly 1,000 acre feet per year for the past sixty years to flood irrigate pastures for cattle ranching.

The purpose of this letter is to inform the State Water Resources Control Board (the "Board") that the DEIR for the Project fails to comply with the requirements of the California Environmental Quality Act ("CEQA"), Public Resources Code § 21000 *et seq.*, and the CEQA Guidelines, California Code of Regulations, title 14, § 15000 *et seq.* ("Guidelines"). Specifically, the DEIR for the Project improperly incorporates the Ranch's historical level of illegal diversions into the baseline for environmental review, and therefore fails to analyze or mitigate the environmental consequences of any decision to approve the application. The DEIR's use of the Ranch's historical average level of diversion as the baseline for evaluating impacts cannot be reconciled with precedent interpreting the baseline requirement, including the California Supreme Court's recent decision in *Communities for a Better Environment v. Southern California Air Quality Management District* (2010) 48 Cal.4th 310.

The mandate of CEQA is simple. Lead agencies must analyze and disclose the environmental impacts of their decisions. (Pub. Resources Code § 21002.1.) Here, the Board is considering whether to grant a permit for the Ranch's future use of water. Accordingly, the environmental impact to be evaluated in the DEIR is the difference between denying the water right application, where future diversions would be limited to the valid riparian right of 75 acre feet annually (AFA),[1] and granting the application, where future diversions would be equal to a rolling 20-year maximum of 1,200 AFA.

The courts have consistently held that the baseline cannot include previously unauthorized and unanalyzed levels of use, such as the Ranch's diversion, when the effect would be to exempt analysis of those levels of use from CEQA. *Riverwatch v. County of San Diego* (1999) 76 Cal.App. 4th 1428 and its progeny, which approve an agency's decision to incorporate prior illegal construction into the baseline, do not alter that basic analysis. While it is true that illegally built physical structures (such as the Ranch's wells) and even past effects of prior illegal diversions are part of the existing environment, the Ranch's future diversions are not. The prior level of diversions will not continue absent the Project approval and therefore must be analyzed as part of the Project.

Further, the courts have repeatedly recognized that levels of water availability and use, by their nature, fluctuate over time, requiring a flexible approach to establishing the appropriate baseline conditions for the particular project under review. (See, e.g., *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 123-24.) The Supreme Court expressly approved this approach in

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[1] The Board originally determined that the Ranch's riparian right was limited to 90 acres of pasture, with a corresponding diversion limit of 270 AFA. (DEIR at 2-13.) The Ranch subsequently proposed that its riparian right was limited to 25 acres, and 75 AFA. (*Id.* at 2-13 n. 4.) We concur with the Department of Fish and Game ("DFG") that the Board should make a determination regarding the scope of the Ranch's riparian right in order to evaluate the effects of the proposed appropriative right. (DFG, Memorandum to Paul Murphey from Jeffrey R. Single re: El Sur Water Right Application No. 30166 Draft Environmental Impact Report, December 14, 2009 ("DFG letter") at 5.) Although the Board does not issue permits for riparian rights, it routinely issues appropriative rights that limit diversions under all bases of right to a specified amount.

Communities for a Better Environment, acknowledging that the selection of a specific high or low "may be as important environmentally as average conditions." (48 Cal.4th at 517.) Thus, in selecting a baseline, an agency must consider whether a particular baseline will allow the agency to evaluate the full scope of a project's environmental impacts.

Here, the central question to be answered in the DEIR is how the Project's proposed level of diversion will affect the river environment and the sensitive species that depend upon it for survival. That question can be answered only by comparing the in-stream flow levels without the Project with the in-stream flow levels that will occur if the Project is approved. (See *Communities for a Better Environment*, 48 Cal.4th at 507; *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"].)

As discussed more fully below, the DEIR for the Project must employ a baseline that does not effectively exempt the Ranch's illegal diversions from CEQA review. To comply with CEQA, the Board must revise the DEIR to evaluate the Project against the environment absent the Project and circulate the revised DEIR for public review.

I. Background

A. The Project Is Likely To Have Significant Impacts On Steelhead.

Trout Unlimited's mission is to protect, reconnect, restore, and sustain California's salmonoid fisheries, their watersheds, and the diversity of their populations. Trout Unlimited is concerned that if the Project is approved as proposed in the DEIR, it will have severe impacts on the South-Central California Coast Steelhead ("steelhead"), which is listed as threatened under the federal Endangered Species Act. (62 Fed. Reg. 43950 (1997); 71 Fed. Reg. 834, 857 (Jan. 5, 2006).) The Project is located near the mouth of the Big Sur River, one of the few remaining watersheds supporting steelhead in this region.

