NO. S217763

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, et al.,
Plaintiffs and Respondents
v.
CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE,
Defendant and Appellant,

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

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

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

As part of an extensive administrative process, the California Department of Fish and Wildlife, formerly the Department of Fish and Game (Fish & G. Code, § 700),[1] undertook a decade-long environmental review of the applications of Newhall Land and Farming for two incidental take permits (Permits) under the California Endangered Species Act (CESA) (§ 2050 et seq.), and for a Master Streambed Alteration Agreement (Streambed Agreement) under section 1600 et seq. The Department's approval followed on the heels of an environmental review process of similar duration undertaken by Los Angeles County to approve the Newhall Ranch Specific Plan. The Department and the United States Army Corps of Engineers (Corps), as co-lead agencies, prepared a joint environmental impact report (EIR) to comply with the California Environmental Quality Act (CEQA) and environmental impact statement (EIS) to comply with the National Environmental Policy Act (NEPA).[2] The Department also developed two related conservation plans with detailed mitigation strategies to avoid and minimize environmental effects expected with buildout of the Specific Plan.

Division Five of the Second Appellate District correctly rejected the three challenges raised by Center for Biological Diversity and the other

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[1] Unless otherwise specified, further section references are to the Fish and Game Code.

[2] CEQA and its implementing guidelines specifically allow and encourage state and federal joint environmental review efforts. (Pub. Resources Code, § 21083.6; Cal. Code Regs., tit. 14, § 15222.) For purposes of this brief, the Department will refer to the EIR/EIS collectively when speaking of the joint efforts. As to its actions specifically and the adequacy of the analysis under CEQA, the Department will refer to the EIR. Similarly for the Corps under NEPA, the Department will refer to the EIS.

petitioners (collectively, CBD) that are now before this Court on review and briefly described below.

1) The Department's and Corps' mitigation measures are not permits or licenses authorizing "take" of the unarmored threespine stickleback, a California native fish designated as "fully protected" and "endangered" under state law.

In contrast to CBD's misguided reading of the "take" language in sections 86 and 5515, the Department's common sense interpretation of these statutes is based on fundamental canons of statutory construction. Words of a statute should be given their ordinary and usual meaning, construed in their statutory context and harmonized to the extent possible with other statutes relating to the same subjects, keeping in mind the apparent purpose of the statute. The words should be interpreted to make them workable and reasonable, in accord with common sense and justice, and to avoid an absurd result. (*Tuolumne Jobs & Small Business Alliance v. Superior Court of Tuolumne County* (2014) 59 Cal.4th 1029, 1037 (*Tuolumne Jobs*); *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239 (*Halbert's Lumber*).)

The following example illustrates why CBD's interpretation of the meaning of "take" is wrong. California is in the midst of an historic drought that is depleting lakes, rivers, and streams, and threatening the survival of fish. Under CBD's interpretation of "take," however, any effort to move stranded stickleback would be prohibited, including efforts to move stickleback out of harm's way as part of a Department and Corps fish protection effort in the permitting context. Such an interpretation is not only absurd, it is inconsistent with the obvious purpose of the Fish and Game Code to (1) conserve, protect, restore, and enhance California fish and

wildlife; (2) prohibit the issuance of permits or licenses to take fully protected fish; and (3) allow conservation efforts that include trapping and transplantation when necessary to protect any endangered species.

The Department is the presumptive expert agency regarding fish and wildlife in the State of California, and the designated trustee for those resources. In that capacity, its interpretation of the fully protected species law and CESA must be given considerable deference. So it is here, where this Court should give deference to the Department's interpretation that mitigation measures to protect stickleback are consistent with the conservation purpose of the statutory scheme and do not authorize "take" of stickleback.

2) CBD did not exhaust its administrative remedies regarding its untimely claim of impacts to cultural resources and juvenile steelhead.

CBD had ample opportunity during the administrative proceedings to raise the claims it presents for judicial review. Indeed, there was a 120-day public comment period, well in excess of the typical 45-day CEQA comment period. Yet, the claims presented by CBD in this lawsuit were not raised until long after the public comment period ended and the public hearing on the project closed. Thus, the Department had no obligation to respond to those claims. The fact that, in accordance with *federal* procedure, Newhall prepared responses to those claims that were received by the Corps during a public comment period required under NEPA alone for the Final EIS, and that the Department reviewed those claims and related responses, did not extend the comment period for *state CEQA review*. Thus, CBD forfeited its belated allegations for purposes of CEQA and those claims are not justiciable under CEQA. To conclude otherwise not only would be inconsistent with the exhaustion of administrative remedies doctrine, it would invite delay and abuse of the CEQA process.

Moreover, CBD's interpretation is inconsistent with the ordinary plain meaning of the words of the statute. (*Tuolumne Jobs*, *supra*, 59 Cal.4th at p. 1037.)

In any event, CBD fails to address the Court of Appeal's alternative holdings that the claims fail on the merits. This omission by CBD is a fatal flaw that precludes it from prevailing on this issue – a flaw that cannot be rectified in a reply brief. (*People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1237 (*JTH Tax*); *Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1292, fn. 6 (*Habitat and Watershed Caretakers*).)

3) As a state agency, the Department sought and properly relied on guidance from the California Air Resources Board, the State's presumptive expert on air quality and climate change, to define the methodology for the EIR's climate change analysis, and evaluated the project's projected greenhouse gas emissions impacts by quantifying existing emissions on the site and quantifying the emissions expected to result from the project. The Department then properly exercised its judgment and made a determination that those emissions, after mitigation, were not significant. In any event, CBD has failed to demonstrate that the methodology resulted in any prejudice.

Accordingly, the Department asks that the judgment of the Court of Appeal be affirmed in all respects.

BACKGROUND

The Court of Appeal's opinion provides a comprehensive and accurate discussion of the facts of the case. (Slip Opn. 3-14.) The following additional facts are relevant to the Department's issues.

I. THE COUNTY ADOPTS THE NEWHALL RANCH SPECIFIC PLAN.

In 2003, Los Angeles County adopted the Newhall Ranch Specific Plan and certified its own environmental impact report prepared for that purpose. (AR:82179-83121.) The Specific Plan area encompasses approximately 11,999 acres located within the Santa Clarita Valley and constitutes the County's plan to develop a new community composed of residential, mixed-use, and non-residential uses within interrelated villages. (AR:9-10, 225, 1103, 2392, 2401-2402, 2459, 2658, 82267-82570.) Development will occur over approximately 20 years through subsequent County permitting and project-level environmental review. (AR:2401-2402, 2459, 2465, 82267-82570.)

II. THE DEPARTMENT'S ROLE AS LEAD AGENCY.

In previously certified CEQA documents, the County analyzed the significant environmental effects associated with the Specific Plan and Valencia Commerce Center, an approximately 321-acre area adjacent to the Specific Plan area, and conditioned its approval of the Specific Plan on hundreds of mitigation measures designed to avoid or substantially lessen significant effects. (AR:2398-2401, 2403-2405, 2418-2420, 2491, 64895-65017.) Although the Department would ordinarily rely on the County's prior lead agency CEQA analysis in issuing its regulatory approvals (Pub. Resources Code, §§ 21069, 21104; Guidelines, §§ 15096, 15381; AR:20-21, 266-267, 48453-48454), [3] the Department determined in this case that potentially significant impacts required an additional "hard look" that could best be accomplished through further Department lead agency review.

[3] References to the "Guidelines" are to the CEQA Guidelines found in Title 14 of the California Code of Regulations, commencing with section 15000.

(AR:48453-48454; Pub. Resources Code, §§ 21002.1, subd. (d), 21166; Guidelines, §§ 15052, 15096, subd. (e).)

