No. S217763

IN THE SUPREME COURT 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.

From a Decision by the Court of Appeal,
Second Appellate District, Division Five
Case No. B245131

Reversing the Ruling by the Honorable Ann I. Jones
Los Angeles Superior Court Case No. BS131347

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

I. STATEMENT OF THE ISSUES

This Court granted review on the following issues:

(1) Does the California Endangered Species Act (Fish & Game Code, § 2050 et seq.) supersede other California statutes that prohibit the taking of "fully protected" species, and allow such a taking if it is incidental to a mitigation plan under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)?

(2) Does the California Environmental Quality Act restrict judicial review to the claims presented to an agency before the close of the public comment period on a draft environmental impact report?

(3) May an agency deviate from the Act's existing conditions baseline and instead determine the significance of a project's greenhouse gas emissions by reference to a hypothetical higher "business as usual" baseline?

II. INTRODUCTION

The Court granted review of three distinct issues arising from the appellate court's decision regarding the California Department of Fish and Wildlife's (the "Department") approvals for the Newhall Ranch development project. On each of the issues under review, the

appellate court misinterpreted established law intended to protect the environment.

First, the Legislature assigned the highest level of protection to specified wildlife under California's Fully Protected Species Laws. (Fish & Game Code §§ 3511, 4700, 5050, 5515.) The appellate court misapplied the statutory scheme for these protections, interpreting Section 5515 of the Fully Protected Species Laws to allow the capture and relocation of fully protected fish as a mitigation measure under the California Environmental Quality Act ("CEQA"). This interpretation misconstrued the unambiguous terms of the Fully Protected Species Laws, and eviscerated the heightened protection the Legislature provided to 37 species of wildlife beyond that afforded by the California Endangered Species Act ("CESA").

Second, the exhaustion doctrine's fundamental purpose is to ensure that agencies are aware of claims and able to consider them before those claims come to court. In light of this purpose, courts, government agencies, and the public have long understood that where a commenter alerts the lead agency to possible violations of CEQA in the administrative process, courts may hear claims relating to those violations. Accordingly, the statute that articulates the exhaustion

doctrine in CEQA cases, Public Resources Code section 21177, provides an exception to exhaustion where a public agency fails to provide an opportunity to raise grounds for objecting to an agency's CEQA compliance. Here, the appellate court's decision to bar CEQA claims based on comments submitted after the comment period on the Draft Environmental Impact Report ("EIR"), but before certification of the Final EIR, contravenes the statute's command, fails to serve the purposes or meet the common understanding of the exhaustion doctrine, and creates an unwarranted barrier to judicial enforcement of CEQA through citizen lawsuits. Moreover, under any interpretation of the exhaustion doctrine, the specific claims barred by the appellate court in this case are properly before the courts.

Third, the appellate court upheld the Department's use of a hypothetical "business as usual" version of the Newhall Ranch project – one with far greater emissions than the project actually proposed, and that never could be built under applicable law – as a baseline for determining the significance of the project's greenhouse gas ("GHG") emissions under CEQA. This Court has squarely held that evaluating a project's emissions by reference to the maximum pollution it could hypothetically emit – rather than by reference to realistic conditions

without the project – is impermissible as a matter of law. Here, the Department used the hypothetical baseline to portray the project's 260,000-metric-ton annual *increase* in GHG emissions as consistent with overall state efforts to *reduce* emissions. This comparison misled the public and decision makers as to the true nature of the project's impacts, rendering the Final EIR incapable of functioning as the Legislature intended: as an "environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.'" (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392 ["*Laurel Heights*"].) This vitiates CEQA's policy that an EIR is a document of accountability, protecting "not only the environment but also informed self-government." (*Ibid.*; *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 322 ["CBE"].)

Resolution of the issues presented will require a writ directing the Department to vacate its certification of the EIR and all approvals based thereon.

III. FACTUAL AND PROCEDURAL BACKGROUND

This review arises from the Department's approvals for the Newhall Ranch project (the "Project"), one of the largest residential developments ever proposed in the state. Newhall Ranch would be built along a six-mile stretch of the Santa Clara River in an unincorporated, undeveloped area of northwestern Los Angeles County. (AR:2391.)[1] At build-out, Newhall Ranch would include over 20,000 residential units and nearly 60,000 residents. (AR:2402, 7205.)

Los Angeles County approved a framework specific plan in 2003 to guide this development scheme, but the development's extensive fill and modification of the Santa Clara River and its tributaries, together with its effects on rare plants and wildlife, required the Department's approval. (AR:2401, 2406-07.) The Department acted as the CEQA lead agency for that approval, certifying the EIR and approving the Newhall Ranch Resource Management and Development Plan, Master Streambed Alteration Agreement, and Spineflower Conservation Plan in 2010. (AR:1.)

Plaintiffs and Respondents ("Plaintiffs") challenged this action

[1] "AR" refers to the certified administrative record for this case.

by a petition for writ of mandate, bringing claims under CEQA, CESA, and the Fully Protected Species Laws. (AA:2-50.)[2] The Superior Court granted the petition on six grounds. (AA:1575-1612.) The Department and Real Party in Interest Newhall Land and Farming Company ("Newhall") appealed. (AA:1888, 1957.) The appellate court's opinion reversed the Superior Court's ruling in full. (March 20, 2014 Slip Opinion ["Opinion" or "Op."].)

Additional facts and procedures relevant to the issues are presented in the respective arguments below.

IV. STANDARD OF REVIEW

The following standards are applicable to the three respective issues presented for review:

(1) The issue of whether CESA (Fish & Game Code § 2050 et seq.) impliedly amended the Fully Protected Species Laws presents a question of statutory interpretation, which is reviewed *de novo*. (*Estate Madison* (1945) 26 Cal.2d 453, 456; *Board of Retirement v. Lewis* (1990) 217 Cal.App.3d 956, 964.) To determine whether CESA supersedes the Fully Protected Species Laws, allowing the taking of fully protected species incidental to a CEQA mitigation

[2] "AA" refers to the Appellant's Appendix for this case.

plan, the Court applies "well-established principles of statutory construction to determine the Legislature's intent," looking first to the statutory language. (*Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32, 45.) If the statutory language is unambiguous, the Court presumes "the Legislature meant what it said, and the plain meaning of the statute controls." (*Ibid.*) The Court considers "extrinsic aids, such as legislative history, only if the statutory language is reasonably subject to multiple interpretations." (*Ibid.*)

(2) Whether CEQA (Pub. Resources Code § 21000 et seq.) bars Plaintiffs from raising issues presented to the Department after the close of the Draft EIR comment period rests on the construction of CEQA's exhaustion statute, Public Resources Code Section 21177. This likewise presents a question of statutory interpretation, which is reviewed *de novo*. (*Committee for Green Foothills*, *supra,* 48 Cal.4th at p. 45.)

(3) Whether the Department complied with CEQA in using a hypothetical higher "business as usual" baseline to evaluate the significance of the Project's greenhouse gas emissions is also a question of law. In reviewing the Department's compliance with

CEQA, the Court's inquiry is whether there was "a prejudicial abuse of discretion" (Pub. Resources Code § 21168.5), which is established "if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (*Ibid.*) Claims of legal or procedural error are reviewed *de novo*, while only an agency's factual determinations are reviewed for substantial evidence. (*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427, 435.) Here, the Department's factual determinations are not at issue. Rather, the question is strictly whether the Department's decision to use a hypothetical version of the project with higher GHG emissions – one that could never be lawfully built – as a CEQA baseline violated long-standing appellate and Supreme Court precedent. As set forth in Section V.C.3.a, *infra*, this question is reviewed *de novo.*

V. ARGUMENT

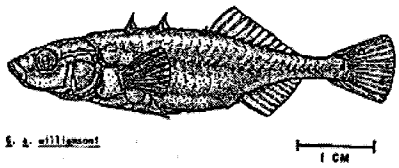
A. CESA DOES NOT SUPERSEDE THE FULLY PROTECTED SPECIES LAWS' PROHIBITION AGAINST TAKE

CESA in no way allows the taking of a fully protected species incidental to CEQA mitigation. Rather than superseding the protections afforded to "fully protected" species, CESA works in

tandem with the Fully Protected Species Laws to promote the conservation and recovery of the state's most imperiled wildlife. The appellate court's misconstruction of the unambiguous statutory text, structure and history of these two statutes creates an unwarranted exception to the Fully Protected Species Laws' take prohibition, disturbing the status quo and substantially weakening protections for all fully protected species.

1. Factual and Procedural Background

The unarmored threespine stickleback is an exceedingly rare freshwater fish found only in southern California streams, and has been designated as fully protected since 1970. (Fish & Game Code § 5515(b).) The take of fully protected species is prohibited with only a few limited exceptions, which no party claims apply here. (Fish & Game Code § 5515(a).) The stickleback is also listed as an endangered species under CESA. (AR:3809.)



(AR:42810.)

Nonetheless, the Department allowed removal of individual unarmored threespine stickleback from their current habitat as part of a CEQA mitigation program. (AR:92-95.) The Project's mitigation measures necessarily require the pursuit and capture of stickleback, which fall within the Fish and Game Code's definition of take. (Fish & Game Code § 86 ["'Take' means hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill."] ("Section 86").) The trial court concluded that "the very 'mitigation' methods recommended ... fall within the meaning of illegal 'taking' under the California Fish and Game Code." (AA:1610 [finding that the Project's mitigation "by its very terms" constituted a taking of stickleback].)