Diversions of water such as the Project are one of the gravest threats to the existence of steelhead. In its decision reaffirming the threatened status of steelhead, the National Marine Fisheries Service ("NMFS") expressly identified water withdrawal and modification of the natural flow regime as key factors contributing to the species' extinction risk. (71 Fed. Reg. at 856.) Similarly, DFG has expressed serious concern

about the effects on steelhead of diversions from the Big Sur River, and therefore has initiated a study to establish minimum in-stream flow requirements in the watershed. (DFG, Study Plan: Habitat and In-Stream Flow Relationships for Steelhead in the Big Sur River, Monterey County (Sept. 2009), at 5.) DFG submitted numerous comments on this Project, indicating that it believes the Project will adversely affect steelhead. (See DFG letter at 12.) NMFS also has submitted comments on this Project indicating that it will result in adverse impacts to steelhead rearing conditions and juvenile fish passage. (NMFS, Letter to Paul Murphey from Dick Butler re: DEIR for the El Sur Ranch Water Right Application No. 30166, December 14, 2009 ("NMFS letter"), at 3-5.)

Despite clear indications from NMFS and DFG that the Project will have significant impacts on steelhead, the DEIR assumes that the Ranch is entitled to divert water at its average historical level of illegal withdrawals—nearly 1,000 acre feet per year—without mitigating the associated impacts. As this letter explains, neither CEQA nor the case law interpreting the baseline requirement supports the DEIR's approach.

B. The Ranch Has A Long History Of Illegal Diversions.

The Project proposes to provide the Ranch with a permit to divert water from the Big Sur River. As the DEIR explains, the Ranch has been illegally diverting water from the Big Sur River for more than sixty years. (DEIR at 2-12-15.) The Ranch began using a well to divert water in 1949, and constructed another well in 1975. (DEIR at 2-12.) In 1992, in response to a complaint filed by the State Department of Parks and Recreation ("DPR"), the Board determined that the Ranch's wells tapped into the subterranean stream flow of the Big Sur River, and therefore that the Ranch needed a permit from the Board to continue diverting water in excess of the amount afforded by riparian right. (*Id.* at 2-13.) According to the DEIR, the Board recommended that the Ranch either cease diverting water to serve non-riparian land, or, alternatively, apply for an appropriative water right to serve that land. (*Id.* at 2-13-14.)

On July 10, 1992, the Ranch filed an application for an appropriative water right. (*Id.* at 2-14.) After DPR, DFG, and the California Sportfishing Protection Alliance filed protests, alleging adverse effects on the Big Sur River and sensitive species, the Ranch amended its application. (*Id.* at 2-15-17.) The Project, as amended, proposes to issue a water right allowing the Ranch an annual maximum diversion of 1,615 acre feet annually ("AFA"), a 20-year rolling average of 1,200 AFA, a maximum diversion rate of 5.34 cubic feet per second, and additional seasonal diversion limits for the dry months. (*Id.* at 2-17.) The Project's proposed level of diversion is even greater than the Ranch's

historical average level of illegal diversions, which the DEIR determined to be 1,136 AFA annual maximum with a 20-year rolling average of 857 AFA. (See *id.* at 4.1-5.)

Since the filing of the application, the Ranch has continued to illegally divert water from the Big Sur River. Although the State Water Board has authority to stop the illegal diversion and to fine the Ranch for breaking the law, the Board has not taken such measures. (Water Code §§ 1052, 1055, 1831; see Water Code § 275.)

C. The DEIR For The Project Improperly Evaluates The Project's Impacts Against A Baseline That Includes The Ranch's Illegal Diversions.

The Board issued the DEIR for the Project in October 2009. The DEIR explains that, to evaluate whether the Project will have a significant effect on the environment, the DEIR established a hydrological baseline based upon the Ranch's historical average level of illegal diversions during the period 1985-2004. (*Id.* at 4.1-4-6.) Thus, with a stroke of the pen, the DEIR deemed the bulk of the Project's proposed future diversion to be part of the environmental setting rather than part of the project description.