III. THE DEPARTMENT'S ENVIRONMENTAL REVIEW.

The Department's decade-long environmental review of the project began with a scoping process in February 2000, and culminated with certification of the EIR on December 3, 2010. (AR:9, 15-19, 224, 2416, 33971-33973.) During that time, the Department held three scoping meetings, provided a 120-day comment period on the Draft EIR, and held a public hearing during the comment period. (AR:15, 2417, 13719, 119099-119100.)[4]

At the end of the CEQA process, the Department, exercising its independent judgment, identified all of the significant environmental impacts expected with project approval, absent mitigation, and all feasible mitigation measures that could avoid or substantially lessen those impacts. (AR:17, 25-26, 3-220.) In so doing, the Department determined that all impacts to biological resources were reduced to less than significant. The Department also adopted a Statement of Overriding Considerations, determining that the benefits expected with approval of the Permits and Streambed Agreement consistent with its regulatory authority outweighed the significant unavoidable impacts to non-biological resources identified in the EIR. (AR:216-220, 556-589, 2000-2001.)

[4] Although the Department's and Corps' public comment period on the Draft EIR/EIS ended on August 25, 2009, the Corps was required under federal law to accept comments on its Final EIS during a public review period that began on June 18, 2010, and ended on August 3, 2010. (AR:8, 16.)

STANDARD OF REVIEW

In determining whether the Department properly exercised discretion under the Fish and Game Code and CEQA, this Court reviews the record de novo. (*Environmental Protection Information Center v. Cal. Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 479 (*EPIC*); *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162; *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427.)

ARGUMENT

I. THE DEPARTMENT DID NOT VIOLATE FISH AND GAME CODE SECTION 5515, A STATUTE PROTECTING THE UNARMORED THREESPINE STICKLEBACK, WHEN IT ISSUED THE PERMITS AND STREAMBED AGREEMENT FOR THE NEWHALL RANCH PROJECT.

The Court of Appeal held that mitigation measures BIO-44 and BIO-46 are not "take" under section 86 and section 5515 of the Fish and Game Code. (Slip Opn. 48.) CBD nonetheless contends the Department violated the take prohibition in section 5515. (OBOM 10, 25.) CBD is mistaken.[5]

The Department did not violate section 5515 when it issued the Permits and entered into the Streambed Agreement for Newhall Ranch in

[5] In response to CBD's Opening Brief, the Department and Newhall have elected to divide the labor as to the three issues before this Court. As the lead agency, the Department will focus on the one biology-related issue within its jurisdiction, stickleback, and respond in depth to the CEQA public review and comment process, including the Court of Appeal's correct application of the exhaustion of administrative remedies doctrine. Newhall, in turn, will devote its briefing to the non-biology issue, greenhouse gas impacts, and supplement the Department's stickleback and exhaustion doctrine analyses.

December 2010. Section 5515 prohibits two things: (1) take and possession of fully protected stickleback, and (2) the issuance of any permit or license authorizing take of the species. No actual take or possession of stickleback has occurred as a result of the Department's issuance of the Permits and Streambed Agreement.

Neither did the Department issue any "permit" or "license" authorizing take of stickleback. In fact, the Permits and the Streambed Agreement expressly *prohibit* take, and mitigation measures under which the U.S. Fish and Wildlife Service can relocate stickleback out of harm's way during project construction are not a prohibited "take" authorization under the plain meaning, common sense interpretation of the term. The Department's interpretation of sections 86 and 5515 is entitled to considerable deference, a fact CBD never acknowledges. (*Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1042 (*ECOS*); *Association of Irritated Residents v. State Air Resources Board* (2012) 206 Cal.App.4th 1487, 1495 (*AIR*).) Moreover, substantial evidence supports the Department's conclusion that the project and its mitigation measures can be implemented consistent with the Fish and Game Code.

A. Background.

This case involves the interpretation of key provisions of the Fish and Game Code that protect the stickleback and other special status species, as they apply to the Department's mitigation measures – section 86, which defines "take" for purposes of the Fish and Game Code, section 5515, which designates stickleback as "fully protected" under state law, and CESA generally, including the definition of "conservation" set forth in section 2061.

1. The stickleback.

The stickleback, a small, freshwater fish, native to Southern California, is "fully protected" under California law. (Slip Opn. 16; § 5515, subd. (b)(9).) By reason of that designation, take and possession of stickleback are prohibited, and no permit or license may be issued or construed to authorize take, except in specified circumstances not applicable here.[6] (Slip Opn. 46; § 5515, subd. (a)(1).) Consequently, the Permits and the Streambed Agreement issued by the Department expressly prohibit take of any fully protected species, including stickleback. (Slip Opn. 25.)

The stickleback is one of a few fully protected species that is also designated or "listed" (in common terminology) under CESA as an "endangered species." (§ 2062; Cal. Code Regs., tit. 14, § 670.5, subd. (a)(2)(L).) Under CESA, take of listed species is generally prohibited, although take authorizations are more broadly available pursuant to the Fish and Game Code than the more narrow circumstances for fully protected species. (See, e.g., §§ 2080, 2081, subds. (a), (b).)

For a species subject to the take prohibitions in both sections 2080 and 5515, the permitting authority otherwise available for an endangered species is limited because the species is also fully protected under state law.

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[6] Although stickleback are "fully protected," the Legislature has authorized the take or possession of stickleback under the following circumstances, none of which is at issue here: for necessary scientific research (§ 5515, subd. (a)(1)); as part of a specified settlement agreement relating to water issues in the southern portion of the state (§§ 2081.7, subd. (a), 5515, subd. (a)(1)); and pursuant to the Natural Community Conservation Planning Act (§§ 2821, subd. (a), 5515, subd. (a)(1)). (Slip Opn. 46.)

(§ 5515, subd. (a)(1).)[7] However, as a CESA-listed and fully protected species, the stickleback is still entitled to the full range of conservation and recovery strategies available to the Department to implement CESA. In other words, the stickleback's status as "fully protected" does not render the fish ineligible for the conservation measures it might otherwise receive as a CESA-listed "endangered species." (*Tuolumne Jobs*, *supra*, 59 Cal.4th at p. 1037 ["statutes must be harmonized, both internally and with each other, to the extent possible"].)

Although CBD makes passing reference to the fact that stickleback is both fully protected and endangered under state law, it does not acknowledge that the two statutes can be harmonized to conserve and protect stickleback. (OBOM 9, 16 [without acknowledgment that stickleback is also protected under CESA, CBD claims that the 1984 amendments to CESA, including the definition of "conservation," "apply only to CESA" and argues that CESA did not "amend or limit the *separate* protections afforded to fully protected species"] (emphasis in original), 18 [ignoring the status of stickleback as both endangered and fully protected, CBD argues the Court of Appeal "nullified subsection (a)(2) of the Fully Protected Species Law"].)

2. The governing statutes.

In 1933, the Legislature adopted section 86 to define "take" as "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill." In 1970, the Legislature adopted section 5515 to identify and protect certain fish not otherwise specifically protected under state law. Under

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[7] By contrast, the status of stickleback as fully protected under California law does not affect federal wildlife agency permitting authority for the species under the federal Endangered Species Act. (*Center for Biological Diversity v. U.S. Fish & Wildlife Service* (9th Cir. 2006) 450 F.3d 930, 941-943.)

section 5515, "fully protected fish or parts thereof may not be taken or possessed at any time" except under permits authorizing take for necessary scientific research, and two other circumstances. (§ 5515, subd. (a)(1).) Also in 1970, the Legislature enacted former sections 900 through 903, requiring the Department to establish criteria to list endangered or rare species under state law. In so doing, for the first time, the Fish and Game Code prohibited the "take" of state endangered and rare species. These provisions predated the 1973 enactment of the federal Endangered Species Act and were precursors to CESA.