The appellate court likewise acknowledged that capture and relocation of stickleback may constitute take within the meaning of Section 86. (Op. at p. 47.) Rather than ending its analysis there, however, the appellate court perceived a conflict between the Fully Protected Species Laws' prohibition against take and Section 2061 of CESA, which defines "conservation" as permitting "live trapping" and "transplantation" to promote recovery of endangered species. (Op. at p. 46.) Citing a duty "to harmonize conflicting statutes to the

extent rationally possible," the appellate court determined the plain language and legislative history of both statutes support a finding that CESA was intended to supersede the Fully Protected Species Laws' prohibition against take as part of a CEQA mitigation program. (Op. at p. 49-50.) It held when CESA and the Fully Protected Species Laws are construed together, the Project's capture and relocation of stickleback could not be considered an "unlawful take." (Op. at p. 47.)

2. CESA Stands in Harmony with the Fully Protected Species Laws

Although the Fully Protected Species Laws provide greater restrictions than CESA on take of protected species, these statutes work toward the same goal: the protection of imperiled species in California. (Fish & Game Code §§ 2061, 5515(a)(1).) The appellate court's attempt to "harmonize" these complementary statutes is unwarranted. The statutes have stood in harmony for decades without ambiguity or tension and there is no reason they should not continue to do so. Neither the plain language nor legislative history of the statutes suggest CESA was intended to diminish or supersede the Fully Protected Species Laws. Therefore, as a matter of law, the

appellate court's misconstruction of these two statutes should be rejected.

a. The Plain Language of the Statutes Demonstrates the Fully Protected Species Laws Are Not Superseded by CESA

Statutory interpretation begins first with "the words of the statute, giving them their usual and ordinary meaning." (*People v. Trevino* (2001) 26 Cal.4th 237, 240 [citing *People v. Snook* (1997) 16 Cal.4th 1210, 1215].) "If the words are reasonably free from ambiguity and uncertainty, the language controls. [Citations.]" (*Voss v. Superior Court* (1996) 46 Cal.App.4th 900, 911-12.) Here, the plain language of both CESA and the Fully Protected Species Laws are unambiguous: as expressly noted in both statutes, CESA does not amend or limit the protections afforded to fully protected species.

i. The Plain Language of the Fully Protected Species Laws

Enacted in 1970, the Fully Protected Species Laws apply to a special group of 37 birds, mammals, reptiles, amphibians, and fish. Although most fully protected species are also listed as threatened or endangered under CESA, a few are protected solely through the Fully Protected Species Laws. (*Compare* Fish & Game Code § 3511(b)(7)

[golden eagle listed as fully protected species] *with* 14 Cal. Code Regs. § 670.5(a)(5) [golden eagle not listed as threatened or endangered].) The language of Section 5515 of the Fully Protected Species Laws lays out a strict prohibition against take:

> "[e]xcept as provided in Section 2081.7 or 2835, fully protected fish or parts thereof may not be taken or possessed at any time. No provision of this code or any other law shall be construed to authorize the issuance of permits or licenses to take any fully protected fish, and no permits or licenses heretofore issued shall have any force or effect for that purpose."

(Fish & Game Code § 5515(a)(1).) The take prohibitions in the other Fully Protected Species Laws – covering species of various types of animals other than fish – are essentially identical. (Fish & Game Code §§ 3511(a)(1), 4700(a)(1), 5050(a)(1).)

The language demonstrates that the protections for fully protected species are expansive. The Legislature has expressly authorized only three limited exceptions to the Fully Protected Species Laws' take prohibition. The Fully Protected Species Laws allow the Department to authorize take "for necessary scientific research, including efforts to recover fully protected, threatened, or endangered species." (Fish & Game Code §§ 3511(a)(1), 4700(a)(1), 5050(a)(1), 5515(a)(1).) The Legislature created two additional

exceptions by amendments enacted in 2002 and 2011. (*Ibid.*, Stats. 2002, ch. 617, § 6 [regarding certain protected species in the Salton Sea Area]; Stats. 2011, ch. 596, § 7 [regarding natural community conservation plans].) None of these exceptions applies here and the plain language of the statute indicates that there are no additional exceptions to the Fully Protected Species Laws' take prohibition. Another amendment enacted in 2003 expressly limits the scope of the "scientific research" exception, specifying that the exception does not apply to "any actions taken as part of specified mitigation for a [CEQA] project." (Fish & Game Code §§ 3511(a)(2), 4700(a)(2), 5050(a)(2), 5515(a)(2), Stats. 2003, ch. 735, § 4.)

ii. The Plain Language of CESA

CESA is a statutory scheme for the conservation and recovery of species listed as endangered or threatened by the Fish and Game Commission. While CESA generally prohibits take of listed species (Fish & Game Code § 2080), it provides for permitted take when the effect of the take is minimized and fully mitigated. (Fish & Game Code § 2081(b)(1).) This is in strong contrast to the Fully Protected Species Laws, which have no provisions for permitted take beyond the three narrow exceptions described above. The difference between

CESA and the Fully Protected Species Laws is thus not in how "take" is defined, since they both rely on the same Fish and Game Code section for that definition (Fish & Game Code § 86), but rather in the degree of protection from take they provide and the species to which they apply.

In 1984, the Legislature amended CESA, stating it was "the policy of the state to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat." (Fish & Game Code § 2052, Stats. 1984, ch. 1240, § 2.) The amendments defined the terms "conserve," "conserving," and "conservation" to include "regulated taking" as one of the "methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [by CESA] ... are no longer necessary." (Fish & Game Code § 2061 (added by Stats. 1984, ch. 1240, § 2).) The definition of conservation also states that:

> These methods and procedures include ... live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

(*Ibid.*)

The 1984 amendments to CESA, including Section 2061's new definition of "conservation," apply only to CESA. (Fish & Game Code § 2060 [definitions apply only to CESA]." The term "conservation" does not appear in the Fully Protected Species Laws. (Fish & Game Code §§ 3511, 4700, 5050, 5515.) The protections codified in the Fully Protected Species Laws were untouched and undiminished by the 1984 CESA amendments.

iii. The Fully Protected Species Laws Were Not Superseded by CESA and There Is No Conflict Between Them

Despite the unambiguous language of the statutes, the Opinion concludes that the Legislature's 1984 CESA amendment "grants the department the authority, when pursuing a strategy of conservation, to use live trapping and transplantation technique[s]" to take a fully protected fish. (Op. at p. 50.) But nothing in the plain language of the statutes suggests that the Legislature intended to amend or limit the *separate* protections afforded to fully protected species. The 1984 amendments did not reference the Fully Protected Species Laws or purport to alter their framework of broad protections and limited exceptions. (Fish & Game Code §§ 2050-2089.)

The Fully Protected Species Laws' take prohibitions are straightforward: "Except as provided in Section 2081.7 or 2835, fully protected fish or parts thereof may not be taken or possessed at any time. No provision of this code or any other law shall be construed to authorize the issuance of permits or licenses to take any fully protected fish." (Fish & Game Code § 5515(a).) The plain meaning and ordinary use of the term "any" is "broad, general and all embracing." (*California State Auto. Assn. Inter-Ins. Bureau v. Warwick* (1976) 17 Cal.3d 190, 195.) The only exceptions to this broad prohibition are the three exceptions described above.

The *expressio unius est exclusion alterius* canon of statutory construction precludes the creation of unwritten take exceptions in the Fully Protected Species Laws by implication. (*See Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195 [no exemption from CEQA should be implied where Legislature created several express exceptions].) This Court has also held that "[w]e must assume that the Legislature knew how to create an exception if it wished to do so." (*DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 998.) Indeed, when the need has arisen to allow take of a fully protected species, the Legislature has expressly amended both CESA

and the Fully Protected Species Laws. (See Fish & Game Code §§ 2081.7 [creating exception for Salton Sea species], 2835 [creating exception for species covered by natural community conservation plan]; 3511(a)(1), 4700(a)(1), 5050(a)(1), 5515(a)(1) ["[e]xcept as provided in Section 2081.7 or 2835, fully protected [species] may not be taken or possessed at any time"].)

By allowing take of fully protected species as a CEQA mitigation measure (Op. at p. 50), the appellate court nullified subsection (a)(2) of the Fully Protected Species Laws. If the Department could allow the take of fully protected species for a CEQA mitigation program, the Legislature's mandate that the exemption for take for scientific research purposes does not apply to "any actions taken as part of specified mitigation for a [CEQA] project" would have no effect. (*See* Fish & Game Code § 5515(a)(2).) Courts must give effect to all parts of a statute when possible and "an interpretation that renders statutory language a nullity is obviously to be avoided." (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 357; see also Code. Civ. Proc. § 1858.) The appellate court's conclusion that CESA supersedes the Fully Protected Species Laws' take prohibitions violates this canon of statutory construction because it is

possible to give full effect to all parts of the Fully Protected Species Laws. This conclusion should be rejected as a matter of law.

"When the language of a statute is clear, we need go no further." (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340.) A court may not, "under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.) Here, the plain language of the both CESA and the Fully Protected Species Laws is unambiguous: CESA does not amend or limit the protections afforded to fully protected species.

b. Legislative History Demonstrates that CESA Does Not Supersede the Fully Protected Species Laws' Take Prohibition

Despite the plain language of the statutes, the appellate court looked to the legislative history of the Fully Protected Species Laws and CESA to resolve a purported conflict between Section 2061 of CESA and Section 5515(a)(2) of the Fully Protected Species Laws, concluding that "the 1984 legislation ... materially change[d] [the] state of the law from that in 1970." (Op. at 49.) However, the legislative history cited in the Opinion discusses only the changes the

1984 amendments made to *CESA*. (*Id.*) The Fully Protected Species Laws were not changed by the 1984 amendments. Nor is there any evidence in the legislative history that the 1984 CESA amendments were intended to supersede or in any way diminish the Fully Protected Species Laws' take prohibitions, and the Opinion cites none.