Although the Project proposes to grant the Ranch a permit for the full amount of the Ranch's application, the DEIR analyzes the environmental impacts associated with only a small fraction of that amount, based upon its determination that fully two-thirds of the diversion is part of the baseline. (*Id.*; see also *id.* at Section 4.2 and 4.3 [analyzing impacts on hydrology and biological resources].) Unsurprisingly, because it measures the Project's impacts against this purported "baseline," the DEIR concludes that many impacts are less-than-significant, and that all others can be easily mitigated to a less-than-significant level. (See *id.* at 3-5-15 [summary of impacts and mitigation measures].)

Several state and federal agencies and non-profit organizations have provided comments on the DEIR, including, as noted above, DFG and NMFS. Many of these agencies and organizations conclude, as we have, that the hydrological baseline proposed by the Board violates CEQA by exempting the great majority of the Project's impacts from meaningful analysis or mitigation. (See, *e.g.*, DFG letter at 7-10; NMFS letter at 4-5.)

II. There Is No Basis In Fact Or Law For The Board's Choice Of Baseline.

An EIR must include an accurate account of the physical environmental conditions under which a project will be carried out; these conditions "normally constitute the baseline" against which the significance of impacts is measured. (Cal. Admin. Code, tit. 14, §15125(a).) The baseline describes the environment *without* the project; its function is to allow the agency to determine what will happen to the environment if the Project is approved. As the California Supreme Court recently explained, "[t]o decide whether a given project's environmental effects are likely to be significant, the agency must use some measure of the environment's state *absent the project.*" (*Communities for a Better Environment*, 48 Cal.4th at 507 [emphasis added].)

Given the particular facts surrounding a project, an agency must determine, "in the first instance, exactly how the existing physical conditions *without the project* can most realistically be measured." (See *Communities for a Better Environment*, 48 Cal.4th at 517 [emphasis added].) Selecting the appropriate baseline is crucial to ensuring that a project's impacts are fully disclosed and analyzed, as required by CEQA. (See *Woodward Park*, 150 Cal.App.4th at 707 [baseline requirement "protect[s] the fundamental essence of an EIR, its evaluation of a project's environmental impacts"].) And selecting an improper baseline "can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts which would result." (*Environmental Planning and Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 358 ("*EPIC*").)

Here, the Project is the Ranch's application to obtain an appropriative water right to divert a maximum of 1,615 acre feet annually from the Big Sur River, using existing wells. (DEIR at 2-18.) The Ranch currently has no right to divert water in excess of its riparian right and would be required to cease diverting water beyond that level if the Board denies its water right application. (DEIR at 6-2 [acknowledging that "[t]he denial of the water right application would require that pumping of the subterranean flow of the Big Sur River for non-riparian pasture cease"].)

The DEIR acknowledges that the Ranch's level of illegal diversion has fluctuated over time, including long periods when the Ranch has not diverted any water. (DEIR at 2-15.) Further, there is no evidence in the record to suggest that impacts on stream functions or aquatic life would persist if the Ranch ceased its diversions beyond its riparian entitlement. Thus, in this case, the existing environment absent the Project is the level of in-stream flows *absent* the Ranch's proposed level of non-riparian diversion.

Yet, inexplicably, the DEIR for the Project incorporates the Ranch's illegal diversions—1,136 AFA maximum—into the environmental setting, and measures the Project's impacts on hydrology and biological resources against this purported "baseline." (DEIR at 4.1-4.) By designating more than two-thirds of the Ranch's proposed future diversion as the "baseline," the DEIR evades analysis and mitigation of the full scope of the Project's impacts on the Big Sur River and habitat for sensitive species, including steelhead.

In effect, the DEIR proposes to exempt or "grandfather" the full scope of the Ranch's illegal diversions, even though they have never been authorized or analyzed under CEQA. As explained in more detail below, this result runs contrary to legal precedent interpreting the baseline requirement, to the fundamental purposes of CEQA, and to the particular factual circumstances of this case.

A. The DEIR Lacks Support For Establishing A Baseline Based Upon Historical Illegal Levels Of Use.

The DEIR asserts that "the Ranch's historic water diversions . . . are part of the existing environment," and therefore establishes a baseline for evaluating impacts on hydrology and biological resources that includes not only the impacts of past illegal diversions, but also the impacts of future diversions. However, unlike the past diversions, those future diversions have not happened yet, and the impacts of those diversions will only be realized if the Project is approved. (DEIR at 4.1-4-5.) Contrary to the DEIR's assumption, the courts have consistently rejected attempts to include historic levels of use in the baseline where the effect would be to exempt, or "grandfather," a previously unauthorized or unanalyzed level of use from environmental review.