In 1984, the Legislature repealed sections 900 through 903, and enacted the statutes now known as CESA, which spell out the State's comprehensive policy "to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat . . . ." (§ 2052.) CESA provides that "conserving a species has as its goal the use of methods and procedures which are necessary to make a species no longer in need of the protections of the endangered species act." (Slip Opn. 36.) Among the legislatively sanctioned conservation measures is live trapping and transplantation. (§ 2061.)[8]

As explained above, the Legislature included the verbs "pursue," "catch," and "capture" in the definition of "take" half a century before the Legislature defined conservation to include live trapping and transplantation. (Compare former § 2, subd (e), as amended by Stats 1937 ch. 455, § 1, p. 1399 [demonstrating that "take" was originally defined in

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[8] As part of the 1984 enactment of CESA, the Legislature considered but ultimately did not enact amendments that would have broadened the definition of "take" in section 86 to incorporate the more expansive federal definition of take. (Compare Stat. 1984, ch. 1240, § 2066, p. 5; Legis. Counsel's Dig., AB 3309 (1983-1984 Reg. Sess.), April 23, 1984, p. 5, with AB 3309 (1983-1984 Reg. Sess.), August 6, p. 5 [proposed amendment adding section 2066 deleted].)

1937 to mean "hunt, pursue, catch, capture, or kill"] with § 2061 [enacted in 1984 and defining "conservation" to include "live trapping" and "transplantation" as categories separate from a "take".) In enacting section 2061, the Legislature distinguished actions constituting "take" from actions constituting conservation for endangered and threatened species, and species also designated as fully protected under state law.

3. The mitigation measures.

Mitigation measures BIO-43, 44, 45, and 46 contain provisions to minimize and avoid impacts to stickleback, under which the U.S. Fish and Wildlife Service may relocate stickleback pursuant to specific scientifically formulated methods if individual fish become stranded due to construction-related activities. These measures, developed jointly by the Department and the U.S. Army Corps of Engineers with input from the U.S. Fish and Wildlife Service, are part of the Department-approved Resource Management Development Plan's broader conservation strategy to protect fish and other biological resources during project-related construction activities. (AR:4267, 4268, 4271, 13647-13651.)

As explained by the Court of Appeal, mitigation measure BIO-43 requires pre-construction surveys by a qualified biologist for any construction activity within 300 feet of Santa Clara River habitat to assure that stickleback are avoided or excluded. If there is evidence that juvenile fish are present, then construction may occur only when these fish are no longer present. (Slip Opn. 18.)

Mitigation measure BIO-44 requires development of a "fish diversion" plan before construction of any temporary or permanent river crossings. (Slip Opn. 19.) The plan must include a detailed description of timing and methods for avoiding impacts to fish. This measure also requires

that river crossings be constructed outside of the winter season and not during spring periods when fish are likely to be spawning. (Slip Opn. 19-20.)

Mitigation measure BIO-45 defines the timing and design of stream diversion bypass channels and dewatering activities and ensures proper construction, operation, and abandonment of the diversion or dewatering systems. (Slip Opn. 20-21.)

Mitigation measure BIO-46 requires that, during stream diversion or culvert installation, a qualified biologist must be present to inspect for stranded fish. (AR:303.) Mitigation measures BIO-44 and BIO-46 specify that a staff member or agent of the U.S. Fish and Wildlife Service – not Newhall – must perform the task of relocating any stranded stickleback. (Slip Opn. 21-22.)

B. CBD's Fish and Game Code claim should be reviewed with considerable deference to the Department.

The only issue is whether the Department prejudicially abused its discretion. (*EPIC, supra,* 44 Cal.4th at p. 516; *Cal. Oak Foundation v. Regents of Univ. of Cal.* (2010) 188 Cal.App.4th 227, 247 (*Oak Foundation*).) Under this deferential standard – completely ignored by CBD in its Opening Brief on the Merits – CBD must show that the Department did not proceed in the manner required by law, that its decisions are not supported by the findings, or that its findings are not supported by substantial evidence. (*EPIC, supra,* 44 Cal.4th at p. 478; *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236.) As the Court of Appeal correctly determined, the Department did *not* abuse its discretion – and the trial court's findings to the contrary are not supported by the record. (*ECOS, supra,* 142 Cal.App.4th at pp. 1027-1028.)

Because the Department is statutorily charged with administering and enforcing the Fish and Game Code and related regulations, this Court should "look to the statutes protecting wildlife to determine if [the Department] has breached its duties" to protect wildlife under the Fish and Game Code. (*EPIC*, *supra*, 44 Cal.4th at p. 515.) Reviewing courts "will be deferential to government agency interpretations" of statutes the agency is charged with implementing, "particularly when the interpretation involves matters within the agency's expertise and does not plainly conflict with a statutory mandate." (*Id.* at p. 490; see also *Yamaha Corp of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12-13 (*Yamaha*); *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 417-419; *AIR, supra,* 206 Cal.App.4th at p. 1495; *Hardesty v. Sacramento Metropolitan Air Quality Management Dist.* (2011) 202 Cal.App.4th 404, 418, 422.) Indeed, case law strongly supports deferring to agency interpretation of statutes, particularly where the agency has expertise and technical knowledge, and "the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion." (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corporation* (2013) 221 Cal.App.4th 867, 880; *Holland v. Assessment Appeals Bd. No. 1* (2014) 58 Cal.4th 482, 494; *City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170; *Riddell v. California Coastal Commission* (2009) 180 Cal.App.4th 956, 968.)

The Department has "jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species," and has the "biological expertise to review and comment upon environmental documents and impacts arising from project activities" pursuant to CEQA.

(§ 1802.) Likewise, fish and wildlife are held in trust for the people of California by and through the Department. (§ 711.7, subd. (a); Guidelines, § 15386, subd. (a).) Accordingly, as the Court of Appeal recognized, the Department should be understood to have "a high degree of expertise in those areas and the body of law that governs them." (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 572; *Sonoma County Water Coalition v. Sonoma County Water Agency* (2010) 189 Cal.App.4th 33, 62 (*SCWC*) [appropriate deference must be given to an agency's "authority and presumed expertise"]; Slip Opn. 15.)

The Court of Appeal recognized that the trial court did not "have the power to judge the intrinsic value of the evidence or to weigh it" and that the trial court's decision was therefore wrong. (*Oak Foundation, supra,* 188 Cal.App.4th at p. 247; *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515; *SCWC, supra,* 189 Cal.App.4th at p. 35.) The Court of Appeal correctly deferred to the Department's expertise, as should this Court. (*Yamaha, supra,* 19 Cal.4th at pp. 7-8, 12-13.)

C. Measures under which the U.S. Fish and Wildlife Service may "collect" and "relocate" stickleback out of harm's way promote conservation and do not authorize take.

CBD contends that two of the Department's mitigation measures – BIO-44 and BIO-46 – violate section 5515 because of the possibility that, if necessary to avoid harm, the U.S. Fish and Wildlife Service could collect and relocate stickleback that may be stranded in construction zones. According to CBD, these measures are tantamount to prohibited "pursuit"

and "capture" under section 86, and therefore constitute "take" in violation of section 5515. (OBOM 10, 25.) CBD is wrong.[9]

To determine whether the mitigation strategy approved by the Department constitutes prohibited "take," this Court's "primary task . . . is to determine the Legislature's intent, giving effect to the law's purpose." (*Tuolumne Jobs, supra,* 59 Cal.4th at p. 1037.) Under relevant canons of statutory construction, courts must "consider first the words of a statute, as the most reliable indicator of legislative intent." (*Ibid.*; *EPIC, supra,* 44 Cal.4th at pp. 459, 490; *People v. Yartz* (2005) 37 Cal.4th 529, 538; *Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818; *People v. Braxton* (2004) 34 Cal.4th 798, 810; *People v. Garcia* (2002) 28 Cal.4th 1166, 1172.) Here, the words of the statutes "must be construed in context" with the Fish and Game Code, and the relevant statutes "must be harmonized, both internally and with each other, to the extent possible. (*Ibid.*; *People v. Loeun* (1997) 17 Cal.4th 1, 9.) "Interpretations that lead to absurd results or render words surplusage are to be avoided." (*People v. Garcia, supra,* 28 Cal.4th at p. 1172; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387; *Halbert's Lumber, supra,* 6 Cal.App.4th at p. 1239.)