The appellate court's examination of legislative history also ignored the chronology of the amendments to the Fully Protected Species Laws and CESA, which demonstrates the Legislature expressly amended the Fully Protected Species Laws several times *after* 1984. As noted above, Section 5515(a)(2), which prohibits take of fully protected fish for scientific research purposes in the context of CEQA mitigation, was enacted nearly 20 years after CESA's Section 2061. (Fish & Game Code § 5515, Stats. 2003, ch. 735, § 4, Sen. Bill No. 412 (2002-2003 Reg. Sess.) enacted Oct. 9, 2003; Fish & Game Code § 2061 (Stats. 1984, ch. 1240, § 2).) Despite Section 5515(a)(2)'s adoption nearly 20 years after the 1984 amendments to CESA, the Opinion concludes that CESA's permitting of live trapping and transplantation for conservation of listed endangered or threatened species must have been intended to trump Section 5515(a)'s

prohibition of take of fully protected fish as part of a CEQA mitigation program. (Op. at p. 48.)

The Opinion's attempt to import CESA's less stringent requirements into the Fully Protected Species Laws to resolve a nonexistent conflict between the two statutes undermines the higher level of protection the Legislature afforded to those few species categorized as fully protected. Neither the statutory language nor the legislative history suggests that CESA intended to limit or diminish the prohibitions against take of fully protected species.

3. Repeal or Amendment by Implication of the Fully Protected Species Laws' Prohibition on Take is Unwarranted

Because nothing in the plain statutory language or legislative history of either statute demonstrates legislative intent that CESA weakened the protections of the Fully Protected Species Laws, any such weakening would require a finding that the Legislature effected a repeal by implication.

As this Court noted in *Tuolomne Jobs v. Superior Court*, "[t]here is a strong presumption against repeal by implication." (*Tuolumne Jobs & Small Bus. Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1039 [citing *People v. Park* (2013) 56 Cal.4th 782,

798].) Courts have found "it should not 'be presumed that the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication.'" (*Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 838 [quoting *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7].)

In order to overcome the presumption against repeal by implication, there must be "no rational basis for harmonizing the two potentially conflicting statutes and the statutes [must be] 'irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.'" (*Tuolumne Jobs*, *supra*, 59 Cal.4th at 1039 [quoting *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 487].) The presumption is particularly strong "where the prior statute has been generally understood and acted upon." (*Metropolitan Water District v. Dorff* (1979) 98 Cal.App.3d 109, 114.) Here, the statutes in question are not "irreconcilable" and have operated concurrently for many decades to recover imperiled species, with the Fully Protected Species Laws simply providing additional protection for a limited group of animals designated by the Legislature.

Because of the presumption against repeals by implication, "the courts are bound to maintain the integrity of both statutes if two may stand together." (*Penziner v. West American Finance Co.* (1937) 10 Cal.2d 160, 176.) Courts have also noted that "implied repeal should not be found unless the later provision gives undebatable evidence of an intent to supersede the earlier." (*Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 420.) Here, there is no such evidence, and none is cited in the Opinion. CESA and the Fully Protected Species Laws may stand together, and indeed have stood together in harmony since each was passed. In fact, the Department has recognized that the statutes work together cohesively when describing the incremental protections for fully protected species above and beyond those that exist under CESA. (AR:233.) The Legislature is presumed to know existing law, and its restraint from amending the Fully Protected Species Laws reveals its intent to ensure that unique protections afforded to fully protected species remain in place. (*In re Greg F.* (2012) 55 Cal.4th 393, 407.)

4. The Project's Mitigation Program Allows for Unlawful Take of a Fully Protected Fish

As a matter of law, the Project's mitigation measures fall within Section 86's definition of take because the Department authorized the capture and relocation of stickleback. The specifics of the mitigation measures are not in dispute. Mitigation measure BIO-44 provides that prior to the construction of stream crossings or diversions of the Santa Clara River, U.S. Fish and Wildlife Service staff or their agents shall relocate special status fish, including stickleback, out of the construction area. (AR:92-93.) Similarly, mitigation measure BIO-46 allows Fish and Wildlife Service personnel or their agents to collect and relocate stickleback stranded by stream diversion or culvert installation. (AR:95.) Collection and relocation of stickleback involves placing blocking nets upstream and downstream of construction, capturing fish trapped between the nets, and placing them into containers for removal to "suitable habitat outside the Project Area." (AR:93; 116547.) If in-stream construction work occurs during high air temperatures, an initial attempt would be made to herd fish downstream from the construction area, but stranded fish would still have to be captured and relocated. (AR:93.)

These measures necessarily require the pursuit, capture, and relocation of stickleback, all activities that are encompassed by Section 86's definition of take. (Fish & Game Code § 86.) Moreover, the record demonstrates that capture and relocation of stickleback may result in mortality. According to biologist Dr. Jonathan Baskin, "... it may be impossible to clear an area of [stickleback] fry without killing large numbers of them, because as soon as you take them out of the water in the net to see if you have them, they die." (AR:9769.) Biologist Dr. Camm Swift noted that "by suddenly placing more fish in such places the crowding may increase competition between the stickleback and overtax the resources available such as space, food, and cover." (AR:116550.) The U.S. Fish and Wildlife Service's 2011 biological opinion, judicially noticed by the trial court, also concluded stickleback would be killed or injured from work in the river and "entrainment in pumps during de-watering and diversions, and as a result of capture for relocation purposes." (AA:838-839.) Together, this evidence demonstrates that the relocation of stickleback to accommodate Project construction will require pursuing, catching, and capturing of individual stickleback, and may result in killing them. Each of these activities is expressly defined as take by Section

86 of the Fish and Game Code. Therefore, the Department's approval of the Project's mitigation program violated the Fully Protected Species Laws' prohibition against take.

If upheld, the Opinion would open a broad loophole in the Fully Protected Species Laws by allowing the capture and relocation of fully protected species to make way for development. This judicially-enacted loophole would weaken the enhanced protection the Legislature has afforded to all fully protected birds, mammals and reptiles, including iconic species like the bald eagle, California condor, and sea otter. (Fish & Game Code §§ 3511(a)(2), 4700(a)(2), 5050(a)(2), 5515.) This Court instead should uphold the protections codified in the plain language of the Fully Protected Species Laws and set aside the Department's approvals in violation of those laws, including its certification of the EIR containing the mitigation measures associated with prohibited take of stickleback.

B. CEQA DOES NOT LIMIT JUDICIAL REVIEW TO ISSUES RAISED DURING A DRAFT EIR'S PUBLIC COMMENT PERIOD

CEQA is a citizen-enforced statute. (See *Concerned Citizens of Costa Mesa v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 936.) Its success depends not only on public participation in

administrative processes, but also on the public's ability to request a judicial remedy when government agencies fail to comply with the law. Nonetheless, to ensure that courts do not waste time on issues that could have been resolved by agencies, the public must inform agencies of any claimed violation of CEQA before any lawsuit is filed to allow them to correct the violation. (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 267.)

Here, the appellate court acknowledged that the lead agency received, reviewed, considered, and responded to comments submitted by Plaintiffs before making its final decision. (Op. at p. 73.) But the appellate court found that the comments were not submitted during a legally-recognized comment period, and thus were not submitted pursuant to a legally-recognized opportunity to provide comments to the lead agency. (Op. at pp. 58-59, 60, 70-71.) Consequently, the court held that Plaintiffs failed to exhaust remedies for issues raised in those comments, and thereby forfeited many of their claims.

There are two possible interpretations of the procedural facts of this case; both require that this Court reverse the appellate court's decision. The interpretation most consistent with the Department's conduct is that Plaintiffs submitted their comments "during the public

comment period" on the Final EIR and thus did not forfeit any CEQA claims. (Pub. Resources Code § 21177(a).) In that case, the appellate court's decision, which held that there was no public comment period on the Final EIR, was plainly incorrect. The appellate court viewed the facts differently, and determined that the Department offered no official comment period on the Final EIR. Even if that view is correct, the appellate court erred in ruling that all issues raised in comments submitted after the 2009 Draft EIR comment period were categorically forfeited, because the exhaustion doctrine does not bar issues raised after the close of the formal public comment period, even where – as here – there is no public hearing on the final project approval.[3]

Under either analysis, the appellate court misapplied the exhaustion statute.

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[3] In the vast majority of CEQA cases, unlike this one, the requirements of the Bagley-Keene Open Meeting Act (Gov. Code § 11120 et seq.) or the Ralph M. Brown Act (Gov. Code § 54950 et seq.) will require a final public hearing before an agency approves a project. In those cases, there is no question that the exhaustion doctrine does not bar litigation based on issues raised as late as that final hearing. Here, there is no statutory requirement for a public hearing for this executive agency's final project approval.