1. Under CEQA, An Agency May Not Incorporate Historic Levels Of Use Into The Baseline If The Effect Is To "Grandfather" An Unauthorized Or Unanalyzed Level Of Use.

The DEIR acknowledges that the Ranch's diversion of water has never been authorized or analyzed under CEQA. (DEIR at 2-13-14.) The DEIR further acknowledges that the effect of its baseline is to exempt the majority of the Project from analysis and mitigation. (Compare DEIR at 4.1-4 [noting that approval of the Project would "allow[] continuation of an existing, but unpermitted, water right activity"] with *id.* at 4.1-5 [limiting analysis to comparison with historical average of illegal diversion].) In analogous circumstances, courts have held that an applicant's proposed level of water use cannot be incorporated into the baseline, but must be analyzed as part of the project.

This is true even when the applicant demonstrates that it has historically engaged in the unauthorized level of use.

In *County of Inyo v. City of Los Angeles* (1973) 32 Cal.App.3d 795, 805-06 ("*County of Inyo I*"), for example, the City of Los Angeles proposed to increase the levels of groundwater extractions to be carried to Los Angeles via a previously constructed aqueduct. The city argued that the groundwater extractions were exempt from CEQA as an ongoing project because the aqueduct was constructed prior to the enactment of CEQA. (*Id.*) The Court of Appeal rejected the city's argument, reasoning that the increased level of extractions had not been analyzed when the aqueduct was built. (*Id.*)

In a subsequent opinion, the appellate court rejected the city's attempt to include in the baseline what the city viewed as its post-CEQA historical average pumping rate, noting that the city was attempting to improperly "narrow" its CEQA obligation. (See *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 195 ("County of Inyo II") ["By an ex parte stroke of the pen, the project definition of the final EIR subtracts a long-term average pumping rate . . . from the CEQA-subject side of the line and places it on the exempt side of the line"].) The effect, reasoned the court, was to treat previously unanalyzed levels of extraction as part of the baseline and to radically understate the impacts of the project. (*Id.* at 196-97.) The court held that this flaw was fatal to the validity of the EIR. (*Id.*)

Similarly, in *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 967 ("*Amador County*"), the Court of Appeal rejected an argument that a proposal to operate a hydroelectric dam for consumptive use was exempt as an existing facility, precisely because it involved a level of water use that had not previously been permitted or analyzed. (See also *Lewis v. Seventeenth Dist. Agricultural Assn.* (1985) 165 Cal.App.3d 823, 826, 836-37 [Blease, J. concurring in the judgment] [explaining that if use was not analyzed when applicant obtained permit for the facility, the existing facilities exemption does not apply].)[2]

These cases demonstrate that, as a general rule, the courts will reject an attempt to incorporate historic levels of use into the baseline, if the effect is to exempt or

[2] *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, 1315-17, is not to the contrary. In that case, the court approved a baseline based upon *previously permitted* levels of use and held that the agency properly applied the categorical exemption for existing facilities. (*Id.*)

grandfather an unanalyzed level of use from CEQA review. Further, these cases suggest that the courts have paid particular attention to attempts to "grandfather" or exempt unanalyzed use of *water*. The courts have clarified that including historic levels of use in the baseline in such circumstances undermines the core purposes of CEQA. (See, e.g., *County of Inyo I*, 32 Cal.App.3d at 805-07 [rejecting exemption because it would subvert legislative intent to give highest priority to analysis of environmental considerations]; *Amador County*, 76 Cal.App.4th at 966 [observing that exemptions should be narrowly construed in order to "afford[] the fullest possible environmental protections within the reasonable scope of statutory language"].)

Like the environmental analyses at issue in *County of Inyo I and II* and *Amador County*, here the DEIR in effect grants an exemption for the Ranch's historic level of diversion from the Big Sur River. Yet the Ranch's diversion has never been permitted or subject to environmental review. Thus, as in *County of Inyo I and II* and *Amador County*, such an "exemption" is wholly unjustified under CEQA.

2. A Baseline Based Upon Historic Levels Of Use Is Appropriate Only In Cases Involving Previous Environmental Analysis Or An Existing Permit.