Interpreting the purpose and meaning of subdivision (a)(1) of section 5515, the Department concluded the words "taken or possessed" do not encompass efforts by the U.S. Fish and Wildlife Service to move stranded stickleback to nearby suitable habitat. The Department's interpretation is both consistent with the plain meaning of the words, *and* reasonable given the context in which those words are used. Moreover, the Department's interpretation successfully harmonizes the applicable Fish and Game Code

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[9] CBD did not raise the claim that the mitigation measures result in "pursuit" in its briefing before the trial court or the Court of Appeal. It raised this claim for the first time before this Court. (PFR, 47.)

provisions to give full effect to the Legislature's intent and to all words.[10] CBD's interpretation, by contrast, results in surplusage because the conservation measures authorized under section 2061 would not be available to species designated as both fully protected and endangered. (OBOM 21-24; *Tuolumne Jobs*, *supra*, 59 Cal.4th at p. 1037.) This is why the Court of Appeal upheld the Department's interpretation. (Slip Opn. 48.)

1. The plain meaning of "pursue," "catch," and "capture" in the definition of "take" shows they are not analogous to the Service relocation measures.

Ignoring the fact that courts must apply the ordinary plain meaning of the relevant text (*Watershed Enforcers v. Dept. of Water Resources* (2010) 185 Cal.App.4th 969, 979 (*Watershed Enforcers)*; *Tuolumne Jobs*, *supra*, 59 Cal.4th at p. 1037 ["We consider first the words of a statute, as the most reliable indicator of legislative intent"]), CBD's interpretation of "take" is not based on the plain meaning of that term. Section 86 defines "take" as "to hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill." Sections 2000 through 2021.5 (found in Division 3, Chapter 1 of the Fish and Game Code, under the heading "Taking and Possessing in General") identify "take" in the context of killing or attempting to kill an animal, or by capturing and then possessing an animal by removing it from its ordinary habitat.

Activities commonly understood as "take" are those that adversely affect fish and wildlife – not, as CBD contends, activities intended to move fish and wildlife out of harm's way. Not only does CBD's uncommon interpretation of "take" fail to advance the purpose of the overall statutory

[10] The Department's interpretation is supported by that fact that, in enacting CESA in 1984, the Legislature considered but did not enact a proposal to amend section 86 to incorporate the more expansive federal definition of take, as discussed in Section I.A.2, fn. 8, *infra*.

scheme, it leads to absurd consequences. CBD construes "take" to mean not just killing a species, removing a species from its normal environment, or otherwise causing an adverse effect, but reads it to mean any activity where a species is physically handled, even for purposes of conservation. CBD would make it unlawful to move a stranded stickleback, as pointed out in the Introduction, *supra*, and would defeat the purpose of the statutory scheme to conserve fully protected and CESA listed species, and California's fish and wildlife resources generally. (§§ 1801, 2052, 2055.)

For the same reason, the U.S Fish and Wildlife Service moving stranded stickleback out of harm's way to nearby natural habitat does not fall within the ordinary, common sense understanding of the words "pursuit," "catch," and "capture" as those words are used in the section 86 definition of "take."

- "Pursue" means to follow in order to overtake, capture, kill, etc.; chase. (http://dictionary.reference.com/browse/pursue (accessed October 6, 2014).)

- "Catch" means to seize or capture, especially after pursuit; to trap or ensnare. (http://dictionary.reference.com/browse/catch?s=t (accessed October 6, 2014).)

- "Capture" means to take by force or stratagem; take prisoner; seize. (http://dictionary.reference.com/browse/capture?s=t (accessed October 6, 2014).)

- By contrast, "conservation" means prevention of injury, decay, waste, or loss; preservation. (http://dictionary.reference.com/browse/conservation?s=t (accessed October 6, 2014).)

- "Relocate" simply means to move to another location. (http://dictionary.reference.com/browse/relocate?s=t (accessed October 6, 2014).)

Based on the plain meaning of these terms, the relocation contemplated in mitigation measures BIO-44 and BIO-46 is not "pursuit," "catch," or "capture," i.e., to kill or hold as a prisoner. Indeed, for purposes of routinely performed identification, stickleback must be physically picked up and examined to determine whether the individual fish is a member of the species. (AR:116550 [describing the protocol for identifying stickleback, noting that "handling is required" and that the fish must be "firmly but carefully held against the scale" to measure before being released].) Such activities do not constitute "pursuit," "catch," or "capture" under the section 86 definition of take, and CBD makes no effort to explain why holding and measuring stickleback is not prohibited take, but the U.S. Fish and Wildlife Service moving an individual fish out of harm's way constitutes take. No reasonable explanation exists.

2. The Department properly concluded that, considered in context, the relocation measures do not constitute prohibited "take."

Context informs any interpretation of the definition of "take" as directed by the Fish and Game Code. In the context of mitigation measures intended to prevent harm to stickleback, "relocation" cannot be interpreted as the equivalent of prohibited "catch" or "capture" under section 86. (§ 2; *ECOS*, *supra*, 142 Cal.App.4th at p. 1039 [recognizing that context must be considered by the Department in issuing take permits][11]; *Watershed Enforcers*, *supra*, 185 Cal.App.4th at pp. 978-79; *Tuolumne Jobs*, *supra*, 59 Cal.4th at p. 1037 [to determine the Legislature's intent, giving effect to the law's purpose, words must be construed in context].)

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[11] The Department cites *ECOS* to support its argument that context must inform its interpretation of "take" and not (as the Court of Appeal suggests mistakenly) for the proposition that "take" under section 86 is limited to mortality. (Slip Opn. 40-43.)

The overall purpose of the Fish and Game Code is to encourage the preservation, conservation, and maintenance of wildlife resources under the jurisdiction and influence of the state. (§§ 1801, 2052, 2055.) It provides the basis for the Department's regulatory authority, jurisdiction, and trustee mandate. (§ 711.7, subd. (a), 1802.) The Fish and Game Code directs the Department to create, foster, and actively participate in science-based partnerships with other agencies and stakeholders, including the federal government. (§§ 703.3, 703.5.) Recognizing population growth, development changes in historic land uses, and continued declines in the state's fish and wildlife resources, the Legislature has acknowledged that a significant portion of the Department's activities should be directed to protecting those resources for the benefit of the people of the state. (§ 710.7, subd. (a)(3).)

Consistent with this purpose, mitigation measures BIO-44 and BIO-46 include the prospect of the U.S. Fish and Wildlife Service collecting and relocating fish pursuant to specific scientifically formulated methods, and pursuant to a diversion plan approved by the Department, if and when stickleback become stranded during construction-related activities; these measures do not constitute prohibited "pursuit" or "capture" as those term appear in the state definition of "take." (§ 86.) They are "conservation" methods under section 2061, which include "live trapping" and "transplantation." (§ 2061.)

