NO. S217763

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, ET AL.,
Petitioners 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

NEWHALL'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

In 1990, this Court cautioned:

> "the rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement."

(*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 576.) Three years later, in 1993, the Court repeated this warning in *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1132, a warning so fundamental it has been codified in the California Environmental Quality Act (CEQA) through CEQA Guidelines section 15003, subdivision (j).[1]

In 1996, The Newhall Land and Farming Company unwittingly put the Court's warning to the test by initiating environmental review for Newhall Ranch, a large-scale planned community located in Los Angeles County. It is now 2014 and, after 18 years, Newhall Ranch has yet to emerge from the maze of regulatory procedures and litigation that now define "environmental law" in California.

Public agencies at all levels (federal, state, regional, and local) have considered and issued permits or approvals for Newhall Ranch: (i) the U.S. Army Corps of Engineers; (ii) the U.S. Environmental Protection Agency; (iii) the U.S. Fish and Wildlife Service; (iv) the California Department of Fish and Wildlife; (iv) the Los Angeles Regional Water Quality Control Board; (v) the Los Angeles County Local Agency

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[1] Except as otherwise noted, undesignated section references are to CEQA in Public Resources Code, section 21000, et seq., and references to "Guidelines" are to title 14, section 15000, et. seq. of the California Code of Regulations.

Formation Commission; (vi) the Los Angeles County Board of Supervisors; and (vi) the Los Angeles County Regional Planning Commission. All of these agencies have imposed conditions on the project to *protect* the environment.

After meeting every other administrative and legal challenge, Newhall will again defend its project. The Court of Appeal unanimously rejected all claims presented by Petitioners Center for Biological Diversity, et al. (collectively, CBD). Now, CBD asks this Court to reverse the Court of Appeal on three of six issues and send the project back to the drawing board for more administrative review and, in all likelihood, more litigation. Newhall and the Department of Fish and Wildlife (the lead agency) will explain why the Court of Appeal got it right, and why CBD's claims should be rejected.

Consistent with the division of labor between Newhall and the Department, Newhall submits this brief to amplify and supplement the Department's Answer Brief on the Merits on the following points:

The Fish and Game Code "take" issue.

- CBD asks this Court to interpret the Fish and Game Code to prevent efforts of the U.S. Fish and Wildlife Service to collect stranded unarmored threespine stickleback and quickly relocate them to another part of the river. That interpretation ignores the Service's independent *federal* authority to move the fish, violates the basic tenets of statutory construction, and runs counter to the conservation management principles embedded in the Fish and Game Code itself. The Court of Appeal rejected CBD's retrograde approach to species conservation. We ask this Court to do the same.

The exhaustion of administrative remedies issue.

- CBD asks this Court to disregard the administrative remedies doctrine (§ 21177, subd. (a)) and treat as timely late comments about project impacts to steelhead smolt and cultural resources — comments submitted on the last day of the U.S. Army Corps of Engineers' *federally-mandated* public comment period on the Final Environmental Impact Statement (EIS), nearly a full year after the Department closed the lengthy *CEQA* public comment period on the Department's Draft EIR.[2]

  CBD contends the Department's CEQA obligations should be extended to match the Corps' separate obligation under NEPA to accept and respond to public comments on the Final EIS. There is no support for this position in CEQA, the Guidelines, or case law. (§ 21083.1.)

  To adopt CBD's position would be inconsistent with the exhaustion doctrine and would invite project opponents to abuse the CEQA process by holding back comments, providing late comments, and causing delays and higher costs — all of which jeopardize projects. As one Court of Appeal put it, the Legislature "has obviously structured the legal process for a CEQA challenge to be speedy, so as to prevent it from degenerating into a guerrilla war of attrition by which project opponents wear out project proponents." (*County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 12.)

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[2] The document under review is an Environmental Impact Statement and Environmental Impact Report (EIS/EIR) prepared jointly by the U.S. Army Corps of Engineers and the Department. The EIS portion addresses the Corps' obligations under the National Environmental Policy Act (NEPA) and the EIR portion addresses the Department's obligations under CEQA.

The Court of Appeal also rejected CBD's steelhead and cultural resource claims *on the merits* — a decision CBD did not challenge in its petition for review or its opening brief. On this issue, the Court of Appeal's judgment should be affirmed on both grounds.

The greenhouse gas emissions issues.

- CBD asks this Court to disregard the EIR's 150-page analysis of the project's greenhouse gas impacts — an analysis meeting every requirement and following every recommendation set forth in Guidelines section 15064.4 — the provision expressly adopted to assist lead agencies in determining the significance of impacts from greenhouse gas emissions.

  The EIR quantified and disclosed existing emissions *without* the project and projected emissions *with* the project and explained why a simple numeric comparison between existing conditions and project conditions was insufficient to determine significance. The explanation, *in part*, was that the scientific community has not yet determined *when* a particular increase in emissions is *significant*.

  Therefore, the Department reasonably and in good faith exercised its discretion to determine significance by assessing whether project emissions would impede statewide compliance with Assembly Bill 32 (AB 32), consistent with the methodology used in the statewide 2008 Scoping Plan adopted by California Air Resources Board — the expert state agency charged with implementing AB 32, enacted in the Global Warming Solutions Act of 2006 (Health & Saf. Code, §§ 38500, et seq., 38561.)

In upholding the EIR's use of the AB 32 significance criterion, the Court of Appeal followed the lead of three other appellate courts: *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 839-841; *North Coast Rivers Alliance v. Marin Municipal Water Dist.* (2013) 216 Cal.App.4th 614, 650-654; *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 335-337 (*CREED*). The EIR's analysis is also consistent with this Court's decision in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 445, 454, 457 (*Neighbors*).