1. Plaintiffs Timely Submitted Their Final EIR Comments During a Noticed Comment Period

Plaintiffs submitted comments during two formal comment periods: one on the Draft EIR and one on the Final EIR.[4] The appellate court held Plaintiffs failed to exhaust, and therefore forfeited, all issues the court determined were raised for the first time in the Final EIR comment period. (Op. at pp. 58-59, 60, 70-71.) The issues included all of Plaintiffs' objections to the EIR's treatment of cultural resources, as well as Plaintiffs' objections to impacts to steelhead, an endangered fish. (*Ibid.*) The appellate court's analysis is incorrect, because the Department offered that second comment period, and issues raised in comments received during this comment period are not barred by the exhaustion doctrine. (*Ibid*; AR:10956-10992 [Petitioners' Draft EIR comment letter].)

The Department, along with the U.S. Army Corps of Engineers ("Corps"), directed a joint state/federal administrative process to approve entitlements for the Project. This process included

[4] The relevant environmental review document was a joint product of the Department, as the CEQA lead agency, and the Army Corps of Engineers, as the federal action agency under the National Environmental Policy Act ("NEPA"), and thus served as both a state EIR under CEQA and an Environmental Impact Statement ("EIS") under NEPA.

environmental review under CEQA, NEPA, and section 404 of the Clean Water Act. The Department circulated the Draft EIR for public comment and held its only public hearing during the Draft EIR comment period, about a year and a half prior to Project approval. (AR:13719.) Plaintiffs submitted comments during that comment period. (*Ibid.*; AR:10956-10992 [Plaintiffs' Draft EIR comment letter].)

Upon completion, the Corps circulated the Final EIS for public review and comment. Coextensively, before it approved the project, the Department affirmatively made the Final EIR available to the public by issuing an official notice publicizing the public review period. (AR:2418; 122299-300.) Plaintiffs timely submitted additional comments within that comment period, which ran from June 18, 2010, to August 3, 2010. (AR:122386-98 [letter from plaintiff Ventura Coastkeeper]; 122797-801 [letter from plaintiff Wishtoyo's executive director], 123134-46 [letter from plaintiff Wishtoyo].) Before it approved the Project, the Department reviewed, considered, and responded to every comment it received, explicitly considering each of the issues that the appellate court later determined were not exhausted. (Op. at p. 73 [noting that after issues were

"raised by [plaintiff Wishtoyo] during the Final EIR comment period, "in response, ... the department and the corps provided additional details"]; Department Opening Appellate Brief at 43; AR:16-19, 123817, 123870 [documentation of Department's review and response to Final EIR comments]; 12079 ["The lead agencies (Corps/CDFG) responded in full to [Wishtoyo's] prior comment letter... The agencies incorporate by reference those responses..."]; 12087 ["[T]he Corps and CDFG incorporate by reference..."].)

The Department considered and responded to Plaintiffs' Final EIR comments, and even substantively modified some of its environmental analysis and mitigation as a result through a Final EIR Addendum. (AR:6693-94 [Addendum to Final EIR]; 10724-26 [Response to comments indicating addition of mitigation measure].) The Addendum incorporated changes – including an entirely new mitigation measure addressing an impact to cultural resources – that were specific to CEQA and irrelevant to NEPA. (Compare AR:17889 [Final EIR mitigation measures] with AR:6693-94 [Addendum to Final EIR including additional mitigation measure].) The Department certified the EIR that specifically incorporated and included the

comments and responses that the Department now contends were not sufficient to put it on notice of the claims. (*Ibid;* AR:1-2.)

Section 21177, subdivision (a), which sets forth CEQA's general exhaustion rule, states that

> [n]o action or proceeding may be brought pursuant to Section 21167 [authorizing court actions challenging agency CEQA compliance] unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project ...

The public comment period referenced in Section 21177, subdivision (a), is not limited to the mandatory minimum comment period on a Draft EIR required by CEQA. (Pub. Resources Code § 21091.) CEQA permits a lead agency to have more than one comment period, including a comment period on a final EIR. (14 Cal. Code Regs. [hereafter "CEQA Guidelines"] § 15089(b).) Plaintiffs submitted timely comments to the Department during just such a comment period: the comment period on the Department's Final EIR.

Despite the fact that it reviewed and responded in writing to what it now alleges to be "untimely" Final EIR public comments, the Department contends that the Final EIR comment period was not an

official comment period on the EIR and that no legal claims can be based on objections raised during that period. (Department Opening Appellate Brief at 41, 42-43; Department Reply Appellate Brief at 28-29.) The appellate court agreed with the Department, even though the court found those very comments to be part of the administrative record. (Op. at pp. 70-71, 73 ("[those] comments constitute part of the administrative record which we review for substantial evidence").)

The appellate court erred in determining that there was no comment period on the Final EIR and the Department was not required to consider concerns raised during that comment period. *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th 1109, is instructive here. Similar to this case, the agency in *Galante Vineyards* offered an optional comment period on the Final EIR and contended that the plaintiff, who participated in the Final EIR comment period, was not entitled to bring its action because it did not participate in the Draft EIR comment period. (*Id.* at pp. 1117-21.) The court there rejected the argument that, for exhaustion purposes, "because the public comment period for the final EIR was optional pursuant to CEQA Guidelines section 15089,

subdivision (b), the [lead agency] was not required to address concerns raised during or after that period." (*Id.* at p. 1118.)

The *Galante Vineyards* court concluded instead that the "public comment period" included any comment period offered by the lead agency, since the lead agency's interpretation would have "render[ed] the phrase 'during the public comment period provided by this division,' which includes optional comment periods, meaningless." (*Id.* at p. 1120.) The court went on to hold that comments offered in the optional comment period satisfied the exhaustion requirement. Here, similarly, the Department's conduct shows that it offered an optional comment period. The Department provided notice of the comment period, and then accepted the comments, considered them part of the record, and even responded to them. Under Section 21177, these comments submitted "during the public comment period" were properly submitted to the agency to satisfy the prerequisite for court review.

2. Even if the Department is Right that There Was Not an Official Comment Period on the Final EIR, Plaintiffs' Claims Were Not Waived

Based on its reading of Public Resources Code Section 21177 and its conclusion that there was no comment period on the Final EIR,

the appellate court incorrectly held that comments after those on the Draft EIR failed to satisfy the exhaustion doctrine. Even assuming for the sake of argument that the appellate court was correct in finding that the Draft EIR comment period was the only official CEQA comment period, CEQA's exhaustion doctrine does not bar claims based on later-filed comments.

The appellate court's holding that Plaintiffs forfeited their CEQA claims serves none of the purposes of the exhaustion doctrine, because it is uncontroverted that the Department knew of, and responded to, all of Plaintiffs' claims. Further, if there was no legally-recognized opportunity for Plaintiffs to present comments after the close of the Draft EIR comment period, Plaintiffs' arguments fall into the exception set forth in Section 21177, subdivision (e), which provides, in relevant part:

> This section does not apply to any alleged grounds for noncompliance with this division for which there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project ...

By incorrectly interpreting CEQA's exhaustion provision to bar all claims raised before the administrative agency after a Draft EIR comment period, the Opinion runs contrary to two fundamental

CEQA policies: ensuring public participation and ensuring that decision makers are fully informed about the environmental consequences of their actions. (*Laurel Heights*, *supra*, 47 Cal.3d at p. 392; *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1229.) Moreover, regardless of whether there was technically a second "comment period," Plaintiffs raised all of their claims either reasonably for the first time in response to the release of the Final EIR, or in the Draft EIR comment period.

a. Precluding Consideration of Comments Submitted on the Final EIR Serves None of the Purposes of the Exhaustion Doctrine, and is Inconsistent with CEQA's Exhaustion Statute

As demonstrated above, Plaintiffs submitted comments directly to the Department within the public review period for the Final EIR, more than three months before the Department's final project approval. The certified EIR upon which the Department based its decision specifically incorporated and included the comments that the Department now contends were not sufficient to put it on notice of Plaintiffs' claims. (Compare AR:17889 [Final EIR mitigation measures] with AR:6693-94 [Addendum to Final EIR including additional mitigation measure]; AR:10724-26 [Response to comments

indicating addition of mitigation measure].) Yet the Department contends, and the appellate court held, that the comments were not submitted during a lawful "comment period" because the only lawful opportunity to comment was during the Draft EIR comment period. In light of the Department's knowledge of the claims arising from the comments on the Final EIR, barring the claims here would fail to serve the purpose of the exhaustion doctrine. And as noted above, if there was no lawful opportunity to present those comments to the agency, barring the claims would violate Section 21177(e).

This Court has explained that the purpose of the exhaustion 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.) 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.*) The doctrine also promotes judicial economy and the application of agency expertise by giving "the agency an opportunity to consider

issues before they get to court." (*Endangered Habitats League v. State Water Resources Control Board* (1997) 63 Cal.App.4th 227, 239) ("*EHL*").)

Where, as here, the agency has actually reviewed and responded to the claims at issue, it serves no meaningful purpose to preclude litigation of those claims under the exhaustion doctrine. Here, the Department had the opportunity to consider all the issues Plaintiffs raised in their comments on the Final EIR, and the Department fully availed itself of that opportunity. The Department accepted and specifically responded to the comments received after circulation of the Final EIR. (AR:16-19; AR:10227, 10723, 12075 ["Responses to Final EIS/EIR Comments"]; AR:12079 ["lead agencies (Corps/DFG) ... incorporate by reference those responses"]; AR:12087 ["lead agencies (Corps/CDFG) do not believe comments are applicable"]; AR:123870, 123817 [Department's acceptance and response to Final EIR comments].) Moreover, it issued a Final EIR Addendum that added material in direct response to those comments. (Compare AR:17889 [Final EIR mitigation measures] with AR:6693-94 [Addendum to Final EIR including additional mitigation measure];

AR:10724-26 [Response to comments indicating addition of mitigation measure].)