Section 2061 was added as part of the 1984 enactment of CESA and is a more specific definition than "pursue," "catch," or "capture" adopted 50 years earlier. (*Tuolumne Jobs*, *supra*, 59 Cal.4th at p. 1039 [later enacted, more specific statute should be read to harmonize with an earlier enacted, less specific statute to avoid repeal by implication].) Under section 2061, conservation means "to use, and the use of, all methods and

procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." The methods and procedures contemplated by section 2061 include, but are specifically not limited to:

> all activities associated with scientific resources management, such as research, census, law enforcement, habitat acquisition, restoration and maintenance, propagation, *live trapping*, and *transplantation*, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking. (§ 2061, italics added.)

The language of section 2061 authorizes all available conservation measures; the listed conservation methods are for illustration only and are not exclusive. And the term "taking" modifies only one of the conservation examples (allowing regulatory taking to reduce population pressure, which is not at issue here). Two of the examples, live trapping and transplantation, are essentially the same as the collect and relocate activities authorized under BIO-44 and BIO-46.

Because stickleback is designated as both a fully protected and an endangered species under state law, and thus subject to both statutes to the extent they are not in conflict, mitigation measures contemplating the relocation of stranded fish, if necessary to keep them out of harm's way, must be viewed through the lens of CESA's conservation mandate. (AR:4248; Cal. Code Regs., tit. 14, § 670.5, subd. (a)(2)(L) (1971).) The allowable conservation techniques described in section 2061 are analogous to the relocation techniques included in the Department's mitigation measures, developed in coordination with various federal agencies, including the U.S. Fish and Wildlife Service, as part of a detailed conservation plan to protect individual stickleback during project

construction activities. When viewed in this context, they are not "take" as defined by section 86.

3. The take prohibition in section 5515 must be harmonized with the conservation benefits available under CESA.

CBD contends the Court of Appeal held that "CESA was intended to supersede the Fully Protected Species Laws' prohibition against take as part of a CEQA mitigation program" resulting in unwarranted repeal by implication. (OBOM 11, 21-24.) The Court of Appeal made no such finding and no repeal by implication occurred. The Court of Appeal did not effectuate an amendment to or repeal of any provisions of the Fish and Game Code; it simply harmonized sections 86, 2061, and 5515.

CBD again misconstrues the Court of Appeal's opinion by suggesting it says CESA "'grants the department the authority, when pursuing a strategy of conservation, to use live trapping and transplantation technique[s]" *to take* a fully protected species." (OBOM 16, italics added.) The Court of Appeal did *not* hold that CESA grants the Department authority "to take a fully protected species"; that language is attributable only to CBD. To the contrary, the Court of Appeal harmonized the provisions of sections 86, 2061, and 5515 to find that a conservation strategy using live trapping and transplantation techniques is consistent with a prohibition on take. (Slip Opn. 50.)

Although CBD acknowledges the fact that stickleback is both fully protected and endangered (OBOM 9), it never acknowledges that the statutes can be read together and harmonized to avoid surplus language. As mandated by this Court in *Tuolumne Jobs*, *supra*, 59 Cal.4th at page 1037, words of statutes, in this case sections 2061 and 5515, "must be harmonized both internally and with each other, to the extent possible." Where, as here,

a species is protected by both CESA and section 5515, the Court of Appeal's decision to allow application of conservation measures results in harmony between the two statutes and avoids surplus language. The conservation provisions are not in conflict with the take prohibition in section 5515, and stickleback is therefore entitled to the conservation benefits afforded under section 2061.

As this Court explained in *Tuolumne Jobs*, *supra*, 59 Cal.4th at page 1039, "the Legislature is presumed to be aware of all laws in existence when it passes or amends a statute." Thus, it must be presumed that when the Legislature adopted section 2061, it was fully aware of the provisions of section 5515. Had it wanted to forbid the adoption of section 2061 conservation measures for endangered or threatened species also designated as fully protected, "it could have easily said so. It did not." (*Tuolumne Jobs*, *supra*, 59 Cal.4th at p. 1039.)

Both the plain meaning of the words and the context of the conservation purpose of the Fish and Game Code show that the mitigation measures allowing relocation cannot be considered prohibited "catch," "capture," or "pursuit" under section 86. Sections 5515 and 2016 can easily be harmonized while providing meaning to every word. (*Tuolumne Jobs*, *supra*, 59 Cal.4th at p. 1037.) The Court of Appeal adopted this interpretation because it is consistent with the plain meaning of the words of the statutes; leaves no language as surplus; allows the statutes to work together in harmony; and implements the intent of the Legislature. The Court of Appeal got it right.

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D. Substantial evidence supports the Department's determination that the mitigation measures can be implemented without violation of section 5515.

The Department conducted multiple studies to support its determination that the project, including conservation measures, can be implemented consistent with the Fish and Game Code. (AR: 233, 25658-25847, 41462-41524, 41525-41585, 41586-41782, 42786-42823, 43018-43051, 43052-43099, 43101-43110, 43111-43124, 108847-108883, 116547-116555.) One of these studies (prepared by Dr. Camm Swift) states that the BIO-44 and BIO-46 relocation techniques are commonly used for conservation and are effective to prevent take. (AR:116547). Dr. Swift is a nationally recognized, leading authority on the biology, management, and conservation of fresh and brackish water fish of coastal southern California, including stickleback. (AR:25837.) BIO-44 and 46 and two other measures (BIO-43 and 45) were designed by Dr. Swift in coordination with federal regulatory agencies, the Department's biological staff and other scientists working on the project to protect fish. (AR:13647-13651.)

Taken together, BIO-43 through 46 were designed in the broader context of the Resource Management and Development Plan to protect and conserve special status fish, and to avoid "take" of stickleback as required by section 5515. (AR:13647-13651.) The measures will avoid some, and substantially lessen other, adverse impacts on fish generally during project construction, and will significantly reduce the possibility that stickleback will be stranded and require relocation by the U.S. Fish and Wildlife Service. (Slip Opn. 43; AR:4267, 4268, 4271.) In short, the use of block nets, exclusion herding techniques, and relocation (if necessary) will protect stickleback. The Department relied on these facts to conclude that project mitigation measures were consistent with and not prohibited by section 5515.

The Department fully considered effects on stickleback, as well as avoidance, minimization and mitigation measures to avoid take of stickleback and conserve its habitat. (AR:4248-4271.) The Department's reliance on expert opinion and its independent judgment that the project can be implemented consistent with the Fish and Game Code is entitled to considerable deference. (*ECOS*, *supra*, 142 Cal.App.4th at p. 1042; *AIR*, *supra*, 206 Cal.App.4th at p. 1495.)

The only record evidence cited by CBD to question the Department's conclusions regarding take of stickleback is a letter from Dr. Jonathan Baskin questioning whether project construction activities could be undertaken without take of stickleback. (OBOM 25.)[12] The letter does not support CBD's position – because it does no more than refer to impacts that could occur *absent* mitigation. As explained in the Department's response to Dr. Baskin, implementation of the project's conservation strategy and related mitigation measures would minimize impacts and *any* harm to special status fish species, including stickleback. (AR:13648-13651.) Protective measures will be implemented, including the pre-construction surveys, biological monitoring, exclusion of the species from the construction areas using temporary diversion channels, and protection of habitat through facilities design guidelines and best management practices described in Mitigation Measures BIO-43 through BIO-46. (AR:4262.) The Department concluded that these measures dramatically reduce the prospect that stickleback will actually need to be relocated, since very few, if any, fish may be stranded after implementation of the measures. (AR:4263.)

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[12] CBD relies on the U.S. Fish and Wildlife Service's biological opinion issued in 2011, but, as discussed in section I.D., *post*, that biological opinion is not part of the record in this case.