Conversely, courts have approved incorporating actual historical levels of use into the baseline only in cases involving a legally permitted past use, or a historical use that has been previously evaluated under CEQA. For example, in *Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238, 242-43, the court held that the EIR properly considered the historic peak traffic levels generated by a mining operations, because those levels had been analyzed in a prior EIR and were legally permitted by the county. (See also *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal. App. 4th 645, 659 [approving incorporation of annual production averages in the baseline for a previously-permitted mining operation].)

Likewise, in *Fat v. County of Sacramento* (2002) 97 Cal. App. 4th 1270, 1281, the court held that the city did not abuse its discretion by incorporating into the baseline the noise levels and safety concerns associated with the airport's ongoing illegal operations, because those levels of use had been analyzed in prior environmental review. The court further noted that there was no evidence that conditions had changed since that analysis. (See *id.*)

Unlike the uses in *Fairview Neighbors* and *Fat*, here the Ranch's diversions have never been permitted or subject to environmental analysis. DFG notes that the

easement agreement entered into between the Ranch and DPR in 1982 was determined to be categorically exempt under CEQA. (DFG letter at 9; see also DEIR at 2-12.) Accordingly, DPR did not conduct an environmental analysis of the Ranch's diversion. In any event, even if DPR had conducted environmental review, conditions have significantly changed since 1982. (Cf. *Fat*, 97 Cal.App.4th at 1281.) In particular, the steelhead was listed as a threatened species in 1997. (See Section I.A above.) Therefore, the current Project is in no way analogous to the circumstances in *Fat* or *Fairview Neighbors*.

In sum, because the Ranch's historical level of illegal diversions has not been previously analyzed or permitted, it is entirely inappropriate to characterize it as part of the baseline. The DEIR's cramped interpretation of the baseline requirement fails to protect the Big Sur River, steelhead, and other sensitive species by characterizing two-thirds of the Ranch's proposed level of diversion as existing conditions. To achieve the purposes of CEQA, the impacts of that level of use should be evaluated as part of the Project.

B. The *Riverwatch* Rule Does Not Apply To The Ranch's Ongoing Illegal Diversion.

In a 2005 memorandum, the Board's Office of Chief Legal Counsel relied heavily on *Riverwatch v. County of San Diego* (1999) 76 Cal. App. 4th 1428, 1452-53 and its progeny, to advise the Division of Water Rights to consider not only prior illegal construction , but also continued levels of prior illegal diversions as part of the baseline. (Memorandum from Craig M. Wilson, Chief Counsel, Office of Chief Counsel, to Victoria A. Whitney, Chief, Division of Water Rights, re: Baseline for Analysis of Water Rights Projects Under the California Environmental Quality Act (June 10, 2005) ("Baseline Memo"), at 1, 3-5.) The DEIR appears to have adopted the Baseline Memo's recommended approach for this Project.

However, as explained below, the *Riverwatch* rule does not apply to the circumstances of this case. *Riverwatch* and its progeny simply addressed how an agency should account for prior illegal activity that has permanently altered the existing physical environment. In the present case, the Ranch's illegal diversions can be halted at any moment, returning in-stream flows to their pre-Project levels with no permanent physical effects. Because the DEIR can meaningfully evaluate impacts using flow levels without the Ranch's illegal diversions as the baseline, the DEIR's apparent reliance on the Baseline Memo and *Riverwatch* is unfounded.

1. *Riverwatch* Addresses How An Agency May Account For Illegal Activities That Have Permanently Altered The Environmental Setting.

In *Riverwatch*, an applicant seeking a permit for a rock quarry had previously engaged illegally in sand mining and disking activities, destroying habitat for sensitive species on the project site. (*Id.* at 1434, 1452-53.) The court rejected the petitioners' argument that the baseline for evaluating impacts on biological resources should have reflected the environmental conditions present before the applicant had illegally destroyed habitat. (*Id.* at 1452-53.) Faced with a permanently altered environment, the court held that the baseline must reflect the existing conditions on the ground, even though some of those conditions were caused by prior illegal activities. (*Id.* at 1453; see also *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 370 [city properly considered an allegedly illegally constructed playground as part of the baseline for evaluating impacts on the surrounding neighborhood].)