The appellate court's holding leaves Plaintiffs without a judicial remedy or forum despite a full record showing the Department *actually considered and responded to* Plaintiffs' arguments and supporting evidence. In short, the Department had, and took, the "opportunity to consider issues before they get to court." (*EHL, supra*, 63 Cal.App.4th at p. 239.) Similar to *Sierra Club v. San Joaquin LAFCO*, "the administrative record has been created, the claims have been sifted, the evidence has been unearthed, and the agency has already applied its expertise and made its decision as to whether relief is appropriate." (*Sierra Club v. San Joaquin LAFCO, supra*, 21 Cal.4th 489 at p. 501.)

Moreover, Section 21177, subdivision (e) provides an exception to the doctrine when there is not an opportunity to provide comments. Significantly, 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.'" (*EHL, supra*, 63 Cal.App.4th at p. 238 [citation omitted].) "We are thus directed to read [section 21177] with reference to a specific common law rule

...." (*Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 590 (citation and quotation omitted).) In other words, section 21177, subdivision (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 p. 238 [quoting 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 314, p. 404].)

Assuming, as the appellate court concluded, that there was no lawful opportunity for public input outside of the Draft EIR comment period, the appellate court's decision is inconsistent with both Section 21177, subdivision (e) and the holding in *EHL*, which rejected the argument that Plaintiffs can waive claims where there is no meaningful opportunity to raise the issues during the environmental review process. (*EHL*, *supra*, 63 Cal.App.4th at 238.) As the *EHL* court recognized, the drafters of CEQA were concerned about the lack of public participation and obstacles to informed agency decisionmaking that would arise from draconian application of exhaustion principles. The Legislature enacted Section 21177, subdivision (e) to codify exceptions to the exhaustion doctrine and to ensure that CEQA claims would not be barred where an agency

provided no procedure, or an inadequate procedure, for accepting comments.

Here, if there was no legally recognized opportunity to comment after the close of the Draft EIR comment period, as the appellate court held (Op. at pp. 58-59, 60, 70-71), "an effective administrative remedy [was] wholly lacking" for any issues that arose during the last year of the administrative process. (*EHL*, *supra*, 63 Cal.App.4th at p. 238.) Plaintiffs would have had no opportunity to participate in the process in a legally-recognized way and to ensure that the Department would consider their objections. The appellate court ignored the exception to the exhaustion doctrine when it barred Plaintiffs from presenting claims in court based on those objections. If the appellate court was correct that there was no legally-recognized opportunity to comment on the Final EIR, Section 21177, subdivision (e) allows Plaintiffs to bring their claims because there was "no public hearing or other opportunity for members of the public to raise … objections" to any grounds for review that may have surfaced after the Draft EIR comment period.

b. Plaintiffs Raised All of Their Claims Either in the Draft EIR Comment Period, or Reasonably for the First Time in Response to the Final EIR

Regardless of how the procedural facts are interpreted, Plaintiffs raised all of their claims either in the Draft EIR comment period, or reasonably for the first time in response to the release of the Final EIR. The claims include Plaintiffs' arguments regarding the Department's failure to conduct an adequate analysis of the Project's impacts on endangered steelhead (Op. at pp. 70-71), as well as the Native American cultural resources claims (Op. at pp. 56–63). The Department responded to all these arguments in its Final EIR. (AR:10227-33, 10723-35, 12075-88.) While the superior court found all these claims meritorious, (AA:1590-92, 1605-1609), the appellate court categorically found them all forfeited.

i. The Impacts to Steelhead Were Raised in the Draft EIR Comment Period

Plaintiffs exhausted administrative remedies as to impacts on steelhead, an endangered species of anadromous fish present downstream from the Project site.

During the Draft EIR comment period, Ventura Coastkeeper ("Coastkeeper") commented that the analysis of impacts to steelhead

was incomplete and inadequate, and that water pollution impacts from copper and other pollutants were among the impacts to steelhead that the Department did not properly analyze. For example, Coastkeeper stated in its Draft EIR comments that "stormwater discharges from the Proposed Project's urban runoff" would cause acute and chronic toxicity impacts to aquatic life, including "endangered species protected under the Federal Endangered Species Act such the Southern California Steelhead." (AR:10958-59 [Comments 8, 9,12,13,14], 10963 [Comment 28].) Coastkeeper requested that the Department evaluate the Project's significant direct, indirect, and cumulative impacts to water quality, and its toxicity impacts to steelhead, from the reach of the Santa Clara River adjacent to the proposed Project site all the way to the estuary. (*Ibid.*)

Coastkeeper also raised specific concerns about the adequacy of the Draft EIR's analysis of water pollution impacts, and requested that the Department provide further information and analysis. (AR:10969 [Comments 47-49].) The Department responded specifically to these comments. (AR: 11148-54 [Response to Comment 47]; AR:11119-21 [Response to Comments 8-9]; AR:11124-26 [Response to Comments 12-14]; see also AR:11160-61 [Response to Comments 8,9,58-59];

AR:11155 [Response to Comment 49]; AR:11134-36 [Response to Comment 28]; AR:11133 [Response to Comment 25].) The Department also provided further and different information and analysis of concentrations of pollutants, including copper – the pollutant that, according to the superior court, the Department did not properly analyze. (AR:11148-54 [Compare AR:27899 [DEIR tables] with AR:11150-51 [Final EIR tables]; compare AR:27901 with AR:11153].) The Department's responses prove that Coastkeeper raised the issue of the Project's impact on steelhead sufficiently for the Department to be aware of its concerns.

While the comments on the Draft EIR raised the inadequacy of the Department's analysis of water pollution impacts on steelhead, Coastkeeper's Final EIR comment letter provided more detailed criticism of the Final EIR's treatment of these impacts. Concerned about the Final EIR's lack of analysis, Coastkeeper submitted additional comments and technical documents focusing specifically on copper's impacts on steelhead, which constituted substantial evidence in support of its argument that the Final EIR unlawfully failed to analyze these impacts (AR:122386-89, 122396-98 [Final EIR Comment Letter]; 122906-915, 122934-35 [NOAA technical

memorandum]). Coastkeeper also requested that the Department conduct a proper analysis (AR:122396-97). Much of Coastkeeper's objection drew on information made available by the Department subsequent to the close of the Draft EIR comment period, and the Department acknowledged as much in its response to Coastkeeper's comments on the Final EIR:

> The pollutant loading data cited in this comment appears to have been obtained from the Final EIS/EIR and Response 47 to the letter from Ventura Coastkeeper, dated August 25, 2009 ... The comment states that the proposed Project would result in an increase in total dissolved copper loading when compared to existing conditions and that the predicted increase could result in adverse impacts to aquatic species such as the Southern California steelhead (steelhead)."

(AR:12075 [see also AR:11148-11154 for record citation to Response 47; AR:27899, 27901 for the difference in data and analysis between Response 47 and the Draft EIR].) The Department went on to respond to Plaintiffs' comments in detail. (AR:12075-12088.)

Accordingly, Plaintiffs did not forfeit objections to the Department's inadequate analysis of the Project's impacts on steelhead. The Department was on notice of this issue – and even considered Plaintiffs' specific objections – long before Plaintiffs

raised the issue in litigation. The exhaustion doctrine's purposes were fully served here.

ii. The Cultural Resources Comments Addressed New Information in the Final EIR

Plaintiffs' comments on impacts to cultural resources were timely and gave the Department ample notice of Plaintiffs' objections. These comments addressed issues that arose in the Final EIR. The Final EIR disclosed new impacts and asserted that already-proposed mitigation measures would sufficiently address them. The Department even stated that the Cultural Resources section of the EIR "has been revised in response to comments received on the Draft EIR (April 2009), and based on additional independent review by the lead agencies ...." (AR:17848.) The Department subsequently responded to the Final EIR comments, rejecting almost all the objections Plaintiffs submitted. (AR:10227-33, 10723-35.) And the Department modified the Final EIR by an Addendum, adding a new cultural resources mitigation measure, specifically focused on meeting a state law requirement that the Final EIR comments called to the Department's attention. (Compare AR:17889 [Final EIR mitigation measures] with AR:6693-94 [Addendum to Final EIR including

additional mitigation measure]; AR:10724-26 [Response to comments indicating addition of mitigation measure].) The appellate court nonetheless categorically rejected all Petitioners' comments on the Final EIR's cultural resources analysis as too late to satisfy CEQA's exhaustion requirement. (Op. at pp. 58-59, 60.)

The Final EIR made new findings of significant impacts to cultural resources, such as Native American burial sites and other sites evidencing historical and cultural presence of Native Americans, based on statutorily-mandated significance criteria. For example, the Final EIR found "Significant impact, but mitigated to less-than-significant level" for three significance criteria, whereas the Draft EIR had characterized the same impacts as "No impact, and no mitigation required." (Compare AR:17891 [Final EIR Summary of Significant Cultural Impacts – Pre- and Post-Mitigation (Revised Table 4.10-9), Alternative 2 column] with AR:30851 [same table and column in Draft EIR].) The Final EIR concludes, contrary to the Draft EIR, that the Project (designated Alternative 2, the "preferred alternative," in the EIR), before mitigation, would "[c]ause a substantial adverse change in the significance of a historical resource as those terms are defined in State CEQA Guidelines section 15064.5" in one project

Planning Area, and "[d]isturb any human remains, including those interred outside formal cemeteries" and "[a]dversely affect a historic property by altering the characteristics that qualify the property for inclusion on the [National Register of Historic Places] in a manner that would diminish the integrity of the property" in all three project Planning Areas. (Compare AR:17891 with AR:30851.)