Taking the quote out of context, CBD refers to a statement by Dr. Swift noting that, by "suddenly placing more fish in such places the crowding may increase competition between the stickleback" and overtax available resources. (OBOM 25.) In fact, Dr. Swift explained that "at least three persons and often more are required" to collect and relocate stickleback when "moving fish outside the local area" and "the larger the area to be covered or the greater number of fish anticipated would partly dictate the number of persons" required. (AR:116550.) Once fish have been removed from the area, "construction work can begin, but biologists have additional work to move and process the containers of fish at a suitable location nearby." (AR:116550.)

Accordingly, Dr. Swift's statement is nothing more than a warning about the proper methods for relocation, and the Department heeded this warning by requiring a diversion plan subject to approval by the Department, and by making sure no one but U.S. Fish and Wildlife Service personnel or its agents perform the relocation under BIO-44 and BIO-46. (AR:4267, 4268, 4271.) In short, CBD points to no evidence suggesting the relocation techniques will require "pursuing, catching, and capturing" stickleback within the "take" definition of section 86. (OBOM 25.) Substantial evidence shows just the opposite.

E. The Court of Appeal did not effectuate an "amendment" to or "repeal" of section 5515 by implication.

CBD contends the Court of Appeal, in holding that BIO-44 and BIO-46 were lawful "conservation" measures, effectively held that, by implication, section 2061 amended or repealed section 5515. (OBOM 21-23.) According to CBD, because the requisite criteria for an implied amendment or repeal are not met here, the Court of Appeal was wrong. (OBOM 21-23.)

CBD's entire argument proceeds from an incorrect premise. The Court of Appeal did not hold that section 2061 trumped section 5515 or otherwise rendered ineffectual any of its provisions. It simply determined that the activities contemplated under BIO-44 and BIO-46 are conservation measures that do not constitute "take" and thus do not violate section 5515, subdivision (a)(1). (Slip Opn. 46-50.) There was no amendment or repeal by implication.

F. CBD's reliance on U.S. Fish and Wildlife Service's biological opinion is improper.

CBD points to the U.S. Fish and Wildlife Service's biological opinion to support its claim that this project may cause prohibited take of stickleback. (OBOM 25.) There are at least three problems with this claim. First, the Service did not issue the extra-record biological opinion until more than six months *after* the Department certified the EIR and approved the project, so it cannot be considered here. (Slip Opn. 50.) Second, the biological opinion applies the *federal* definition of "take," which is more expansive than the state definition at issue in this case. (16 U.S.C. § 1532(19).) Third, CBD's petition for review did not challenge the Court of Appeal's refusal to consider this biological opinion and thus cannot raise it now. (Cal. Rules of Court, rule 8.516(b)(1).)

II. CBD DID NOT EXHAUST ITS ADMINISTRATIVE REMEDIES WITH REGARD TO CULTURAL RESOURCES IMPACTS AND SUB-LETHAL IMPACTS TO JUVENILE STEELHEAD.

Relying on the plain language of Public Resources Code section 21177, subdivision (a), the Court of Appeal correctly held that CBD forfeited its challenges to the EIR's analysis of impacts on steelhead smolt and cultural resources by failing to raise those issues before the close of the

comment period on the jointly prepared Draft EIR/EIS or during the public hearing. (Slip Opn. 58-59, 70-71.)

Reviewing courts employ a de novo standard of review when determining whether the exhaustion of administrative remedies doctrine applies. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536 (*City of Orange*); *Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 873.) To the extent this analysis turns on statutory interpretation, the Court's primary task is to determine the Legislature's intent, giving effect to the law's purpose and consider first the words of a statute. (*Tuolumne Jobs*, *supra*, 59 Cal.4th at p. 1037.)

A. Background.

The Department's 10-year review of the project included three public scoping meetings over the span of five years before release of the Draft EIR. (AR:15.) The 120-day public comment period on the Draft EIR, well in excess of the typical 45-day CEQA comment period for a Draft EIR, began on April 27, 2009, and closed on August 25, 2009. (Slip Opn. 6; AR:16, 2417, 13719, 119099-119100; Guidelines § 15205, subd. (d).) On June 11, 2009 (during the comment period), the Department and the Corps held a joint public hearing on the Draft EIR/EIS. (AR:2417, 21043-21124.)

Contrary to CBD's assertions, there was no public comment period on the Final EIR for purposes of CEQA. (OBOM 30.) Federal NEPA regulations required the Corps to solicit input on the Final EIS. (40 C.F.R. § 1506.10.)[13] No such requirement exists under CEQA. (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1111 (*Gray*); Pub. Resources Code,

[13] CBD challenged the EIS in United States District Court for the Central District of California, and issues of NEPA compliance may be addressed in that proceeding. (*Center for Biological Diversity, et al. v. U.S. Army Corps of Engineers, et al.* (Case No. 2:14-cv-01667-ABC-CW) (C.D. Cal. 2014).)

§ 21083.1 [it is the Legislature's intent that courts "shall not interpret this division or the state guidelines adopted pursuant to Section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines"]; Guidelines, § 15225, subd. (a) ["one review and comment period is enough" to satisfy CEQA requirements in the context of a joint EIR/EIS].)

The Corps' compliance with federal NEPA regulations regarding the Final EIS did not create an additional CEQA public comment period. (AR:16, compare 118840-118844 [Joint Notice of Availability of Draft EIR setting comment period from April to June, 2009] and 119099-119100 [Joint Notice extending the comment period to August, 2009] with 122307-122320 [Corps individual Notice of Availability of Final EIS with comment period June 18 to July 19, 2010, with no mention of Department review or involvement in the Corps comment period], 122334 [noting Corps' extension of comment period to August 3, 2010].)

Just before midnight on the last day of the extended Final EIS ***federal*** comment period, and nearly one year after the close of the CEQA *state* comment period on the Draft EIR, Ventura Coastkeeper (a Petitioner in this case) submitted a letter stating the EIR should assess the potential for project discharge of dissolved copper to affect juvenile steelhead downstream of the project site. (AR:122385, 122396-122397.) For the first time, the letter claimed the significance of such effects should be determined using thresholds from a 2007 study by the National Oceanic and Atmospheric Administration (NOAA). (AR:122387.) Shortly after midnight, Wishtoyo Foundation (another Petitioner) submitted a letter criticizing – for the first time – the EIR's cultural impacts analysis. (AR:123130, 123134-123146.)

In accordance with federal procedures, Newhall prepared responses to the comments received during the Corps' Final EIS period. (AR:16, 48455, 123871.) Although the Department independently reviewed Newhall's responses and concluded that "the applicant's responses [were] fair and reasonable," the Department recognized it had no duty to respond directly to any comments on the Final EIS submitted as part of the federal review process. (AR:16-17, 48455, 48462.) At that time, Newhall prepared a document entitled "Final Addendum/Additional Information," reflecting discrete clarifications to the text of the EIR/EIS in response to comments on the Final EIS. (AR:16, 7867-7868, 48456.) The Department confirmed that the Addendum did not represent significant new information requiring recirculation under CEQA, and certified the EIR and approved the project on December 3, 2010. (AR:1, 17-19.) Importantly, the Department was not required to hold a final hearing to approve the project. (§§ 1600 et seq.; 2081; Cal. Code Regs., tit. 14, §§ 699.5, 783.5.)

B. Based on a plain reading of Public Resources Code section 21177, CBD did not exhaust its administrative remedies as to steelhead and cultural resources impacts.

Public Resources Code section 21177, subdivision (a), provides that any alleged grounds for noncompliance with CEQA must be raised "during the public comment period provided by [CEQA] or prior to close of the public hearing on the project before issuance of the notice of determination."