When this Court stated that California's environmental laws "should not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement," it was pointing out that CEQA and other resource protection laws — while vital to the environmental health of the State — do not operate in a vacuum where population growth is static and no development is allowed. (*Citizens of Goleta Valley, supra,* 52 Cal.3d at p. 576.) The challenge is to ensure that lead agencies approve projects that not only offer "social, economic, or recreational development and advancement," but can be implemented consistent with the environmental ethic that makes California unique among the 50 states of the union.

Newhall Ranch is exactly such a project. For example:

Eighty percent of the project site (more than 10,000 acres) will be dedicated to natural open space, including more than 8,500 acres of preserve land with Newhall-funded endowments of more than $10 million for the management of natural resources.

Newhall Ranch will preserve and protect more than 90 percent of the Santa Clara River tributary drainages and other wetlands on site.

As documented in the EIR and record, Newhall must implement design features and mitigation measures to reduce greenhouse gas emissions and avoid impeding the implementation of AB 32.

Residential and non-residential buildings will *exceed* the State's 2008 mandated energy standards by providing, for example, improved insulation and ducting, low E glass, high efficiency heating and air conditioning, and radiant barriers in attic spaces.

Newhall will produce or purchase solar-equivalent renewable energy for every single-family home and non-residential roof area or, alternatively, secure carbon credits to achieve the same or equivalent GHG emission reductions.

Newhall will rely on numerous design features to reduce GHG emissions, such as:

(a) close proximity of homes to jobs and services;

(b) public transit;

(c) trails, paseos, and pathways for walking and biking;

(d) tree planting and native and drought-tolerant landscaping;

(e) energy efficient lighting;

(f) use of solar water heating for all Newhall Ranch recreational center pools;

(g) silver certification for the design and construction of Newhall Ranch fire stations and public library consistent with the "Leadership in Energy and Environmental Design," or LEED standards;

(h) comprehensive recycling;

(i) park-and-ride lot, bus stops, transit station, bus transfer station; and

(j) reservation of right-of-way for a Metrolink light rail line to facilitate residents relying less on vehicle travel.

After years of expert agency review — as reflected in the 123,000-page administrative record — followed by many years of intense judicial scrutiny, it is time to end the litigation and allow Newhall Ranch to proceed.

STATEMENT OF FACTS

A. Project area.

The Newhall Ranch project area consists of more than 12,000 acres in northwestern Los Angeles County comprised of the Newhall Ranch Specific Plan site (about 11,999 acres) and the 1,517-acre Salt Creek conservation area in Ventura County, adjacent to the western boundary of the Specific Plan site (AR:1106, 1111, 2000-2001) — along with two additional planning areas, the Valencia Commerce Center (164 acres) and Entrada (316 acres). (AR:791, 1113, 2001, 2011.)[3] The Department's environmental review encompassed this entire project area.

B. The County's Specific Plan approval and litigation.

In 1996, Newhall began processing the Specific Plan for Newhall Ranch. (AR:2398.) The County prepared an EIR for the Specific Plan, held numerous public hearings, imposed hundreds of conditions and

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[3] Because the Court of Appeal's statement of facts (Slip Opn. 3-14) correctly describes the project in detail, this section of Newhall's brief is limited to additional facts relevant to CBD's issues on review. References to "AR" are to the Department's certified Administrative Record, and references to "AA" are to Newhall's Appellants' Appendix filed in the Court of Appeal.

mitigation measures and, on March 23, 1999, approved the EIR, the Specific Plan, and other related entitlements — but challenges to the County's decision resulted in more than four years of litigation. (AR:2398, 2400-2401.)

Two of the petitioners here — Friends of the Santa Clara River and SCOPE — filed the initial lawsuit in Kern County Superior Court to challenge the validity of the EIR under CEQA. (AR:24850.) On August 1, 2000, the Kern County trial court upheld much of the EIR but issued a writ of mandate requiring additional analyses on six issues. (AR:2400.) The County conducted the additional environmental analyses, reapproved the Specific Plan in May 2003 (AR:2400-2401, 82179-83121), and filed a return in the Kern County case. Friends and SCOPE opposed the return but the trial court approved it and discharged the writ. (Slip Opn. 4.) Friends and SCOPE filed an appeal but the parties settled their dispute and the appeal was dismissed on April 1, 2004. (Slip Opn. 4.)

As approved, the Specific Plan envisions a new community composed of residential, mixed-use, and non-residential job-creating uses in interrelated villages. (AR:9-10, 1103.) Specific Plan build-out will occur over a 20-year period — with additional County permitting and project-level EIRs required by CEQA. (AR:2392, 2401-2402.) The Specific Plan also contemplated the need for federal and state permits from other agencies. (AR:2398, 82370.)

C. The Department's and Corps' permitting decisions.

As contemplated, Newhall submitted applications for state and federal permits — two to the Department and one to the U.S. Army Corps of Engineers. Specifically, Newhall applied to the Department for (i) a master streambed alteration agreement under Fish and Game Code section

1602 (AR:2406-2407) to minimize impacts to riparian resources in and along the Santa Clara River and its tributary drainages (AR:556-638, 115835-115838), and (ii) for two incidental take permits under the California Endangered Species Act (CESA, Fish & G. Code, § 2081). The permit applications addressed impacts on a state-listed endangered plant (the spineflower) and three state-listed endangered riparian birds incidental to otherwise lawful activities implementing the Specific Plan. (AR:639-697, 698-776, 2406-2407, 115835-115838.)

