No.: S217763

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, et al.,
Plaintiffs and Respondents,

v.

CALIFORNIA DEPARTMENT OF FISH AND GAME,
Defendant and Appellant,

THE NEWHALL LAND AND FARMING COMPANY,
Real Party in Interest and Appellant.

Court of Appeal
Case No. B245131

Superior Court
Case No. BS131347
[Hon. Ann I. Jones, Judge Presiding]

REPLY TO ANSWER TO PETITION FOR REVIEW

After a decision by the Court of Appeal
Second Appellate District, Division Five

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TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES:

Plaintiffs submit this Reply to the Answers by the Department of Fish and Wildlife ("Department" and Newhall Ranch and Farming Co. ("Newhall"). Despite Newhall's and the Department's protestations to the contrary, this case merits review to address each of the following three important questions of law:

1) Does a provision of the California Endangered Species Act implicitly amend the laws the California Legislature designed to protect a small number of fish and wildlife species determined worthy of a "fully protected" status because they are the most threatened species?

2) Does the exhaustion doctrine under the California Environmental Quality Act effectively limit issues that can be raised in litigation to those made during comments on a Draft EIR—regardless of how extensive the changes might be in the Final EIR—unless there is a subsequent formal opportunity to comment?

3) May an EIR use a "Business as Usual" hypothetical future project as the baseline against which it measures greenhouse

gas impacts to determine the significance of the project, rather than against the existing environment, or does this approach conflict with this Court's decisions regarding baselines?

I. REVIEW SHOULD BE GRANTED TO CONSIDER AN IMPORTANT QUESTION OF LAW REGARDING CALIFORNIA'S MOST PROTECTIVE FISH AND WILDLIFE LAWS

The Legislature has bestowed on a select set of animals the highest level of protection possible under state law: fully protected status. The Opinion creates a new judicial exception that undermines this protection and vitiates the Legislature's express intent by allowing fully protected animals to be captured and relocated to make way for development. The Department and Newhall both disregard the plain consequence of the Opinion: under the Opinion, a "take" of a fully protected species is authorized if it occurs as part of a project's mitigation scheme. This fundamentally alters the existing legal and regulatory landscape. The Court should grant review to resolve this issue of first impression and important question of law.

The mitigation measures at issue involve the capture and relocation of the fully protected unarmored threespine stickleback. (Op. at pp. 44-45.) The Opinion acknowledges these mitigation

measures may fall within the Fish and Game Code's definition of "take." (*Id.* at p. 47; Fish & G. Code § 86.) The issue considered in the Opinion is not whether the mitigation measures will result in take, as the Department claims, but whether mitigation measures requiring capture and relocation, which fall within the definition of take, are prohibited under the Fully Protected Fish Statute. (*Id.* at pp. 47-48; Fish & G. Code § 5515; *see* Department Answer at p. 4.)

Newhall incorrectly characterizes the Opinion as holding that the mitigation measures will not result in take as defined by Section 86. (Newhall Answer at 4.) If so, that would have been the end of the matter, and there would be no reason for the Opinion to resort to a convoluted statutory construction and legislative history analysis. (Op. at pp. 47-50.) The Opinion, however, finds an ambiguity between the Fully Protected Fish Statute's prohibition on take and the California Endangered Species Act's ("CESA") definition of "conservation," which encompasses methods to promote the recovery of endangered species including "live trapping" and "transplantation." (*Id.* at pp. 45-46; Fish & G. Code § 2061.) It concludes that "when the pertinent provisions of the Fish and Game and Public Resources Codes are construed together, *no unlawful take* will occur." (Op. at p.

47, emphasis added.) Thus, according to the Opinion, even if the capture and relocation of stickleback constitutes "take" under Section 86, it is not prohibited take under Section 5515.