Similarly, in *Fat v. County of Sacramento*, a prior illegal physical expansion of an airport had destroyed habitat for sensitive species. (97 Cal.App.4th at 1281.) Following *Riverwatch*, the court held that the county had properly included the expanded facilities in its baseline for evaluating environmental impacts. (*Id.*) Like the illegal sand mining in *Riverwatch*, the illegal airport expansion had permanently altered the physical environment. In addition, as noted above in Section II.A.2, the court held that the county properly included historic levels of airport use in the baseline. However, that aspect of the court's decision rested heavily on the prior environmental review of the levels of use proposed in the application. (See *Fat*, 97 Cal.App.4th at 1281.) Moreover, the court was careful to emphasize that its holding was limited to "the circumstances of this case." (*Id.* at 1280.) Thus, *Fat* should not be read to extend the *Riverwatch* rule to incorporate illegal levels of use into the baseline absent prior environmental review.

2. Because The Ranch's Illegal Activity Has Not Resulted In Any Permanent Diversion Of Water, The *Riverwatch* Rule Does Not Apply.

The *Riverwatch* line of cases, which all involved a prior illegal use that permanently altered the physical environment, should not determine how the Board accounts for the Ranch's historic illegal diversion of water from the Big Sur River. Unlike the environments at issue in *Riverwatch*, *Eureka Citizens*, and *Fat*, here, the

Ranch's illegal activity has not resulted in any permanent diversion of water from the Big Sur River. The Board can halt the Ranch's illegal diversion at any moment, returning in-stream flows to their pre-Project levels with no permanent physical effects.[3] In these circumstances, as explained above, the most relevant precedent addressing unpermitted levels of use indicates that the baseline should be the level of in-stream flows without the Project. (See, e.g., *County of Inyo*, 32 Cal.App.3d at 806.)

This is not to say that the *Riverwatch* rule is necessarily irrelevant to the environmental setting in this case. The existing physical conditions may well include certain characteristics that have been permanently altered by the Ranch's past illegal diversion (e.g., the existence of the second well). However, there is no basis for extending the *Riverwatch* rule to cover the Ranch's future diversion of water.

C. The Board Must Exercise Its Discretion To Measure The Baseline In A Manner That Achieves The Fundamental Purposes Of CEQA.

In *Communities for a Better Environment*, the California Supreme Court affirmed that while the baseline must reflect existing conditions on the ground, "[n]either CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline." (48 Cal.4th at 517.) Rather, an agency should take into account the particular facts and circumstances surrounding the project, in order to accurately evaluate the project's true environmental impacts. (See *id.* at 517.) Thus, an agency has flexibility in selecting a baseline, but its choice must be supported by substantial evidence. (*Id.*) And if the agency's choice of baseline is not supported by substantial evidence, the EIR "fail[s] as [an] informative document." (*EPIC*, 131 Cal.App.3d at 358.)

The courts have repeatedly recognized that establishing baseline levels of water use, in particular, requires a flexible approach depending upon the factual circumstances surrounding the project. For example, in *Save Our Peninsula*, the court acknowledged that the date for establishing a baseline cannot be rigid because water use

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[3] In its analysis of the No Project alternative, the DEIR acknowledges that without the Project, the Ranch cannot divert water in excess of its riparian right. (DEIR at 6-2-15.) The limited analysis provided in the DEIR's discussion of the no-project alternative does not cure the DEIR's fundamentally flawed baseline, however, because it neither accurately describes existing conditions nor requires mitigation for the full scope of the Project's impacts.

fluctuates over time, and certain flow conditions "are more relevant to a determination whether the project's impacts will be significant." 87 Cal.App.4th at 125. Similarly, in *County of Amador*, the court made clear that not just monthly diversion levels, but also the timing and speed of water releases, were relevant to evaluating a project's impacts on the river environment. 76 Cal.App.4th at 954-55.

At the same time, *Communities for a Better Environment* clarifies that an agency's range of choices is not without limits. Indeed, *Communities for a Better Environment* confirms that an agency's choice of baseline must be consistent with the major purposes underlying CEQA: the public disclosure and mitigation of a project's environmental impacts. (48 Cal.4th at 512-13; see *Woodward Park Homeowners Association v. City of Fresno* (2007) 150 Cal.App.4th 683, 707 [the two major purposes of CEQA are "to adopt feasible mitigation measures to lessen [] environmental impacts" and "to inform the public and decision makers of the consequences of environmental decisions before those decisions are made"].) To that end, an agency cannot select a baseline that provides "an illusory basis for a finding of no significant adverse effect." (*Communities for a Better Environment*, 48 Cal.4th at 512-13.)