Because the Specific Plan requires installation of bridge supports and flood control improvements in or adjacent to the river and its tributary drainages, Newhall also applied to the U.S. Army Corps of Engineers for a Clean Water Act section 404 "dredge and fill" permit. (33 U.S.C. § 1344; AR:2405, 33880-33881.) Before a 404 permit could issue, Newhall had to obtain a water quality certification under section 401 of the Clean Water Act from the Los Angeles Regional Water Quality Control Board. (AR:2405, 122309.) As part of the federal permit review process, the Corps was required to consult with the U.S. Fish and Wildlife Service under section 7 of the federal Endangered Species Act (ESA). (AR:2405, 122309-122310.) The Corps' consultation with the Service included review of the stickleback. (AR:3607-3609.)

The Newhall Ranch resource management plan and spineflower conservation plan were completed as part of this federal and state permitting effort. (AR:9-14.) The resource management plan is the backbone of the 404 permit, streambed agreement, and the riparian bird incidental take permit. (AR:9-12, 33-124, 700-703, 2423-2429, 1086-1936.) The spineflower conservation plan is the foundation for the spineflower incidental take permit. (AR:228-229, 640, 862, 777-1085.)

As encouraged by the Guidelines, the Department and the Corps partnered to prepare a joint EIS/EIR to satisfy both CEQA and NEPA. (Guidelines, §§ 15220, 15222; AR:2000.) The Department was the lead agency for preparation of the EIR under CEQA (§ 21067; AR:33974-33981), and the Corps was the lead agency for preparation of the EIS under NEPA (40 C.F.R. §§ 1501.5(a), (b), 1506.2(a), (b); AR:33621-34076). As explained below, this joint federal and state agency EIS/EIR process culminated in completion of the *second* lengthy environmental document for Newhall Ranch.

D. The environmental review process.

The EIS/EIR scoping process, which began on February 9, 2000, included inter-agency coordination and public meetings to identify issues to be presented in the environmental document (although the scoping process was held in abeyance pending resolution of the Kern County litigation about the Specific Plan). (Slip Opn. 6.)

On July 19, 2005, the Corps issued its "notice of intent" to prepare the draft EIS (AR:15, 2416; 33970-33973), and on July 25, 2005, the Department issued its notice of preparation of the draft EIR (AR:33974-33981). Three public scoping meetings were held, one in February 2000, another in February 2004, and the third in August 2005. (AR:2416, 33843-33969, 33970-34076.)

On April 27, 2009, the Department and the Corps provided notice of the availability of the draft EIS/EIR for public comment (AR:118840-118841), as well as notice of a joint public hearing to solicit public comments on the draft document. (*Ibid.*) The agencies provided a 60-day public review period for the draft EIS/EIR ending on June 26, 2009. (AR:118840.)

On June 11, 2009, during the 60-day public comment period, the Department and the Corps held the noticed public hearing (AR:118840, 21043-21166), then extended the public comment period for another 60 days to August 25, 2009. (AR:119185.) After the close of this 120-day comment period, the agencies spent roughly a year preparing responses to each comment and finalizing the EIS/EIR. (AR:18882-21042.)

On June 18, 2010, the Department and the Corps completed the Final EIS/EIR. (AR:8, 122307-122320.) As required by federal law but not state law, the Corps provided an additional 45-day comment period on the Final EIS pursuant to NEPA. (40 C.F.R. § 1503.1(b); AR:3, 8, 48453-48455, 48462, 122309, 122334.) The additional federally-required comment period ended on August 3, 2010. (AR:48454-48455, 122334.) The Corps, with input from the Department, Newhall, and the consulting team, completed responses to the additional comments. (AR:16, 48453-48462, 123871-123872, 7952-13701.)

On December 3, 2010, the Department certified the EIR and adopted CEQA findings. (AR:1-2, 9, 224-225, 2391-2422.) The Department's certified EIR and related permits impose over 100 biological resource mitigation measures and conditions of approval, in addition to those identified in the County's Specific Plan EIR. (AR:269-401, 686-690, 762-775.) Moreover, the resource management plan, streambed agreement, and incidental take permits expressly prohibit take of state-designated "fully protected species," including stickleback. (AR:583, 645, 706, 1140.)

The Department required even more environmental protection than the County did when it approved the Specific Plan. (AR:9.) Among other things, the project authorized by the Department:

- Preserves more than 10,000 acres of natural and active open space in conjunction with the existing regional preserve system (AR:14, 216-217, 230, 862).

- Includes more than 8,500 acres of managed and funded natural open space preserves, over 13 square miles of preserved habitat (AR:14, 218, 230).

- Reduces net developable acres by 26 percent, a reduction of approximately 899 acres (AR:14).

- Reduces the number of bridges from three to two that will be constructed across the Santa Clara River (AR:9-11).

- Avoids permanent impacts to more than 90 percent of the Santa Clara River corridor subject to the Department's jurisdiction (AR:2495, 198, 565, 45035, 45273).

- Dedicates a conservation easement to the Department that will protect the entire Santa Clara River corridor within the Specific Plan area through an endowment of over $2.8 million, funded by Newhall, for the benefit of fish and wildlife resources (AR:217-218, 563).

- Provides significant monetary endowments and implements long-term conservation measures for the protection of biological resources in perpetuity at a total cost of over $10 million (AR:217).

- Provides about 50 miles of community and regional public access trails (AR:82349-82354).

- Provides numerous project design features and mitigation to reduce greenhouse gas emissions and thereby avoid impeding AB 32's emissions reduction mandate (AR:7634-7636, 7762-7782, 48448-48452).