The Opinion's effort to harmonize the Fully Protected Fish Statute and CESA upsets Section 5515's carefully balanced set of prohibitions and exceptions, and allows something expressly *not allowed* by the statute – the capture and relocation of fully protected fish as part of a project's mitigation plan. (*See* Fish & G. Code § 5515(a)(2).) In recognizing this new exception to Section 5515's prohibition of take, the Opinion simultaneously erases Section 5515(a)(2)'s qualification that allowable take for species recovery purposes does not include actions taken as part of a project's mitigation.

The Department and Newhall deny that the Opinion recognizes a new exception to the Fully Protected Fish Statute's take prohibition. (Department Answer at p. 8; Newhall Answer at p. 6.) However, both ignore the plain language of the Opinion, which concludes that the 1984 CESA amendments "materially changed state of the law from that in 1970" to allow the capture and relocation of fully protected fish as part of project mitigation. (Op. at 48-50.) This allowance does not

exist in the express terms of Section 5515, nor does the legislative history of the 1984 CESA amendments indicate any intent to amend the Fully Protected Species laws.

The Department acknowledges that the Opinion attempts to "harmonize" the disparate and unrelated provisions of the Fully Protected Fish Statute and CESA Section 2061. (Department Answer at pp. 7-8.) This harmonization results in an unjustified judicial exception, because Section 5515 and CESA are not ambiguous or in conflict. The Department attempts to justify the Opinion's harmonization because "[i]t makes no sense that relocating a fish protected under the fully protected statute constitutes prohibited take, but the same action to relocate a fish under [CESA] would be considered conservation." (Department Answer at p. 7.) This argument is based on a grave misreading of Section 2061's definition of "conservation"; while efforts to conserve and hence recover endangered fish may include "live trapping" and "transplantation," not all actions to "relocate a fish" are conservation actions. (Fish & G. Code § 2061.) The measures at issue in this case are not conservation measures intended to recover the stickleback, but mitigation measures designed to move stickleback from their present

habitat to accommodate development, and are likely to result in mortality and stress. (*See* AR:9767-69.) The Department is also wrong that relocation of a fully protected fish for conservation purposes would constitute prohibited take; Section 5515 already provides that fully protected fish may be taken for conservation purposes – but not as a part of a project's mitigation. (Fish & G. Code § 5515(a)(1)-(2).)

The Department contends that "[i]f the Legislature intended that the conservation measures [described in the 1984 CESA amendments] apply only to endangered species, but not to fully protected species, it would have said so." (Department Answer at p. 7.) Not only did the Legislature in fact explicitly restrict CESA's definition of conservation to CESA in the 1984 amendments, (Fish & G. Code § 2060), but this argument stands the appropriate inquiry on its head. The question is not whether the Legislature intended the 1984 CESA amendments to apply "only to endangered species," but whether the Legislature intended to create a new exception to the Fully Protected Species laws. There is no evidence of any kind that it did. On the contrary, the Legislature manifestly knows how to create express exceptions to the take prohibitions of the Fully Protected Species

laws, and amended these statutes when CESA so required. (Fish & G. Code §§ 3511(a)(1), 4700(a)(1), 5050(a)(1), 5515(a)(1) ["Except as provided in Section 2081.7 or 2835, fully protected [species] may not be taken or possessed at any time."].)

Courts must give effect to all applicable statutes if possible. (Code of Civ. Proc. § 1858.) But rather than "harmonizing" the two statutes, the Opinion's creation of a new exception allowing capture and relocation of fully protected fish for mitigation purposes renders superfluous the portion of the Fully Protected Fish Statute that prohibits take in connection with a project's mitigation, even if part of a "strategy of conservation," (Fish & G. Code § 5515(a)(2).)

Because the various Fully Protected Species laws contain nearly identical terms, the Opinion opens similar loopholes allowing the capture and relocation of fully protected birds, mammals, reptiles, and amphibians to accommodate development, despite the express prohibition of this type of take by each of the statutes. (Fish & G. Code §§ 3511, 4700, 5050, 5515.) In total, the Opinion diminishes the protection afforded to 37 animals classified by the Legislature as fully protected. (*Id.*) This Court's review is necessary to address

whether this diminished protection is justified without specific legislative action.