Moreover, the Final EIR discloses other significant impacts that were not addressed in the Draft EIR. For example, the Department included information regarding the widening of highway SR-126 and related impacts to LAN-2233 – an archeological site in the northern area of the Project that is known to include Native American burial grounds and village remains – for the first time in the Final EIR. (AR:17869-70, 17864.) This disclosure revealed that impacts of the Project could be significant for all five of the mandatory significance criteria with respect to this site, and that it was unlikely that preservation in place of the site, CEQA's preferred mitigation measure for such historic cultural resources, would be feasible. (*Ibid.*; CEQA Guidelines § 15126.4(b)(3).)

The Department's cultural resources analysis changed between the Draft and Final EIRs, disclosing new significant impacts, and the

Department had ample notice of Wishtoyo's objections to the Final EIR's analysis and mitigation measures. In short, the purposes of the exhaustion doctrine were fully satisfied here. The appellate court's holding, in contrast, would improperly eliminate judicial review of Wishtoyo's claim that the EIR's analysis and mitigation measures were inadequate, depriving Wishtoyo of the opportunity to enforce CEQA's requirements with respect to the important Native American cultural resources at stake.

C. THE SIGNIFICANCE OF GREENHOUSE GAS EMISSIONS CANNOT PROPERLY BE DETERMINED BY REFERENCE TO A HYPOTHETICAL HIGHER "BUSINESS AS USUAL" BASELINE

1. The Department Used a Hypothetical and Legally Impossible Version of the Project as Its Sole "Baseline" for Evaluating the Significance of the Project's Climate Impacts

No one disputes that the Newhall Ranch development will increase greenhouse gas ("GHG") emissions more than twentyfold. The area proposed for development is currently used primarily for ranching, agriculture, and oil and gas production. (AR:7674.) The Final EIR estimated current GHG emissions as equivalent to 10,272 metric tons per year of carbon dioxide ("mt/yr"). (*Ibid.*) Emissions

from the proposed Project, however, will total about 269,000 mt/yr. (AR:7702.)

The Department declined to consider this difference between existing and projected GHG emissions in determining the significance of the Project's impacts under CEQA. (AR:7702.) Instead, the Department assessed significance solely by reference to a hypothetical "business as usual" version of the Project that had never been proposed and could not legally be built.

The Department based its hypothetical on a scenario developed by the California Air Resources Board ("CARB") under the Global Warming Solutions Act of 2006, more commonly known as AB 32. (See Health & Saf. Code § 38550 [requiring CARB to "establish a statewide greenhouse gas emissions limit" with the goal of reducing California's greenhouse gas emissions to 1990 levels by 2020].) CARB developed the "2020 No Action Taken" scenario – also known as the "business as usual" scenario – as one measure of the effectiveness of statewide greenhouse gas reduction measures proposed in the AB 32 Scoping Plan. (AR:12379-80; see Health & Saf. Code § 38561(a) [directing Scoping Plan preparation].)

In order to determine whether "the proposed Project's GHG emissions [would] impede compliance with the GHG emission reductions mandated in AB 32" (AR:7672; see also AR:7703), the Department compared "the proposed Project's emissions ... with the emissions that would be expected *if the proposed Project were constructed consistent with the assumptions utilized by CARB in developing the CARB 2020 NAT [No Action Taken] scenario.*" (AR:7672, emphasis added.) The Department concluded that "[i]f the proposed Project's emissions are at least 29 percent below the CARB 2020 NAT scenario, impacts would be less than significant."[5] (AR:7672-73.)

It is critical to note that CARB's 2020 No Action Taken scenario is not a "business as usual" scenario in the usual sense of the phrase; it is not a description of what would otherwise occur under normal conditions. To the contrary, CARB's 2020 No Action Taken scenario *will never occur*. Both CARB's scenario and the Department's hypothetical "business as usual" project baseline are

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[5] The Department also described the hypothetical version of the Project based on the CARB 2020 "No Action Taken" scenario as the "business as usual" or "BAU" scenario. (See AR:26257.) This brief uses the "business as usual" terminology.

founded on three assumptions: that in 2020 "all new electricity generation would be supplied by natural gas plants, no regulatory action would impact vehicle fuel efficiency, and building energy efficiency codes would be held at the 2005 Title 24 standards." (AR:7704, 26257, 26268.) These assumptions, however, are legally impossible. First, as the EIR recognizes, natural gas plants will not supply all new electricity generated in California. (AR:7645, 7683 [discussing mandatory renewable energy standards].) Second, regulations improving California vehicle fuel efficiency took effect in mid-2009 – more than a year before the date of the Final EIR. (AR:7645-47, 7687].) And third, Title 24 building code standards were updated in 2008 to increase the efficiency of both residential and non-residential buildings. (AR:7678, 7682.) The Department thus determined significance solely by reference to a hypothetical version of the Project, based on the counterfactual assumption that California's legal mandates requiring reductions in GHGs do not exist.

The resulting comparison is deeply misleading. The Department calculated emissions from the proposed Project – as opposed to the "business as usual" hypothetical – using factors

reflecting anticipated reductions under each applicable regulatory scheme. (AR:26258-60, 26266 [incorporating renewable energy and vehicle efficiency standards], 26264-66 ["assuming applicability" of 2008 Title 24 building standards].) Newhall further promised to achieve 15 percent greater efficiency than the 2008 Title 24 standards required. (AR:7678.) Adding this commitment to the reductions otherwise mandated by law, the EIR calculated that the Project's estimated emissions would be 31 percent lower than the emissions from the hypothetical version of the Project to which none of these requirements or commitments applied. (AR:7704-05.) Based on this comparison, the Department found the Project's increase in GHG emissions less than significant. (AR:7704.)

Put simply, the Department fabricated an illusory, hypothetical "business as usual" version of the Project that assumed, contrary to both fact and law, that critical regulations requiring GHG reductions would not exist in 2020. The Department then used that hypothetical project as its sole "baseline" in determining that the Project's 260,000-metric-ton annual increase in GHG emissions was consistent with AB 32 and therefore not significant. (*Ibid.*; AR:26255-56, 26273.)

Plaintiffs challenged this conclusion as contrary to CEQA's long-standing prohibition against determining the significance of environmental impacts by reference to a hypothetical project baseline. (AA:346-49.) The trial court agreed, holding that analysis against an existing conditions baseline was necessary to inform decision makers and the public about the Project's effects, and further concluding that the baseline employed in the EIR masked the extent to which the Project would actually impede the goals of AB 32. (AA:1603.) The appellate court, however, agreed with the Department and reversed the trial court, reasoning in part that cases such as *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, authorized the EIR's comparison between the Project and a "business as usual" baseline. (See Op. at p. 108.).

2. CEQA Does Not Permit Significance Determinations Based on Comparisons with "Hypothetical Project" Baselines

Existing physical conditions in the vicinity of a project "normally" serve as the "baseline" for determining the significance of the project's environmental impacts – that is, the set of conditions

against which the scope and severity of the project's effects are compared. (CEQA Guidelines § 15125(a); *CBE*, *supra*, 48 Cal.4th at p. 315.) An accurate baseline thus serves the "fundamental goal" of an EIR: "to inform decision makers and the public of any significant adverse effects." (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 447 ["*Neighbors*"]; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 953 [without an "adequate baseline description ... analysis of impacts, mitigation measures and project alternatives becomes impossible"].)

This Court has acknowledged agency discretion to use projected future *conditions* without the project as a baseline where necessary to provide an accurate and informative analysis. (*Neighbors*, *supra*, at pp. 456-57.) But no decision of this Court – and until recently, no published appellate court decision – has even suggested that determining the significance of a project's environmental impacts by comparison to a hypothetical version of the *project* is permissible under CEQA. Indeed, an unbroken line of cases culminating in this Court's *CBE* decision confirms the contrary.

In *CBE* this Court rejected the contention that a refinery normally operating well below its air pollution permit limits nonetheless could use those higher permitted pollution rates as the baseline for analyzing the effects of a proposed expansion that would substantially increase pollutant emissions. (See *CBE*, *supra*, 48 Cal.4th at pp. 318-19.) The Court reviewed numerous appellate cases holding that project impacts "are ordinarily to be compared to the actual environmental conditions existing at the time of CEQA analysis, rather than to allowable conditions defined by a plan or regulatory framework." (*Id.* at p. 321.) These cases consistently rejected attempts to evaluate the significance of a project's impacts in comparison to those of a hypothetical alternate project that could have been built under applicable planning or zoning laws. (*Id.* at p. 321, fn. 6.) In *Environmental Planning and Information Council v. County of El Dorado*, for example, the appellate court invalidated two "area plan" EIRs that claimed the plans would reduce population density below that anticipated under the overall county general plan – even though both area plans actually "call[ed] for substantial increases in population" compared to existing conditions. (*Environmental Planning and Information Council v. County of El Dorado* (1982) 131

Cal.App.3d 350, 355-58.) The court held the EIRs' reliance on these "illusory decreases" improper as a matter of law. (*Id.* at p. 358.) The appellate court in *City of Carmel-by-the-Sea v. Board of Supervisors* similarly faulted an EIR's conclusion that a zoning change would reduce the density of development in relation to the governing coastal land use plan, where the residential development contemplated in the zoning change would substantially increase on-the-ground impacts. (*City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 246-47.) And in *Woodward Park Homeowners Association v. City of Fresno*, the appellate court invalidated an EIR that had as its "dominant theme" a comparison between a proposed office park/shopping center and a larger "hypothetical project" that could have been built under the city's general plan. (*Woodward Park Homeowners Association v. City of Fresno* (2007) 150 Cal.App.4th 683, 707-11.)