PROCEDURAL BACKGROUND

CBD filed its petition for a writ of mandate on January 3, 2011, which was heard by the trial court on September 20, 2012. (Slip Opn. 12.) On October 15, 2012, the trial court issued its decision, judgment, and writ, ruling against the Department and Newhall on six issues but rejecting CBD's remaining contentions. (Slip Opn. 12-13.)

On March 20, 2014, in response to appeals by both the Department and Newhall, Division Five of the Second Appellate District reversed the judgment in its entirety, holding (as relevant to the issues being reviewed by this Court) that:

- There is no "take" of stickleback within the meaning of Fish and Game Code sections 86, 5515, and 2061 (Slip Opn. 43-50);

- The exhaustion of administrative remedies doctrine, codified in CEQA (§ 21177, subd. (a)), bars CBD's steelhead and cultural resources claims (Slip Opn. 59, 71); additionally, those claims fail on the merits (*id.* 59-63, 71-74); and

- The Department's greenhouse gas emissions analysis and related significance determination comply with CEQA and legal precedent, and are supported by substantial evidence (Slip Opn. 100-111).

This Court granted review on July 9, 2014 and on its own motion, granted calendar preference under section 21167.1, subdivision (a).

ARGUMENT

I. THE DEPARTMENT DID NOT VIOLATE FISH AND GAME CODE SECTION 5515 BECAUSE IT DID NOT ISSUE A PERMIT OR LICENSE AUTHORIZING "TAKE" OF STICKLEBACK.

In the Court of Appeal, CBD insisted that the Department had unlawfully authorized a "take" of stickleback, a fully protected species under Fish and Game Code section 5515, subdivision (a)(1).[4] The Court of Appeal rejected that claim, concluding that no unlawful take will result from any authorized action. (Slip Opn. 46-50.)

CBD repeats the same claim here, contending the Department's adoption of mitigation measures BIO-44 and BIO-46 unlawfully authorized a take of stickleback, a fully protected species, under section 5515, subdivision (a)(1). (OBOM:24-25.) CBD is wrong.

First, CBD ignores the fact that BIO-44 and BIO-46 — which allow qualified biologists to rescue stranded fish — were developed expressly to *protect* special-status aquatic species, including stickleback. From CBD's perspective, no stickleback can ever be touched or moved, even for its own safety. CBD interprets section 5515 in a vacuum, ignoring the context in which it interacts with other provisions of the Fish and Game Code.

Second, CBD's narrow and cabined interpretation of the Fish and Game Code would leave stickleback and other fully-protected species

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[4] Undesignated section references in this part of our brief are to the Fish and Game Code.

"untouchable" for any purpose — so that actions to conserve and benefit them would be illegal, a result that is plainly anti-conservation.

Third, the Court of Appeal properly harmonized section 5515 with sections 86 and 2061, and correctly concluded that BIO-44 and BIO-46 are consistent with the overall conservation scheme of the Fish and Game Code. (Slip Opn. 48.) The Department did not abuse its discretion when it adopted BIO-44 and BIO-46.

Fourth, under BIO-44 and BIO-46, the only entity that can relocate stickleback is the U.S. Fish and Wildlife Service — which will perform this work pursuant to the federal Endangered Species Act (16 U.S.C. § 1531 et seq.), *not* pursuant to any state permit issued by the Department. As a result, CBD has no section 5515 claim against the Department.

A. Stickleback is subject to both state and federal designations.

The unarmored threespine stickleback is a small, fresh water fish native to rivers and streams in Southern California. (AR:25676.) In 1970, stickleback was listed as a federal endangered species under the federal Endangered Species Conservation Act of 1969 (the precursor to the current federal Endangered Species Act of 1973). (AR:25676; 35 Fed.Reg. 16047.) At the same time, stickleback was designated a fully protected species in California (§ 5515, subd. (b)(9)). A year later, the stickleback was placed on California's list of "endangered species." (AR:25676; Cal. Code Regs. tit. 14, § 670.5(a)(2)(L).) Thus, for more than 40 years, stickleback has been under the jurisdiction and protection of both the Department *and* the U.S. Fish and Wildlife Service.

For purposes of Newhall's application for a section 404 permit, federal law required the Service to "consult" with the Corps to determine

whether the project might adversely affect federally-listed species, including the stickleback. (16 U.S.C. § 1536; AR:3607-3608.)

To meet their respective federal and state obligations, the Department and the Corps jointly prepared and independently adopted the mitigation measures covering stickleback and other aquatic species — BIO-43 through BIO-46 (AR:300-303, 4262-4267). These measures redirect fish away from in-river construction areas where they might be injured. (*Ibid.*) In the unlikely event fish become stranded, the measures authorize qualified biologists to collect and relocate the fish to a safe place in the river. (AR:300-303; AR:4266.) However, BIO-46 states expressly that only the U.S. Fish and Wildlife Service can collect and relocate stickleback:

> During any stream diversion or culvert installation activity, a qualified biologist(s) shall be present and shall patrol the areas within, upstream, and downstream of the work area. The biologists shall inspect the diversion and inspect for stranded fish or other aquatic organisms. *Under no circumstances shall the unarmored threespine stickleback be collected or relocated, unless USFWS personnel or their agents implement the measure.* Any event involving stranded fish shall be recorded and reported to CDFG and USFWS within 24 hours.

(AR:303, italics added.)

Because only the U.S. Fish and Wildlife Service or its agents can "collect" and "relocate" stickleback, they will do so under the protections afforded by federal law. (*Center for Biological Diversity v. United States Fish and Wildlife Service* (9th Cir. 2006) 450 F.3d 930, 932-934.)