Accordingly, an agency's choice of baseline must allow it to realistically describe *both* the existing environmental conditions and the impacts of the project. As the court explained in *Woodward Park*:

> For instance, if a hypothetical project half the size of the proposed project is used as a baseline, the EIR will report only half the project's impact. The EIR would fail to inform the public of the other half. It would also necessarily lack consideration of mitigation measures for the omitted portion of the project's impact.

150 Cal.App.4th at 707. Thus, an agency's choice of baseline must aim to achieve two objectives: first, it must accurately characterize the existing environment; and second, it must allow the agency to analyze and mitigate the full scope of a project's impacts.

Here, the DEIR's choice of baseline neither informs the public of the full scope of the Project's impacts nor considers and mitigates those impacts. Instead, the DEIR includes nearly two-thirds of the Ranch's proposed future diversion in the baseline, resulting in an illusory analysis and no mitigation of the great majority of the actual impacts on the Big Sur River environment of the Board's decision to issue the permit. This result runs counter to the courts' oft-repeated insistence that CEQA be interpreted

"to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Mountain Lion Foundation v. Fish and Game Com.* (1997) 16 Cal.4th 105, 147 [internal quotation omitted].)

D. The DEIR's Approach Provides Perverse Incentives To Water Right Applicants.

Strong policy reasons counsel in favor of establishing a general rule that, in after-the-fact water right applications, the baseline does *not* include the applicant's past illegal diversions. Most important, including illegal diversions as part of the baseline effectively grants the applicant an exemption from CEQA and prevents the Board from requiring mitigation for the full scope of environmental impacts associated with diverting water. (See Sections II.A-C, above.)

In addition, the DEIR's approach provides applicants with an incentive to maintain or increase illegal diversions prior to applying for a water right and while the application is pending, in order to secure a higher baseline. This perverse result was addressed in *Save Our Peninsula Committee*, where the court held that the agency abused its discretion by selecting a baseline that included artificially high levels of pumping after the application was filed. (87 Cal.App.4th at 125-26.) The court reasoned that the production of water was controlled by the applicant during that time period, and the applicant had an incentive to elevate production figures to establish a high baseline. Similarly, in *Communities for a Better Environment*, the Supreme Court cautioned that "over-reliance on short-term activity averages might encourage companies to temporarily increase operations artificially, simply in order to establish a higher baseline." (48 Cal.4th at 517.)

Here, as in *Save Our Peninsula*, the Ranch had an incentive to maintain high levels of illegal diversions while its application was pending to establish a high baseline. (See DEIR at 2-14; 4.1-4-6 [Ranch filed application in 1992; baseline includes average water use from 1985-2004].) Given that *all* of the Ranch's diversions have been illegal beyond its riparian right, the DEIR's approach is particularly unjustified: it provides a perverse incentive to water rights applicants to increase and maintain high levels of illegal diversions during the water rights application process—even where, as here, there has been mounting pressure to reduce consumption in a water-constrained community. (See *Save Our Peninsula Committee*, 87 Cal.App.4th at 126 [noting that increased pressure on local water supply provided additional incentive to inflate the baseline].)

Worse yet, use of an incorrect baseline actively encourages people to initiate diversions illegally, before filing a water right application. Given the Board's long-running problems dealing with thousands of illegal diversions in coastal areas, this is precisely the wrong signal to send.

1. The Policy Concerns Underlying *Communities for a Better Environment* Support Excluding Historic Illegal Diversions From The Baseline For After-The-Fact Water Right Applications.

In *Communities for a Better Environment*, an oil refinery sought a permit allowing it to use its existing boilers for a new manufacturing process. (48 Cal.4th at 512-13.) The agency used the maximum levels of pollution authorized by the refinery's existing permits as the baseline for evaluating air quality impacts, even though there was no evidence that the refinery had ever attained those levels of emissions. (*Id.*) The Court held that the agency could not use previously permitted levels of emissions as the baseline, because those levels did not reflect the existing environmental setting. (*Id.*)

The policy considerations underlying the Court's decision in *Communities for a Better Environment* support excluding the Ranch's historical level of illegal diversion from the baseline and analyzing the full scope of the Project's impacts. The Court was particularly concerned that the use of previously permitted levels of emissions as the baseline "provid[ed] an illusory basis for a finding of no significant adverse effect. . . ." (*Id.* at 513.) As explained above, the DEIR's incorporation of the Ranch's historic levels of diversion has the same effect here.[4]