Adopting the principles laid out in these decisions, this Court concluded in *CBE* that the refinery expansion at issue had to be evaluated against a "realistic description of the existing conditions" without the project – in other words, against the facility's actual emissions rather than the maximum amount of pollution it could

legally emit. (*CBE*, *supra*, 48 Cal.4th at p. 322.) Using "hypothetical allowable conditions" as the baseline "provid[ed] an illusory basis for a finding of no significant adverse effect despite an acknowledged increase" in pollution. (*Ibid.*) The Court confirmed that such "illusory" comparisons "'can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts,' a result at direct odds with CEQA's intent." (*Ibid.* [quoting *Environmental Planning & Information Council*, 131 Cal.App.3d at p. 358].)

In *Neighbors*, this Court echoed *CBE*'s "insistence that CEQA analysis employ a realistic baseline that will give the public and decision makers the most accurate picture practically possible of the project's impacts." (*Neighbors*, *supra*, 57 Cal.4th at p. 449.) To that end, this Court carved out a narrow exception to the general rule that existing conditions at the time environmental analysis commences must be used as the baseline. An agency may use *future projected environmental conditions* as the sole baseline where substantial evidence demonstrates a comparison to existing conditions would be misleading or uninformative. (*Id.* at p. 457.)

Nothing in *Neighbors*, however, suggests that determining significance by reference to a version of the *project* that might be built under different, purely hypothetical assumptions – like the maximum permitted emissions baseline held unlawful in *CBE* – could be similarly justified. (See *id.*, *supra*, 57 Cal.4th at p. 449 [noting *CBE*'s "holding that the analysis must measure impacts against actually existing conditions was in contrast to hypothetical permitted conditions"]; see also *CBE*, *supra*, 48 Cal.4th at p. 322 [holding "illusory" comparison with "hypothetical situations" unlawful].) As explained below, the general prohibition against hypothetical baselines underscored in *CBE* applies with even greater force here.

3. The Department's "Business as Usual" Project Baseline Violates CEQA as a Matter of Law

a. The Department's Use of Hypothetical Baseline is Reviewed *De Novo* as a Failure to Proceed in a Manner Required by CEQA

The Department's decision to use a baseline clearly proscribed by CEQA was an error of law that should be reviewed *de novo*. (See *Vineyard Area Citizen*, *supra*, 40 Cal.4th at p. 435 [clarifying that claims of legal or procedural error are reviewed *de novo* under CEQA].) An agency's *factual* determinations – such as "exactly how

the existing physical conditions without the project can most realistically be measured" – are reviewed for substantial evidence. (*CBE, supra*, 48 Cal.4th at p. 328.) Here, however, Petitioners are not challenging the Department's factual conclusions (such as the methodology used to measure existing conditions or the accuracy of the EIR's emissions estimates). Rather, Petitioners are challenging the Department's *legal* determination, in reliance on "a standard inconsistent with CEQA and the CEQA Guidelines" (*id.* at p. 319), that the Project's GHG emissions are not significant – a type of error this Court has found contrary to law and an abuse of discretion. (*Id.* at pp. 326-27; see also *Woodward Park, supra*, 150 Cal.App.4th at p. 691.)

The Court in *Neighbors* did not revisit or qualify its holding in *CBE* that a hypothetical *project* baseline is contrary to CEQA as a matter of law. (See *Neighbors, supra*, 57 Cal.4th at p. 449 [explaining that holding in *CBE* addressed "the use of hypothetical permitted conditions, not projected future conditions"].) *Neighbors* held only that an agency may use projected environmental *conditions* as the sole baseline if substantial evidence supports the agency's factual determination that using existing conditions would be misleading or

uninformative. (See *id.*, *supra*, 57 Cal.4th at p. 457.) The Department made no such determination here, and thus the narrow substantial evidence test announced in *Neighbors* is not applicable. The correct standard of review is *de novo*.

b. The Department's Use of a Hypothetical "Business as Usual" Project Baseline Was Legally Erroneous

Under *CBE* and the cases affirmed therein, the EIR fails as a matter of law. Indeed, the hypothetical baseline advanced by the EIR here deviated even more sharply from CEQA's requirements than anything considered in *CBE* or prior appellate decisions. Those cases rejected EIRs that evaluated project impacts by reference to alternative versions of the project that hypothetically *could* be built under otherwise applicable regulatory or planning standards. Here, the so-called "business as usual" version of the Project used to determine the significance of climate impacts *cannot* be built under any conceivably applicable set of regulatory constraints.

Under this Court's decisions in *Neighbors* and *CBE*, CEQA analysis must "employ a realistic baseline that will give the public and decision makers the most accurate picture practically possible of the project's likely impacts." (*Neighbors*, *supra*, 57 Cal.4th at p. 449

[citing *CBE, supra*, 48 Cal.4th at pp. 322, 325, 328].) Here, in contrast, the Department's own EIR consultant described the "business as usual" scenario as "not realistic" given emissions reductions required under AB 32 and other regulatory mandates. (AR:48085.) And in responses to comments, the Department conceded that its "business as usual" baseline was "not an 'allowable condition.'" (AR:13615.) Moreover, the Department's decision to determine the significance of GHG emissions solely in relation to this hypothetical higher baseline resulted in the misleading suggestion that the Project's 260,000 mt/yr *increase* in emissions would assist in the State's efforts to *reduce* emissions. (See AR:7704 [claiming the Project would reduce emissions below the point required to satisfy AB 32's mandate].) Accordingly, the Department's admittedly *unrealistic* "business as usual" baseline relied on "a standard inconsistent with CEQA and the CEQA Guidelines," was erroneous as a matter of law, and must be set aside. (*CBE, supra*, 48 Cal.4th at p. 319.)

4. Neither CEQA Guidelines Section 15064.4 Nor Appellate Case Law Authorized the Department's Decision

Relying on CEQA Guidelines Section 15064.4, as well as appellate decisions upholding assessment of climate impacts in

relation to the AB 32 Scoping Plan, the appellate court held that the Department had discretion to use a "business as usual" version of the Project as a baseline. (Op. at 108 [citing *Friends of Oroville*, *supra*, 219 Cal.App.4th at p. 841, and *CREED*, *supra*, 197 Cal.App.4th at p. 336].) However, neither Guidelines Section 15064.4, nor *CREED*, nor *Friends of Oroville* confers discretion to employ a fictitious "business as usual" baseline unauthorized by CEQA.

a. Guidelines Section 15064.4 Forbids Use of CARB's "Business as Usual" Scenario as a CEQA Baseline

The "business as usual" scenario developed by CARB as one measure of statewide progress toward AB 32's goals was never intended to serve as a baseline for analysis of individual *project* impacts under CEQA. Granted, Guidelines Section 15064.4, subdivision (b)(3), provides that an agency "should consider ... [t]he extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions." The AB 32 Scoping Plan is arguably such a "statewide plan." In its Final Statement of Reasons explaining Section 15064.4, however, the Resources Agency made clear that assessing GHG impacts by

reference to a baseline derived from the Scoping Plan's "business as usual" scenario would be improper. (AR:12808-09.)

Indeed, in section 15064.4, subdivision (b)(1), the Resources Agency expressly provided that agencies also should consider "[t]he extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting" specifically to

> avoid a comparison of the project against a "business as usual" scenario as defined by ARB in the Scoping Plan. Such an approach would confuse "business as usual" projections used in ARB's Scoping Plan with CEQA's separate requirement of analyzing project effects in comparison to the environmental baseline.

(*Id.*) This Court has looked to an agency's final statement of reasons as evidence of the agency's interpretation of statutory requirements. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 309.) The argument that section 15064.4 authorizes a "business as usual" baseline is directly contrary to the understanding of the agency that drafted it.

The Attorney General's office echoed the Resources Agency's concerns about use of a "business as usual" baseline in comments on a "threshold of significance" proposed by the San Joaquin Valley Air

Pollution Control District. (AR:12772-73 [addressing a proposal to treat projects with emissions 29 percent below those of a hypothetical "business as usual" project as less than significant].) Observing that "[t]he appropriate baseline under CEQA is not a hypothetical future project, but rather existing physical conditions," the Attorney General cautioned that the District's approach could allow project proponents to "'game' the system":

> Under the current proposal, each project will be considered against a hypothetical project that could have been built on the site [under "business as usual" conditions, defined as 2002-2004 conditions]. It is not clear why the project should be compared against a hypothetical project if that hypothetical project could not legally be built today, and the approach would appear to offer an incentive to project proponents to artificially inflate the hypothetical project to show that the proposed project is, by comparison, GHG efficient.

(AR:12774-5.) The Attorney General also noted that a "business as usual" baseline would allow even very large projects – such as "a new development on the scale of a small city [that] emitted hundreds of thousands of tons of GHG each year" – to be found less than significant, even if "other feasible measures might exist to reduce those impacts." (AR:12775.) The Attorney General further observed that using a 29 percent below "business as usual" significance

criterion for new developments could conflict with AB 32; "new development must be more GHG-efficient than [the 29 percent] average, given that past and current sources of emissions, which are substantially less efficient than this average, will continue to exist and emit." (AR:12774.)