Here, the CEQA public comment period on the Draft EIR began on April 27, 2009, a public hearing was held on June 11, 2009, and the comment period closed on August 25, 2009. (AR:2417, 13719, 119099-119100.) No other public comment periods were required under CEQA. (Guidelines, § 15202, subd. (a) ["CEQA does not require formal hearings at

any stage of the environmental review process"].) No public hearing was required by Department regulations for the Permits or Streambed Agreement. (§§ 1600 et seq.; 2081; Cal. Code Regs., tit. 14, §§ 699.5, 783.5.)

Both exhaustion opportunities provided by section 21177, subdivision (a), occurred before August 25, 2009, and comments submitted after that time cannot support a justiciable CEQA claim. (*City of Orange, supra,* 163 Cal.App.4th at p. 535 [exhaustion requirement is jurisdictional]; *Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 291; *Tuolumne Jobs, supra,* 59 Cal.4th at p. 1037 [the words of a statute are the most reliable indicator of legislative intent].)

The posture of this case differs from the situation in *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109 (*Galante Vineyards*), the case relied on by CBD. (OBOM 33-34.) There, the public agency held a public hearing on the project *after* the petitioner submitted its comments on the final EIR —satisfying the "prior to the close of the public hearing" component of Public Resources Code section 21177, subdivision (a). (*Galante Vineyards, supra,* 60 Cal.App.4th at p. 1116.) By contrast, there was no such later hearing in this case. "*Galante Vineyards* does not provide authority for the position that objections are timely if they are submitted after the close of the public comment period, and such an interpretation is contrary to the plain language of the statute." (*Central Delta Water Agency v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 245, 274.) Thus, *Galante Vineyards* focused on whether comments were submitted prior to the close of the public hearing on the project (*Galante Vineyards, supra,* 60 Cal.App.4th at pp. 1115-1116) — not, as CBD asserts, whether a comment period on a Final EIR was "optional." (OBOM 34.)

Because CBD's arguments related to steelhead smolt and cultural resources were based on comments provided after the close of the public comment period and the public hearing on the project, CBD did not exhaust its administrative remedies as to those issues. For this reason, the Court of Appeal correctly held that CBD is barred from raising those issues in this case. (Slip Opn. 58-89, 70-71.)

C. CBD's new argument that they were not afforded an opportunity to exhaust their administrative remedies is both untimely and without merit.

Now, for the first time, CBD wants to avoid this jurisdictional bar by relying on subdivision (e) of Public Resources Code section 21177, which says the exhaustion requirement does not apply where no public hearing has been held and no opportunity to submit written or oral comments has been provided. (OBOM 35.)[14] Section 21177, subdivision (e), does not apply here.

As explained above, the Department provided the public with ample opportunity to participate in the ten-year CEQA process, including multiple public scoping meetings, a public hearing, and a 120-day review period on the Draft EIR. (AR:15-16.) CBD's claim that it was not provided a meaningful opportunity to comment is contradicted by the record.

CBD's reliance on *Endangered Habitats League v. State Water Res. Control Bd.* (1997) 63 Cal.App.4th 227 (*EHL*) is misplaced. *EHL* holds that

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[14] Although the Department addresses its merits, this new theory cannot be raised at this late stage of proceedings. (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501 [a party is not permitted to change its position and adopt a new and different theory on appeal]; *Woodward Park Homeowners' Association, Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 712 [as a general rule, an appellate court will not review an issue that was not raised by some proper method by a party in the trial court].)

the exhaustion requirement does not apply when a lead agency takes an action without providing a "mechanism for the receipt of . . . objections." (*Id.* at p. 240.) In *EHL*, the lead agency approved a negative declaration in 1986 for a master drainage plan that alluded to future environmental review, to serve as a guide for the long-term construction schedule of drainage facilities. (*Id.* at pp. 231, 237.) When the lead agency moved forward with implementation of a specific construction plan in 1994, it did no "second tier" environmental review, and held no public hearing to discuss the construction plans. (*Id.* at pp. 238, 240.) Relying on section 21177, subdivision (e), *EHL* held the lead agency had presented no meaningful opportunity for the public's concerns to be heard regarding the need for and content of the "second tier" review, and the exhaustion requirement of section 21177, subdivision (a), thus did not apply. (*Id.* at pp. 238-240.)

EHL is factually distinguishable from this case because it is akin to an agency's reliance on a CEQA exemption or addendum, which have no public review component, or an agency's failure to comply with CEQA at all. Courts have waived the exhaustion requirement of Public Resources Code section 21177, subdivision (a), in those circumstances. (*Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 701-702; *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1210-1211; *Maintain Our Desert Environment v. Town of Apple Valley* (2004) 124 Cal.App.4th 430, 442.) Here, by contrast, the Department provided ample opportunity for public comment, and section 21177, subdivision (e), does not apply.

CBD's reliance on *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489 is similarly misplaced. In that case, which does not mention section 21177, the petitioners objected to a city's

annexation of land for development and a wastewater treatment facility. (*Id.* at p. 494.) The Local Agency Formation Commission (LAFCO) approved the annexation. After filing and withdrawing a request for reconsideration by LAFCO, the petitioners filed a petition for a writ of mandate. This Court ultimately granted review and held that a request for reconsideration by the same administrative agency, where no new evidence and legal arguments would be presented, was not always a prerequisite to judicial review of those administrative findings. (*Id.* at pp. 495, 510.) But this case does not involve a statutory reconsideration provision, nor does it require application of common law exhaustion doctrines. *Sierra Club v. San Joaquin Local Agency Formation Com.* has nothing to do with the issue now before this Court.

D. The Department's review and concurrence with the addendum did not reopen the Department's comment period.

CBD's obligation to exhaust administrative remedies under Public Resources Code section 21177, subdivision (a), is not altered by the fact that the Department considered CBD's comments on the Final EIS. (OBOM 30-34.) CBD mistakenly claims the Department responded to the Final EIS comments and prepared an Addendum. (OBOM 31.) Not so.

Newhall, not the Department, prepared responses to Final EIS comments and the Addendum pursuant to *federal* procedures, not CEQA requirements. (AR:16-17.) The Department had no obligation to respond to late comments, and in fact, it did not. (Pub. Resources Code, § 21091, subd. (d)(1); Guidelines, § 15088, subd. (a); *Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 925, fn. 10; *Gray, supra,* 167 Cal.App.4th at p. 1110.) The Department independently reviewed the responses and the Newhall-prepared Addendum before

certifying the EIR under CEQA, but such independent review does not convert late comments into timely ones for purposes of satisfying CBD's exhaustion obligations. (AR:16-17.)

CBD points to mitigation measures added to the Final EIR/EIS "in direct response" to late comments. (OBOM 38.)[15] The mitigation measure in question, Cultural Resources-6 (CR-6), merely memorializes compliance with existing law regarding inadvertent discovery of human remains during construction. (AR:389-390.) Health and Safety Code section 7050.5, subdivision (b), contains provisions triggered by the discovery or recognition of human remains in any location other than a dedicated cemetery. Those procedures must be followed as a matter of law, and need not be formalized as mitigation measures, but were added in this case merely to clarify Newhall's obligations during construction. (AR:10724-10725.) The Addendum containing this mitigation was not "issued" by the Department, although the Department did independently review it. (AR:16-17.) In any event, the mere addition of a mitigation measure to a Final EIR, particularly one that merely echoes an existing legal requirement, does not relieve CBD of its obligation to exhaust its administrative remedies.

E. CBD's earlier comments were not sufficient to exhaust administrative remedies regarding steelhead smolt and cultural resources.

To properly exhaust administrative remedies, commenters must present "the exact issue" to the administrative agency. (*City of Orange, supra,* 163 Cal.App.4th at pp. 535-536; *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614,

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[15] This is another new argument, raised for the first time in these proceedings. (*In re Marriage of Broderick, supra,* 209 Cal.App.3d at p. 501; *Woodward Park Homeowners' Association, Inc. v. City of Fresno, supra,* 150 Cal.App.4th at p. 712.)