The stickleback's regulatory status as a "fully protected" and "endangered" species under *both* state and federal law informs the context in which the challenged mitigation measures must be viewed.

B. The permits issued by the Department do not authorize — and, in fact, expressly prohibit — take of stickleback.

1. The Department's interpretation of the Fish and Game Code is entitled to deference.

An assessment of the Department's compliance with section 5515, subdivision (a)(1), requires an analysis of the language of that statute and sections 86 (defining "take") and 2061 (defining "conservation" in the context of California's endangered species act). The standards of statutory interpretation are well established.

A reviewing court's "primary task in interpreting a statute is to determine the Legislature's intent, giving effect to the law's purpose." (*Tuolumne Job & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037.) This analysis begins with an examination of "the statute's words, giving them a plain and common sense meaning." (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) Words are construed in context, and statutes are harmonized, both internally and with each other, to the extent possible; interpretations leading to absurd results or rendering words surplusage are to be avoided. (*People v. Loeun* (1997) 17 Cal.4th 1, 9.)

Where, as here, the statutes under review implicate a complex regulatory scheme, courts seek interpretive guidance from the agency charged with the implementation of that scheme. (*Southern California Cement Masons Joint Apprenticeship Committee v. California Apprenticeship Council* (2013) 213 Cal.App.4th 1531, 1541-1542.) An

agency's interpretation is entitled to significant deference if is "has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion." (*Ibid.*)

An agency's interpretation of controlling statutes "will be accorded great respect by the courts and will be followed if not clearly erroneous." (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170.) The level of deference is especially high where, as here, the agency is charged with enforcing the code section implicated in the litigation. (*Hardesty v. Sacramento Metropolitan Air Quality Management Dist.* (2011) 202 Cal.App.4th 404, 418, 422.) In short, while the interpretation of a statute is ultimately a question of law, courts "will defer to an administrative agency's interpretation of a statute or regulation involving its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the interpreted provision." (*Estrada v. City of Los Angeles* (2013) 218 Cal.App.4th 143, 148-149.)

Here, because the statutes at issue are all part of the Fish and Game Code and form part of the state's policy to conserve endangered species (§§ 2052, 2061), context matters (§ 2). The Department is the presumptive expert agency on matters affecting fish and wildlife and, specifically, the conservation of fish and wildlife. (§ 1802.) The Legislature has assigned to the Department the task of implementing the Fish and Game Code and developing regulations toward that end. (*California Forestry Ass'n v. California Fish & Game Com'n* (2007) 156 Cal.App.4th 1535, 1547, 1551 [deference to agency appropriate given agency's scientific expertise regarding endangered species]; § 1802 [Department has jurisdiction over conservation, protection, and management of fish and wildlife and habitat necessary for biologically sustainable populations of those species].)

Given the breadth of the Fish and Game Code, the Department's statutory duties are complex. The Department's role in applying the Fish and Game Code is further complicated by the fact that the Department shares jurisdiction with the federal government over many natural resources and wildlife species, including the stickleback, which is "fully protected" and state-listed "endangered" under California law, and federally-listed "endangered" under federal law. (§§ 5515, subd. (b)(9), 2062; Cal. Code Regs., tit. 14, § 670.5(a)(2)(L); 16 U.S.C. § 1536, subd. (a).) As a result, the Department must coordinate its conservation efforts with federal agencies. (§§ 703.5, 1375.)

In addition, the Department's jurisdiction over the "waters of California" often coincides the Corps' jurisdiction over "waters of the United States." (33 U.S.C. § 1344). The Santa Clara River, where the stickleback resides, is within the jurisdiction of both the Department and the Corps. (AR:2405-2408; § 89.1; 40 C.F.R. § 122.2.)

Given the complex scientific, technical, and jurisdictional environment in which the Department operates, this Court should defer to the Department's interpretations of sections 5515, 86, and 2061, unless clearly wrong or unreasonable (which they are not). (*City of Arcadia v. State Water Resources Control Bd., supra,* 191 Cal.App.4th at p. 170.)

2. Section 5515 prohibits take and the "issuance of permits and licenses to take" fully protected fish.

CBD ignores the language of section 5515, subdivision (a)(1) — the statute on which CBD's entire "fully protected" claim is built. The relevant text is instructive:

> 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,* and no permits or licenses heretofore shall have any force or effect for that purpose.

(§ 5515, subd. (a)(1), italics added.)

The first sentence makes it illegal to actually take all or a part of a fully protected fish. This provision does not apply here because (as CBD concedes) the project has not yet commenced and there has been no actual take of stickleback. CBD's claim turns on the second sentence, which prohibits the Department from issuing "permits or licenses" to take fully protected fish.

But, the Department did not issue any permit or license authorizing the take of stickleback. The only "permits" issued by the Department were two incidental take permits for spineflower and for three riparian bird species. (AR:703, 2407.) Neither of those permits authorizes take of stickleback; to the contrary, both expressly prohibit take of stickleback:

> This ITP does not authorize the take of any fully protected species as defined by state law. ... *DFG has advised the Permittee that take of any species designated as fully protected under the Fish and Game Code is prohibited.* DFG also recognizes that certain fully protected species are documented to occur within the vicinity of the RMDP area, or that such species have some potential to occur on, or in, the vicinity of the RMDP area, due to the presence of suitable habitat. These fully protected species include the American peregrine falcon ..., California condor ..., golden eagle ..., white-tailed kite ..., *unarmored threespine stickleback* ..., and the ringtail cat.... DFG believes that the Permittee can implement the RMDP and SCP consistent with the Fish and Game Code.