II. REVIEW SHOULD BE GRANTED TO SETTLE AN IMPORTANT QUESTION OF LAW REGARDING CEQA'S EXHAUSTION DOCTRINE

The Department and Newhall do not contest the drastic expansion of the exhaustion doctrine wrought by the Opinion: that issues raised in comments submitted after the close of a comment period on a Draft EIR categorically fail to satisfy the exhaustion doctrine unless there is a later formal opportunity to comment prior to project approval.[1] No prior California court decision has ever interpreted the exhaustion doctrine this way, and with good reason. This novel interpretation leaves plaintiffs with no judicial remedy for any errors introduced or uncovered at any point after the close of a Draft EIR comment period, even where the administrative agency has clear, actual notice of its errors and an opportunity to fix them through

[1] Op. at p. 59 ["None of the Native-American cultural resources issues which served as the basis for the writ of mandate was preserved during the comment period which concluded on August 25, 2009. Thus, they may not be utilized as grounds for judicial review.]; Op. at p. 71 ["The comment period expired on August 25, 2009. Here, the steelhead smolt issues were not raised during the statutory and regulatory prescribed comment period. Thus, they have been forfeited and may not serve as a basis for setting aside the environmental impact report."]

the administrative process. It is beyond dispute that this holding dramatically changes the law. It is thus worthy of review by this Court.

The Department's and Newhall's narrow discussions in their respective Answers focus on whether there was a second comment period after release of the Final EIR in 2010, and argue that there was no such comment period; instead, they argue, the comment period in 2009 on the Draft EIR provided the sole opportunity for public input. (See DFG Answer at pp. 9-12; Newhall Answer at pp. 6-9.) While that characterization is wrong (as explained in the Petition for Review and further elaborated briefly below), it is also irrelevant. Even assuming there was no second comment period in 2010, the Court of Appeal still got the law fundamentally wrong.

The intent of the Legislature in enacting Section 21177 was to "codify the exhaustion of remedies doctrine, but not 'to limit or modify any exception . . . contained in case law.'" (*Endangered Habitats League v. State Water Resources Control Board* (1997) 63 Cal.App.4th 227, 238) ("*EHL*") (citation omitted).) Section 21177(e) codified "a major judicial exception to the doctrine: 'The exhaustion requirement is not applicable where an effective administrative

remedy is wholly lacking.'" (*EHL*, 63 Cal.App.4th at 238, *quoting* 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 314, p. 404.) If – as the Opinion holds and the Department and Newhall argue – the comment period on the Draft EIR was the only legally-recognized opportunity for any member of the public to address possible deficiencies in the environmental review, then there can be no doubt that "an effective administrative remedy [was] wholly lacking." While the Department and Newhall state repeatedly that parties had ample opportunity in 2009 to comment on the Draft EIR, they fail to address how any party could have effectively obtained an administrative remedy in 2009 for any issues surfacing at any later point in the review process.

Here, the June 2010 Final EIR incorporated material changes in the project, and a subsequent November 2010 Addendum to the Final EIR incorporated new project features and mitigation specifically addressing issues raised in the purportedly "late" comments timely submitted during the Final EIR comment period. But the Court's holding has even broader implications. An agency could, for example, select in its Final EIR a different preferred alternative from the Draft EIR, or introduce new analysis containing factual or

methodological errors, or disclose new impacts. Under the Opinion's rule, there would be neither an opportunity to request administrative correction nor an opportunity for judicial review of any of these developments. Tellingly, the Answers do not even make a serious attempt to argue otherwise; instead, they attempt to convince this Court there is nothing new in the Opinion. But the fact is no appellate court has ever held before claims raised in response to a Final EIR, but not raised in a prior Draft EIR comment period, are jurisdictionally barred under Section 21177.