Further, in *Communities for a Better Environment*, the Court rejected the refinery's argument that requiring CEQA analysis of any previously permitted levels would impinge on its purported vested rights under the permits. (*Id.* at 513-14.) Here,

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[4] In *Communities for a Better Environment*, the Court addressed only whether an agency could incorporate allowable levels of emissions that had not actually been achieved into the baseline. Although the Court cited *Riverwatch* and its progeny with approval, it had no occasion to consider whether it is the correct rule for the circumstances presented here. (See *id.* at 512 and n.7.) The Court did not address the factual situation presented in *Riverwatch*, where prior illegal activities had permanently altered the environment, let alone a situation, as presented here, involving previously unanalyzed and unpermitted levels of use.

the Ranch has *no* right to divert water at any level beyond its riparian use. Thus, concern for maintaining the Ranch's historical operations cannot justify the DEIR's choice of baseline.

2. The Policy Concerns In *Riverwatch* Do Not Support Extending That Rule To After-The-Fact Water Right Applications.

In *Riverwatch*, the court reasoned that in many cases, it would be difficult for a lead agency to determine the nature and scope of the prior illegal activity, and therefore that the enforcement agency should be primarily responsible for addressing an applicant's prior illegal conduct. (76 Cal.App.4th at 1452-53.) The concerns identified by the *Riverwatch* court in support of its rule are not present here. In this case, the Board is both the lead permitting agency and the agency that has enforcement authority over the Ranch's continuing illegal activity. Accordingly, establishing a baseline that excludes the Ranch's historic illegal diversion would in no way conflict with any enforcement action by the Board. In fact, as DFG observed in its letter, "by adopting a baseline which includes the unpermitted and illegal diversion of water, the [Board] itself is undermining its own ability to require modification to the project to avoid adverse effects on the water resources." (DFG letter at 9.)

Further, in this case, there is no question about the nature of the Ranch's illegal conduct. The EIR itself contains a complete description of the Ranch's history of illegal diversions, and acknowledges that the sole reason the Ranch applied for a water right is to avoid the Board's enforcement authority. (DEIR at 2-12-15.) Thus, the reasoning in *Riverwatch* does not support extending its rule to grandfathering in a historic illegal diversion of water that persists only because the Board allows it to.

In sum, it is well within the Board's discretion to avoid the perverse incentives created by using a baseline that includes historic illegal levels of diversion. Indeed, as explained above, case law interpreting CEQA *compels* the Board to select a baseline that both reflects existing conditions and analyzes the full scope of the Project's environmental impacts. Here, that means selecting a baseline that does not reward the Ranch's illegal use of water.

III. The DEIR Must Be Revised And Recirculated For Public Comment.

The DEIR cannot form a legally adequate basis for a final EIR. Because the DEIR selected an improper baseline and analyzed only a small fraction of the Project's environmental impacts, it is "fundamentally and basically inadequate," and

"meaningful public review and comment were precluded." (Guidelines § 15088.5.) Further, in order to cure the fundamental flaws in the DEIR identified in this letter, the Board must obtain substantial new information to adequately assess the proposed Project's environmental impacts, and to identify effective mitigation and alternatives capable of alleviating the Project's significant impacts.

CEQA requires preparation and recirculation of a revised draft EIR "[w]hen significant new information is added to an environmental impact report" after public review and comment on the earlier draft EIR. (Pub. Resources Code § 21092.1; see also Guidelines § 15088.5.) The opportunity for meaningful public review of significant new information is essential "to test, assess, and evaluate the data and make an informed judgment as to the validity of the conclusions to be drawn therefrom." *Sutter Sensible Planning, Inc. v. Sutter County Board of Supervisors* (1981) 122 Cal.App.3d 813, 822; *City of San Jose v. Great Oaks Water Co.* (1987) 192 Cal.App.3d 1005, 1017. Accordingly, CEQA requires that the public have an opportunity to review and comment upon any significant new information in the form of a recirculated draft EIR. (See, *e.g.*, *Save Our Peninsula Committee*, 87 Cal.App.4th at 134 [requiring recirculation based upon new information regarding use of purported riparian right for project's water supply].)

Thank you for the opportunity to comment on the DEIR. Trout Unlimited respectfully requests that the Board postpone consideration of the Project until such time as a legally adequate draft EIR is prepared and recirculated.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

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cc: Brian J. Johnson, Trout Unlimited