Citing these concerns, the trial court correctly concluded in this case that the EIR's baseline would impede rather than advance AB 32's goals. (AA:1603-04.) The appellate court, however, dismissed the Attorney General's concerns largely because the Attorney General "was not evaluating the present environmental impact report" and had not taken a position on it.[6] (See Op. at 110-11.) But the significance threshold criticized by the Attorney General relied on the same improper "business as usual" baseline the Department used here; both approaches determined the significance of a project's GHG emissions by claiming "reductions" as compared to a hypothetical "business as usual" version of the project. Indeed, the Attorney General's concerns about improper comparisons to hypothetical projects that "could not legally be built today" – and the observation that a "small city" with

[6] Notably, the Attorney General is not representing the Department in this litigation.

"hundreds of thousands of tons" of emissions each year could be deemed less than significant against such a hypothetical baseline – appear uncannily prescient in the context of this Project, which would house approximately 60,000 people and increase GHG emissions by nearly 260,000 mt/yr. (See Op. at p. 4 [build-out population]; AR:7702.)

In short, the very agency that drafted CEQA Guidelines Section 15064.4 cautioned that this section should not be interpreted to authorize a "business as usual" baseline for CEQA evaluation. The Attorney General echoed these concerns in a functionally identical context. The Department's contrary conclusion that Section 15064.4 authorized the "business as usual" approach was an abuse of discretion.

b. *CREED* and *Friends of Oroville* Do Not and Cannot Authorize the Department's Use of an Otherwise Impermissible Baseline

The appellate court concluded that *CREED* and *Friends of Oroville* supported the Department's decision to determine the significance of climate impacts by reference to a hypothetical version of the project derived from assumptions in the AB 32 Scoping Plan. (See Op. at p. 106.) Although neither case squarely addresses the

precise question presented here, both contain overbroad language that could be read, contrary to CEQA and all prior precedent, as endorsing a hypothetical "business as usual" project comparison.

In *CREED*, the City of Chula Vista compared the proposed project (the expansion of an existing Target store) to a hypothetical "business as usual" version of the store with higher emissions. (See *CREED*, *supra*, 197 Cal.App.4th at p. 337.) Noting that "implementation of energy saving measures" would reduce emissions by 29 percent compared to the "business as usual" project (and below the *existing* store's emissions), the city found the store's impacts less than significant. (*Ibid.*) The petitioners in *CREED*, however, did not directly challenge the "business as usual" baseline as improper. Rather, they argued the city should have measured impacts against a threshold other than one derived from AB 32. (*Id.* at p. 335.) They also contended the city's choice to use a 20-percent reduction from "business as usual" in determining significance was unsupported, particularly because a 25-percent reduction would be required for consistency with AB 32. (*Id.* at pp. 336-37.) The *CREED* court rejected both arguments, holding that the city had discretion to choose a threshold of significance based on AB 32 and that the project's 29-

percent reduction from "business as usual" rendered the dispute over the exact standard immaterial. (*Id.* at pp. 336, 337.) However, the court did not squarely address whether the "business as usual" comparison relied on an impermissible baseline.

Friends of Oroville similarly upheld a city's discretion to choose an AB 32-based significance threshold in a case challenging an EIR for expansion of a Walmart store. (*Friends of Oroville*, *supra*, 219 Cal.App.4th at pp. 835, 841.) The court in *Friends of Oroville* read *CREED* as endorsing significance determinations based on a comparison between proposed project emissions and those of a hypothetical "business as usual" project. (*Id.* at pp. 841-42.) The EIR challenged in *Friends of Oroville*, however, did not determine significance by reference to such a "business as usual" baseline; rather, the EIR concluded the store's emissions represented only a minuscule fraction of California's overall emissions, rendering the project consistent with AB 32. (*Id.* at p. 841.) The court in *Friends of Oroville* rejected this conclusion as not only resting on a "meaningless … relative comparison" between the project's small impact and the state's economy-wide emissions, but also lacking substantial evidence. (*Id.* at pp. 842-44.) The discussion of *CREED* in *Friends*

of Oroville, however, can be read as suggesting AB 32 consistency would be properly assessed by comparing project emissions to emissions under a hypothetical "business as usual" project baseline.

Neither *CREED* nor *Friends of Oroville* directly interprets CEQA Guidelines Section 15064.4 as conferring discretion to assess significance in relation to an otherwise impermissible, hypothetical "business as usual" project baseline. Nor could they. The discretion afforded under Section 15064.4 must be exercised in accordance with CEQA's fundamental goals, which include providing as accurate a picture as possible of a project's environmental impacts. (See *Neighbors*, *supra*, 57 Cal.4th at pp. 447, 449.) The Resources Agency's warning that Section 15064.4 does not sanction significance determinations based on comparison with a hypothetical "business as usual" baseline is entitled to considerable weight, not only because it represents an agency's interpretation of the agency's own regulation within an area of considerable expertise, but also because it is consistent with this Court's CEQA jurisprudence. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12-14.) Use of a hypothetical "business as usual" project baseline results in an illusory, misleading comparison that interferes with CEQA's

informational goals, even more so than a comparison to hypothetical planning or permit limits. (See *CBE*, *supra*, 48 Cal.4th at pp. 322, 325, 328.) To the extent *CREED* and *Friends of Oroville* hold or suggest otherwise, those cases conflict with CEQA and this Court's precedent and should be disapproved.

5. The Department's Error Was Prejudicial

The Department's decision to use a hypothetical "business as usual" baseline was prejudicial. "An omission in an EIR's significant impacts analysis is deemed prejudicial if it deprived the public and decision makers of substantial relevant information about the project's likely adverse impacts." (*Neighbors*, *supra*, 57 Cal.4th at p. 463; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712 [failure to include relevant information is prejudicial if it "precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process"].) The Department's errors here were not "[i]nsubstantial or merely technical" (*Neighbors*, *supra*, 57 Cal.4th at p. 463), but rather subverted CEQA's core policies of public participation and agency accountability. (*See Laurel Heights*, *supra*, 47 Cal.3d at p. 392.)

In *Neighbors*, this Court concluded that although the agency there failed to support its selection of a future conditions baseline with substantial evidence, the error was not prejudicial because there were no "grounds to suppose the same analysis performed against existing … conditions would have produced any substantially different information." (*Neighbors*, *supra*, 57 Cal.4th at p. 463.) *Neighbors*, however, involved a large-scale public transit project expected to reduce both traffic and air pollution, both at the time it began operating and during the future year used as the baseline for analysis. (See *id.* at pp. 463-64.) An existing conditions analysis thus would have added little to public or official understanding.

Here, in contrast, it is undisputed that the Project would *increase* existing emissions by about 260,000 mt/yr – a twenty-six-fold increase. Yet, the EIR's use of a hypothetical "business as usual" baseline led not only to the conclusion that the Project's increase in emissions was less than significant, but also to the suggestion that the Project would assist in the state's efforts to *reduce* emissions. Moreover, the Project's increase over existing conditions vastly exceeded several of the potential significance standards the Department declined to consider (AR:12224-25, 19911-12, 20014-

15), providing ample "grounds to suppose" that an existing conditions analysis might have resulted in a determination that the Project's emissions were significant and required implementation of feasible mitigation. (Pub. Resources Code, §§ 21002, 21002.1, 21081 [stating that an agency cannot approve a project with significant effects unless it incorporates feasible mitigation measures or alternatives to avoid or lessen those effects].) The EIR thus provided an "illusory basis for a finding of no significant adverse effect despite an acknowledged increase" in emissions. (*CBE*, *supra*, 48 Cal.4th at p. 322.)

Again, this Court and other courts have found that such illusory comparisons are misleading and fail to inform decision-makers and the public as CEQA requires. (*CBE*, *supra*, 48 Cal.4th at pp. 322, 328; *Woodward Park*, *supra*, 150 Cal.App.4th at p. 708; *City of Carmel-by-the-Sea*, *supra*, 183 Cal.App.3d at pp. 246-47; *Environmental Planning & Information Council*, *supra*, 131 Cal.App.3d at p. 358.) This is the very definition of prejudice. (*Neighbors*, *supra*, 57 Cal.4th at p. 463.)

VI. CONCLUSION

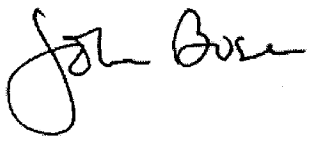
Petitioners respectfully request that this Court correct the Department's and the appellate court's errors of law on each of the

important issues presented here. The Fully Protected Species Laws – undermined to their core by the appellate court's decision – should be restored to achieve the State's objective of recovering species at risk of extinction. The critical ability of the public to review and comment on projects, long recognized by this Court as central to CEQA's purpose, should be upheld. And this Court should ensure that the public and decision makers are not misled by use of imaginary, hypothetical baselines that would undermine the State's efforts to confront the threat of climate change.

Because both the decision of the appellate court and the Department's EIR were deeply flawed and contrary to law, Plaintiffs urge this Court to reverse the appellate court on each of the issues presented and to direct the Department to set aside its approvals and the EIR on which they were based.

Respectfully Submitted,

September 8, 2014 By:



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CERTIFICATION REGARDING WORD COUNT

I certify that the total word count for this brief, including footnotes, is 13,815 words, as determined by the word count of the word processing program on which this brief was prepared.

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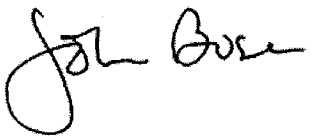

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PROOF OF SERVICE

I, Russell Howze, declare as follows:

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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 September 8, 2014, at San Francisco County, California.

_____
Russell Howze