(AR:645, 706, italics added.)

As for the Streambed Alteration Agreement, it is not a "permit" or "license" within the meaning of section 5515, subdivision (a)(1) — but even if it were, it *prohibits* take of stickleback. (AR:583, 3599.) Quite plainly, Newhall cannot use its incidental take permits or streambed agreement as shields against criminal and civil liabilities should any stickleback be taken. (§§ 2582-2584, 12000, subds. (a), (b).)

Because CBD has not identified any Department-issued permit or license authorizing take of stickleback, CBD cannot fit its claim within the text of section 5515. The claim fails.

3. BIO-44 and BIO-46 protect stickleback; they don't take them.

BIO-44 and BIO-46 are conservation mitigation measures jointly developed by the Department and Corps with assistance from the U.S. Fish and Wildlife Service and Dr. Camm Swift, a renowned stickleback expert and principal at Entrix Consulting. (Slip Opn. 27-30.) BIO-44 and BIO-46 are not "permits" or "licenses" as those terms are used in section 5515, subdivision (a)(1); they are part of a larger fish protection program that involves monitoring, limits on construction periods, a fish diversion plan, and strategies for rescuing any fish that might become stranded. (AR: 300-303.) The *raison d'etre* for all of these measures — which begin with BIO-43 and end with BIO-46 — is to *protect* fish, including stickleback, not *take* them. (Slip Opn. 18-23.) Significantly, the Department *always* retains

the right to rescue any species — even fully protected ones such as stranded stickleback — if necessary to prevent or relieve their suffering. (§ 1001.)[5]

CBD nevertheless contends BIO-44 and BIO-46 will require (or at least allow) the biologists from the U.S. Fish and Wildlife Service to "pursue" and "capture" stickleback (OBOM:24-26) — two terms that fall within the definition of "take" set forth in section 86. (§ 86 ["Take" means "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill"].) But neither BIO-44 nor BIO-46 uses the words "pursue" or "capture" (AR:303) — they simply say that, if necessary to rescue stranded fish, U.S. Fish and Wildlife Service biologists can "collect" and "relocate" them to a safer place in the river. (AR:301, 303.)

The difference between "pursue" and "capture" on one hand and "collect" and "relocate" on the other might be semantic; but in this context, semantics matter.

First, unlike the *federal* definition of take, the state definition does not identify "collect" or "collection" as a form of take. (Compare § 86 with 16 U.S.C. § 1532(19).)[6] In fact, the federal definition of "take" includes both "capture" and "collect," demonstrating that Congress viewed the two terms as distinct, with different meanings. (16 U.S.C. § 1532(19).) This is important because in 1984, the Legislature considered amending section 86

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[5] Section 1001 provides that: "Nothing in this code or any other law shall prohibit the department from taking, for scientific, propagation, public health or safety, prevention or relief of suffering, or law enforcement purposes, fish, amphibians, reptiles, mammals, birds, and the nests and eggs thereof, or any other form of plant or animal life."

[6] The federal Endangered Species Act of 1973 defines the term "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or *collect*, or to attempt to engage in any such conduct." (16 U.S.C. § 1532(19).)

to correspond exactly to the more expansive federal definition, but ultimately did not enact the amendment. (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.)[7] As a result, "collect" never became part of the state definition of take.

Second, the words "pursue," "catch," and "capture" reflect an attempt to chase down an animal and hold it without any protective benefit for the species in question. Put another way, "pursue," "catch," and "capture" involve tracking down an animal and either killing, caging, selling or trading it — ultimately leading to its death *or* its removal from the wild. These words bring to mind the elephant seal in the zoo, the whale in the aquarium, the sheep's head mounted on the wall, and the sale or trading of eagle feathers.[8]

In contrast, "collect" and "relocate" — particularly when considered in the context of the fish protection program described in BIO-43 through BIO-48 — reflect the intent of the Department, the Corps, and the U.S. Fish and Wildlife Service to keep stickleback out of harm's way. Under these measures, no one other than Service biologists or their agents can touch or pick up stickleback; and even they can only do so to rescue stranded stickleback and put them back in the river.

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[7] This legislative history is part of the Court of Appeal record.

[8] California statutes identify many species as "fully protected," including not only the stickleback, but also the northern elephant seal, Guadalupe fur seal, Pacific right whale, and Golden eagle. (§§ 3511, subd. (b)(7), 4700, subd. (b)(2), (b)(3), (4), 5515, subd. (b)(9).)

It is not surprising, then, that the Department and the Court of Appeal determined that the "collect and relocate" activities described in BIO-44 and BIO-46 are "conservation" measures as defined in section 2061, not "take" as defined in section 86. (Slip Opn. 48.) The full text of section 2061 demonstrates the logic of this interpretation:

> "Conserve," "conserving," and "conservation" mean 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. These methods and procedures include, but are 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 quoted passage provides an expansive definition of "conservation" (Slip Opn. 48), including "the use of *all* methods and procedures" necessary to bring any endangered species to a point where they no longer need protection. Among the methods and procedures authorized for the conservation of an endangered species are "live trapping" and "transplantation" (§ 2061), and section 2055 requires state agencies to "conserve endangered species" by using their authority to further the purposes of California's Endangered Species Act. Accordingly, the "collect" and "relocate" activities described in BIO-44 and BIO-46 — clearly intended to conserve and protect stickleback — do not constitute "take" in violation of section 5515.