Moreover, the Department did hold a second comment period, where it actually considered Petitioners' comments and responded in detail to them. (AR 16-19.) While the Department and Newhall rest heavily on their view that the comment period on the Final EIR was only an official comment period under NEPA, they ignore the obvious truth: the Department actually considered and responded to the comments submitted during a noticed public comment period. (AR 10227-33, 10723-35, 12075-88.) And the Department's Final EIR Addendum included new mitigation measures specifically responsive to comments received during the 2010 comment period. (AR 10724-26, 6693-94, 17889.)

In light of the Department's knowledge of the claims arising from the 2010 comments, barring the claims here would plainly fail to serve the purpose of the exhaustion doctrine. This Court has explained that the purpose of the doctrine is "to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief." (*Sierra Club v. San Joaquin LAFCO* (1999) 21 Cal.4th 489, 501 (citation omitted).) The doctrine "facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency," and "can serve as a preliminary administrative sifting process, unearthing the relevant evidence and providing a record which the court may review." (Ibid.) Here, where the agency has reviewed and responded to the claims at issue, the doctrine cannot serve any meaningful function.

To sum up: there are two possibilities. The first is that the Department, Newhall, and the Opinion are correct that there was no opportunity for the public to call to the Department's attention any issues with the EIR during the last year of the administrative process. In that case, the Court of Appeal made a significant and far-reaching error when it concluded that all issues raised in comments submitted

subsequent to the 2009 Draft EIR comment period were categorically forfeited. The second possibility is that the Department, Newhall, and the Opinion are wrong, and that the comments were submitted "during the public comment period" on the Final EIR and thus were not forfeited. In that case, the Opinion clearly violates the plain language of Section 21177(a). Either way, the Court of Appeal erred by misapplying the exhaustion statute and creating new law. Review is thus warranted to settle this important question of law.

III. REVIEW SHOULD BE GRANTED TO RESOLVE THE GROWING CONFLICT REGARDING ANALYSIS OF GREENHOUSE GAS IMPACTS UNDER CEQA

Recent Court of Appeal decisions regarding thresholds of significance for greenhouse gas emissions are causing confusion for agencies and project proponents, leading to conflict with this Court's clear instruction that an EIR must compare a project's impacts with actual baseline conditions. The Opinion exacerbates and broadens this conflict. Newhall's Answer, in turn, only underscores why review should be granted.

Newhall concedes that the Department evaluated the significance of the Project's greenhouse gas emissions solely in relation to an alternate "business as usual" version of the Project

"'consist[ing] of *anticipated* real construction and development of *presently open space.*'" (Newhall Answer at pp. 10, 14 [quoting Opinion at p. 111] [emphasis added].) The Department's baseline comparison here – assessing significance in relation to a hypothetical version of the project rather than against existing conditions – has *never* been permissible under CEQA. (*See, e.g., Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 322 & n.6 [collecting cases] (*CBE*).)

Having effectively conceded that the baseline applied by the Department and validated by the Court of Appeal was categorically impermissible, Newhall resorts to mischaracterizing the Department's analysis and misconstruing this Court's holdings. (Newhall Answer, pp. 11-15.) Contrary to Newhall's assertions, agencies do not have unlimited discretion to choose significance thresholds that rely on assumed baselines; the agency's discretion is limited to choosing only among legally permissible baselines. And the business-as-usual threshold approach, with its hypothetical version of the project, inherently and necessarily results in a legally impermissible baseline. To the extent overly broad language in *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011)

197 Cal.App.4th 327 (*CREED*) and *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832 (*Friends of Oroville*) suggest otherwise, those cases should be disapproved.

Here, the Department impermissibly compared the project with an imaginary project that could never be built, to support a misleading finding that the project's greenhouse gas (GHG) emissions were insignificant despite a 2,700 percent increase in emissions over existing conditions. Without review by this Court, agencies will continue to read *CREED* and *Friends of Oroville* as authorizing similar misleading, hypothetical baselines for their GHG significance analysis, in direct contravention of this Court's jurisprudence.