623.) "'Bland and general references to environmental matters'" and "'isolated and unelaborated' comments" are not adequate to satisfy the exhaustion requirement of Public Resources Code section 21177, subdivision (a). (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 527 (*CREED*); *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 594.)

To avoid these rules, CBD contends Ventura Coastkeeper's August 25, 2009 letter commenting on the Draft EIR was adequate to exhaust administrative remedies regarding sub-lethal impacts to steelhead. (OBOM 42-43.) Not so. This 2009 letter never mentioned (i) sub-lethal impact or (ii) the 2007 NOAA study cited in Wishtoyo's August 2010 letter. (AR:19648, 19684, 122386-122398.)

CBD also claims its late comments were based on information included in the Final EIR that had not been in the Draft EIR. (OBOM 43-44.)[16] In the Court of Appeal, CBD claimed that a 2007 NOAA Study, mentioned only in passing in Ventura Coastkeeper's late-submitted 2010 letter, included a threshold of significance regarding potential sub-lethal impacts to steelhead that the Department allegedly should have used in the 2009 Draft EIR. (AR:10827, Wishtoyo RB 9; Slip Opn. 72.)[17] This 2007 study was available during the 2009 Draft EIR comment period, but was

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[16] This is another new argument. (*In re Marriage of Broderick*, *supra*, 209 Cal.App.3d at p. 501; *Woodward Park Homeowners' Association, Inc. v. City of Fresno*, *supra*, 150 Cal.App.4th at p. 712.)

[17] Substantive arguments regarding sub-lethal impacts to steelhead were not raised by CBD on review. (See section II.E, *post.*) The argument is mentioned here only to show that CBD did not, in fact, exhaust its administrative remedies.

not mentioned by any commenter at that time. CBD conveniently ignores these critical facts, pointing instead to Ventura Coastkeeper's general comments on the Draft EIR regarding water quality as evidence of exhaustion — precisely the type of "general references to environmental matters" found insufficient in *CREED*, *supra*, 196 Cal.App.4th at page 527. (OBOM, 42-43.)

With regard to cultural resources, CBD claims (in another new argument) that its late-submitted comments addressed issues that arose for the first time in the Final EIR. (OBOM 46-49.) CBD is incorrect. The late-submitted cultural impact comments attacked the archival research and field surveys conducted by the project's archaeologist in 1994. (AR:6652-6654.) These criticisms could have and should have been raised prior to the August 25, 2009 deadline for comments on the Draft EIR. They are not comments directed at any new information in the Final EIR.

The Final EIR did include revisions to the Cultural Resources section and other sections, made in response to comments on the Draft EIR. (AR:13718-13720, 17848-17892.) CBD cites one table from the Cultural Resources Section as evidence of "new significant impacts" justifying the late comments (OBOM 47-48), but CBD ignores the accompanying text revisions in the Final EIR showing that the so-called changes in significance are merely clarifications of the Draft EIR analysis. (AR:17869-17871.) The Department concluded these revisions did not constitute significant new information requiring recirculation, and these changes did not reopen opportunities for further public comment. (AR:17-19.)

As the Court of Appeal observed, none of CBD's cultural resources issues were "preserved during the comment period which concluded on August 25, 2009." (Slip Opn. 59.) The Court of Appeal correctly concluded

there "is no merit to the argument that otherwise generalized criticisms regarding the draft environmental impact report were sufficient to preserve the issues relied upon by the trial court." (*Ibid.*; and see *CREED*, *supra*, 196 Cal.App.4th at p. 527.)

F. A plain reading of Public Resources Code section 21177 does not pose far-reaching consequences for environmental plaintiffs.

The Court of Appeal's holding vis-à-vis exhaustion does not (as CBD contends) have sweeping consequences for environmental petitioners, tribes, or other interested parties. (OBOM 3, 27.)

As discussed above, the Department was not required to hold public hearings to approve the Permits or Streambed Agreement sought by Newhall. As CBD admits, local land use actions, comprising the "vast majority" of CEQA projects statewide (OBOM 28, fn. 3), require public hearings for approval. (Gov. Code §§ 65355, 65453, 65853 et seq., 65867, 65905.) CEQA considerations should be addressed during those required hearings. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1200-1201.)

The facts of this case rarely occur in practice, and this Court need not be swayed by CBD's doomsday rhetoric to the contrary. Rather, this Court should uphold the plain reading of section 21177, which requires exhaustion of administrative remedies during the public comment period required by CEQA or prior to the close of the public hearing on the project. To conclude otherwise would be inconsistent with the plain meaning and intent of section 21177 and the exhaustion of administrative remedies doctrine. (*Tuolumne Jobs*, *supra*, 59 Cal.4th at p. 1037.) It would also invite delay and abuse of the CEQA process, a process that already is criticized

for allowing undue delay that unnecessarily adds to the high costs of lengthy CEQA review.

G. CBD fails to address the Court of Appeal's alternative holdings rejecting CBD's steelhead and cultural resources arguments on the merits, which compel resolution of those issues against CBD.

Although the Court of Appeal held that CBD's arguments were barred by its failure to exhaust administrative remedies, the Court of Appeal also held, in the alternative, that substantial evidence in the record supported the Department's substantive conclusions on these two issues. (Slip Op. 59-63, 71-74.) Neither CBD's Petition for Review nor its Opening Brief on the Merits challenged the Court of Appeal's decision on the merits of those two issues.

This fatal flaw means CBD cannot win on these issues. (*JTH Tax, Inc., supra,* 212 Cal.App.4th at p. 1237 ["failure to address all bases for the court's ruling constitutes a waiver of its appellate claim."]; *Gunn v. Mariners Church, Inc.* (2008) 167 Cal.App.4th 206, 217-218 [where appellant failed to make arguments regarding the court's alternate bases for its ruling it waived any other challenges]; *Habitat and Watershed Caretakers*, *supra*, 213 Cal.App.4th at p. 1292, fn. 6; *Davies v. Sallie Mae, Inc.* (2008) 168 Cal.App.4th 1086, 1096.)

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CONCLUSION

For all the reasons stated above, the Department asks that the judgment of the Court of Appeal be affirmed in all respects.

Respectfully submitted,

Dated: October 7, 2014

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CERTIFICATE OF WORD COUNT

The undersigned counsel certifies that, pursuant to rule 8.204(c) of the California Rules of Court, the text of this brief was produced using 13 point Roman type and contains 10,802 words. Counsel relies on the word count of the computer program used to prepare this brief.

October 7, 2014

By: _____

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California Department of Fish and Game, et al. v. Center for Biological Diversity, et al., Supreme Court Case No. S217763, Court of Appeal Second Appellate District Division A, Case No. B24513, Los Angeles County Superior Court, Case No. BS131347

PROOF OF SERVICE

I am a resident of the United States, employed in the City and County of Sacramento. My business address is 455 Capitol Mall, Suite 801, Sacramento, California 95814. I am over the age of 18 years and not a party to the above-entitled action.

On October 7, 2014, I served the following:

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE'S ANSWER BRIEF ON THE MERITS

On the parties in this action by causing a true copy thereof to be delivered via Federal Express to the following person(s) or their representative at the address(es) listed below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 7th day of October 2014, at Sacramento, California.

_____

Stephanie Richburg

California Department of Fish and Game, et al. v. Center for Biological Diversity, et al., Supreme Court Case No. S217763, Court of Appeal Second Appellate District Division A, Case No. B24513, Los Angeles County Superior Court, Case No. BS131347

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