Construed as a whole, the statutory scheme allows the Department to approve live trapping and transplantation as permissible methods to conserve any endangered species, including stickleback, because the stickleback, in addition to being a fully protected species, is also a state and federal endangered species — meaning the stickleback is entitled to the conservation benefits afforded by section 2061. Any other interpretation makes no sense, and would diminish the Department's ability to conserve endangered species with dual listings, thereby frustrating a fundamental policy of this state. (§ 2052.) More to the point, any other interpretation would be absurd because it would render stickleback so "protected" that even actions to conserve and benefit them would be illegal.

4. The Court of Appeal properly determined that the "collect and relocate" activities described in BIO-44 and BIO-46 are conservation measures, not take.

Did the Court of Appeal carve out a "conservation" exception to section 5515, subdivision (a)(1)? No. The Court of Appeal held that the mitigation measures under review — those involving the protective relocation of stickleback by the U.S. Fish and Wildlife Service — do not qualify as take *at all.* (Slip Opn. 48.) Accordingly, section 5515, subdivision (a)(1) is not implicated. This result does not offend any provision of sections 5515, 86, or 2061. To the contrary, it harmonizes the sections, giving full effect to each. (Slip Opn. 49-50.) No word is twisted or taken out of context, and the Department's ability to implement the Fish and Game Code as the Legislature intended is left intact. It is CBD's interpretation, not the Court of Appeal's, that is out of step with the policy of this state to *conserve* endangered species.

II. CBD'S CHALLENGES TO PROJECT IMPACTS ON STEELHEAD SMOLT AND CULTURAL RESOURCES ARE BARRED BY THE CEQA EXHAUSTION DOCTRINE AND BY CBD'S FAILURE TO CHALLENGE THE COURT OF APPEAL'S HOLDING ON THE MERITS OF THOSE ISSUES.

The Court of Appeal held that CBD forfeited its CEQA challenges regarding project impacts on steelhead smolt and cultural resources because no one raised those issues before the close of the public comment period on the Draft EIR portion of the jointly-prepared EIS/EIR. (Slip Opn. 58-59, 70-71; § 21177, subd. (a).)[9] CBD disagrees, describing the Court of Appeal's opinion as a "sweeping ruling" that ignores the plain language of section 21177. (PFR 18; OBOM:41.) CBD is wrong. The Court of Appeal did not "ignore" the plain language of section 21177, subdivision (a); it enforced it — by properly rejecting CBD's invitation to *graft* the U.S. Army Corps of Engineers' *NEPA* public comment requirements *onto* the Department's *CEQA* public comment requirements.

Under CEQA, the alleged grounds for non-compliance must be raised "during the public comment period provided by [CEQA] *or* prior to the close of the public hearing on the project before the issuance of the notice of determination [by the CEQA lead agency]." (§ 21177, subd. (a), italics added.) The public hearing was on June 11, 2009, and the 120-day public comment period on the Draft EIR ended on August 25, 2009. (AR:8, 2417.) The comments at issue were submitted almost a year later (August 3, 2010). By applying existing CEQA law to the record, the Court

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[9] Newhall supports the Department's thorough analysis of CBD's failure to exhaust CEQA's available administrative remedies as to its steelhead smolt and cultural resources claims, and intends only to supplement it in certain respects. And in this section, the undesignated section references are again to the Public Resources Code.

of Appeal was following the Legislature's admonition to *not* impose requirements beyond those set forth in CEQA or the Guidelines:

> It is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, *shall not* interpret [CEQA] or the state guidelines ... in a manner which imposes procedural or substantive requirements *beyond those explicitly stated in [CEQA] or in the state guidelines.*

(§ 21083.1, italics added.)

A. In accordance with the governing laws, the Department and the Corps followed different public comment processes — one under CEQA, the other under NEPA.

CBD ignores the fact that the Department, in complying with CEQA, followed different "public comment" procedures than those imposed on the Corps under NEPA. CEQA's public comment procedures differ substantively from their federal analogs and have different timelines; they are neither subsumed within nor augmented by NEPA. (Cf. *California ex rel. Imperial County Air Pollution Control Dist. v. U.S. Dept. of Interior* (9th Cir. 2014) __ F.3d ___, 2014, WL 3766720 at 7.) The Department's "public comment" duties under CEQA do not change simply because the document in question is a joint EIS/EIR independently reviewed and approved by the Corps.

1. The Department's CEQA process does not involve a public comment period on a Final EIR.

The Department's 120-day CEQA public comment period on the Draft EIR began April 27, 2009, and closed August 25, 2009. (AR:13719,

118840-118841, 118852-118854, 119099.)[10] The Department did not hold — and was not required to hold — a public hearing after the close of the public comment period. (§ 21177.) Accordingly, all comments alleging non-compliance with CEQA were due on or before August 25, 2009. (§ 21177, subd. (a).) During that period, no person or entity submitted comments critical of the EIR's assessment of project impacts to steelhead smolt or cultural resources.

When the Final EIR was released to the public on June 18, 2010, the Department did not request public comment, and (contrary to CBD's assertion) there was no public hearing on the Final EIR (OBOM:30) because none was required. (§ 21083.1; Guidelines, § 15089 [public review of final EIR is allowed, but not required]; *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1111.)

2. NEPA required the Corps to accept and respond to public comments on the Final EIS.

The Corps' NEPA review followed a different process and timeline. (*California ex rel. Imperial County Air Pollution Control Dist. v. U.S. Dept. of Interior, supra,* WL 3766720 at 7.) Unlike the Department, the Corps was required by federal regulations to accept public and agency comments on the Final EIS. (40 C.F.R. §§ 1503.1(b), 1506.10.) Accordingly, the Corps established a second public comment period for receiving input on the Final EIS that opened on June 18, 2010 and closed on August 3, 2010. (AR:48453-48456, 122307-122320, 122334.)