Newhall attempts to recharacterize the Department's significance analysis as akin to the type of analysis approved in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* and *Woodward Park Homeowners Assn., Inc. v. City of Fresno*. (Newhall Answer at p. 14-15; *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439 (*Neighbors*); *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683 (*Woodward Park*).) But it cannot avoid conceding that the "business as usual" version of the project

was the sole basis for the Department's significance determination. (*See* Newhall Answer at p. 10). Newhall nonetheless attempts to characterize this purely hypothetical version of the project as a projection of future "existing physical conditions," which this Court in *Neighbors* held may be used as a baseline in certain narrow circumstances. (*See Neighbors*, *supra*, 57 Cal.4th at pp. 451-52; Newhall Answer at p. 14.) The attempt fails. *Neighbors* held that where a comparison to current physical conditions would be misleading or uninformative, an agency may compare a project's impacts to a projection of *future physical conditions without the project*. (*See id.*) Nothing in *Neighbors* holds that an agency may compare a project to a projection of *some other version of the project itself*, as Newhall concedes the Department used here. Indeed, this Court in *CBE* affirmed a long line of cases holding such comparisons impermissible. (*CBE*, *supra*. 48 Cal.4th at p. 322 & n.6.)

Newhall then attempts to characterize the Department's significance analysis as a "two-baseline approach," which used both existing and "business as usual" versions of the project as baselines. (Newhall Answer at p. 15.) But the EIR did not use existing conditions as a baseline; it provided no analysis that acknowledged

the significance of the project's dramatic increase in emissions compared to existing conditions. A "baseline" under CEQA is the "physical conditions by which a Lead Agency determines whether an impact is significant." (14 Cal. Code Reg. § 15125(a).) Here, the existing conditions were disclosed, but then ignored for the purpose of determining the significance of impacts.

Instead, as Newhall effectively concedes, the *sole* significance threshold used for the project's GHG emissions was a "29% reduction from 2020 [business as usual] conditions." (Newhall Answer at p. 10.) Newhall's attempt to equate this analysis to the "two-baseline approach" that was affirmed in *Neighbors* is therefore unavailing. (Newhall Answer at pp. 13, 15.) As the Court of Appeal in *Woodward Park*, noted, the "'two-baselines approach' only works if the EIR actually carries out both comparisons." (*Woodward Park, supra,* 150 Cal.App.4th at 707.) The EIR here failed to do so.

The Opinion and Newhall also rely on *CREED* and *Friends of Oroville* in concluding the Department had discretion to use an otherwise clearly impermissible "business as usual" baseline. Although *CREED* did not directly address whether this "business as usual" baseline was permissible, it held that an agency has broad

discretion to choose a threshold of significance based on the California Global Warming Solutions Act of 2006, Health and Safety Code section 38500 *et seq.* (commonly known as "AB 32"). (*CREED*, *supra*, 197 Cal.App.4th at p. 337.) Similarly, *Friends of Oroville* upheld an agency's discretion to choose a greenhouse gas significance threshold based on AB 32, even though the EIR at issue in the case did not turn on such a comparison. (*Friends of Oroville*, *supra*, 219 Cal.App.4th at pp. 841-42.) Both the Opinion and Newhall read the broad language of both cases as endorsing an otherwise impermissible comparison using a hypothetical "business as usual" project baseline, although neither *CREED* nor *Friends of Oroville* explicitly so held. (Op. at p. 106; Newhall Answer at p. 9.)

To the extent these cases suggest that agencies have discretion to use thresholds of significance that necessarily rely on impermissible "baseline" comparisons, they are in conflict with this Court's precedent and must be disapproved. Use of "business as usual" comparisons in significance determinations squarely contravenes CEQA's clear requirement that existing physical conditions normally constitute the baseline for significance assessments. (*CBE, supra,* 48 Cal.4th at pp. 320-21.) The narrow

exception recognized in *Neighbors* has no applicability here. (*Neighbors*, *supra*, 57 Cal.4th at pp. 451-52.) Instead, the general rule holds: under no circumstances can a determination of significance be based on a comparison between the proposed project and some alternate, hypothetical version of the project that could have been built under applicable zoning laws or permit limits. (*CBE*, *supra*, 48 Cal.4th at 322.) If anything, the hypothetical project baseline here is even more egregious; as the Department acknowledged, the "business as usual" version of the project could never be built because it would violate existing regulations. (AR 13615.)

While the "business as usual" comparison may help evaluate *statewide* progress toward AB 32's GHG emission goals, a hypothetical "business as usual" version of a project has no place in a *project*'s EIR significance analysis. As *CBE* made clear, "illusory comparisons that can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts" are prohibited by CEQA. (*CBE*, *supra*, 48 Cal.4th at p. 322 [internal quotations omitted].) If agencies and courts follow the overbroad language of *CREED* and *Friends of Oroville,* as the Opinion did here, an agency can misleadingly describe a highly

significant *increase* in greenhouse gas emissions as a *reduction* simply by comparing a project to some other, more harmful version that could never be permitted. This would further allow agencies to skew their significance analysis to avoid any consideration of mitigation measures to reduce GHG emissions. This does not mean AB 32 cannot be referenced in assessing the significance of greenhouse gases. It means only that an alternate, hypothetical version of the project based on the AB 32 Scoping Plan's "business as usual projection" cannot be used as the sole baseline in a CEQA significance analysis.

Although the GHG portion of the Opinion is unpublished, it contributes to the widening conflict between this Court's baseline cases and recent appellate court cases addressing public agency discretion to choose greenhouse gas significance thresholds. It does not, as the Department contends, simply apply "established rules of environmental law...." (Department's Answer, p. 12.)[2] Without

[2] As petitioners have made clear, the Department's significance analysis and the opinion are inconsistent with this Court's baseline cases. By failing to address this inconsistency, the Department also fails to address the ongoing conflict between the Department's approach to GHG significance analysis and the Attorney General's and Resource Agency's guidance against the use of "business as usual" comparisons for significance determinations. (14 Cal. Code

review, the Opinion would send a signal to other appellate courts to allow agencies to choose significance thresholds that inherently rely on impermissible baseline comparisons. As this Court warned in *CBE*, such comparisons cannot fulfill CEQA's requirements; they can only mislead the public and decision makers. (*CBE*, *supra*, 48 Cal.4th at p. 322.) Review should be granted to settle this important question of law.

CONCLUSION

In summary, the Department and Newhall's Answers are replete with mischaracterizations and errors regarding both the facts and the Court of Appeal's Opinion. None of their objections should give this Court pause to grant review to address the three important questions of law raised by the Petition for review regarding the Fully Protected Species laws, CEQA's exhaustion doctrine, or the important baseline for the measurement of greenhouse gas impacts in an EIR.

Reg. §§ 15064.4(b)(1), 15125(a); AR 12774, 12808-09.) Both the Attorney General and Resources Agency have warned that such comparisons could violate CEQA's requirement to make significance determinations using on existing environmental conditions. (AR 12774, 12808-09.)

Respectfully Submitted,

May 27, 2014 By:

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CERTIFICATION REGARDING WORD COUNT

I certify that the total word count for this brief, including footnotes, is 4132 words, as determined by the word count of the word processing program on which this brief was prepared.

May 27, 2014 By:

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PROOF OF SERVICE

I, Russell Howze, declare as follows:

I am employed in the County of San Francisco, State of California. I am over the age of eighteen and my business address is 351 California St., Suite 600, San Francisco, CA 94104.

On May 27, 2014, I served the following document(s) entitled:

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I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this Proof of Service was executed on May 27, 2014, at San Francisco County, California.

Russell Howze