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[10] During the comment period, on June 11, 2009, the Department and the Corps held a joint public hearing on the Draft EIS/EIR. (AR:2417, 21043-21124.)

On the final day of the NEPA comment period on the Final EIS — August 3, 2010 — Ventura Coastkeeper, one of the petitioners in this case, submitted a letter stating the EIS/EIR should assess the potential for project discharges of dissolved copper to affect juvenile steelhead downstream of the project site (AR:10826-10827 10836-10837), an issue that had never been raised by anyone. The same day, Wishtoyo Foundation, another petitioner, submitted a letter critical of the EIS/EIR's cultural impacts analysis, another issue that had never been raised by anyone. (AR:123134-123146, 123334-123338 [Chumash letter].)

These are the comments CBD sought to use as the foundation for its CEQA claims against the Department regarding impacts to steelhead and cultural resources. As the Court of Appeal correctly concluded, they cannot serve this purpose.

B. The Department held no public comment period on the Final EIR; and NEPA's requirement that the Corps accept public comments on Final EIS did not "reopen" the CEQA public review period.

Contrary to CBD's assertions, the Department established *no* "public comment period" for the *Final* EIR, and no such public comment period is required by CEQA even where, as here, the lead agency does not hold a public hearing on the *Final* EIR. (OBOM:29; Guidelines, § 15089 [public review of final EIR is allowed, but not required]; AR:48453-45455.)

Federal law is different. NEPA required the Corps to designate a public comment period and accept further input on the Final EIS (40 C.F.R. §§ 1503.1(b), 1506.10) — but there is nothing in NEPA or CEQA that superimposes these federal requirements on a state agency. (Compare AR:118840-118844 and AR:119099-119100 with AR:122307-122320.) Time-barred CEQA comments are not revived or reopened by the fact that

they were submitted before the NEPA deadline for comments on the Final EIS under federal law. Further, under CEQA, while lead agencies *may* provide a public review period on the Final *EIR*, they are *not* required to do so. (Guidelines, §§ 15089, subd. (b); 15005, subd. (c) [defining "may" as a "permissive" term, "left fully to the discretion" of the agency].)

C. CBD's position would impose federal duties on state agencies, thereby discouraging state agencies from working cooperatively with their federal counterparts.

CEQA expressly encourages lead agencies to work with their federal counterparts and develop joint EIS/EIRs. (Guidelines, §§ 15226, 15228, 15170, 15220-15229; *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 278-279.) But CEQA does not anywhere make lead agencies in California subject to the procedural requirements of NEPA or any other federal statute.

Few state or local agencies would agree to partner with the federal government if cooperation forced the state and local agencies to assume *federal* obligations in addition to their *state* and *local* obligations. That result would be contrary to CEQA's legislative directive to our courts to interpret CEQA in a way that does not impose procedural or substantive requirements beyond those explicitly stated in CEQA or the Guidelines. (§ 21083.1.)

D. CBD's contention that it has no judicial remedy for its steelhead smolt and cultural resources claim ignores the fact that those claims were timely for purposes of the Final EIS.

CBD contends the Court of Appeal's holding leaves CBD "without a judicial remedy or forum" to address its steelhead and cultural resources

arguments. (OBOM:39.) Not so. CBD's comments on steelhead smolt and cultural resource impacts — while untimely for purposes of a CEQA claim against the Department — were raised for purposes of pursuing NEPA claims against the Corps in federal court. And this fact has not been lost on CBD; it has sued the Corps in federal court, alleging among other things that the Corps' EIS provided an inadequate analysis of impacts to steelhead smolt and cultural resources. (*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.)[11]

E. CBD's challenge must be rejected because CBD failed to raise and address the Court of Appeal's alternative holdings on the merits of the steelhead smolt and cultural resources issues.

In the alternative, the Court of Appeal held that substantial evidence supported the EIR's substantive determinations on CBD's steelhead smolt and cultural resources claims. (Slip Opn. 59-63, 71-74.) Because CBD did not challenge those holdings in its petition for review or in its opening brief, the issues have been forfeited. This omission defeats CBD's claims on substantive grounds. (*People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1237; *Gunn v. Mariners Church, Inc.* (2008) 167 Cal.App.4th 206, 217-218; *Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1292.)

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[11] As more formally presented in the accompanying Request for Judicial Notice, Newhall asks the Court to judicially notice CBD's federal court amended complaint. (Evid. Code, §§ 452, subd. (d), 453.)

III. SUBSTANTIAL EVIDENCE SUPPORTS THE EIR'S ANALYSIS OF THE PROJECT'S GREENHOUSE GAS IMPACTS.

A. Overview.

CBD attacks the method by which the Department determined the significance of the project's greenhouse gas impacts. (OBOM:50, 53.) As we explain, the attack lacks merit. The EIR's significance criterion was derived from the 2006 Global Warming Solutions Act — better known as AB 32 — and provides a realistic measure of the project's greenhouse gas impacts in the larger context of California's adopted policy to reduce emissions to 1990 levels by 2020. (AR:7702, 7704-7705, 126257; Health & Saf. Code, § 38550.) Further, the EIR applied this significance criterion to the project using a methodology drawn directly from the Air Resources Board's *Climate Change Scoping Plan* — the Plan adopted to implement AB 32. (AR:106760-106911.)

The Department properly exercised the discretion granted to it by CEQA and the Guidelines. It made sure the EIR: (1) disclosed the "existing conditions" emissions on site as required by Guidelines section 15125, subdivision (a), and compared those existing emissions to the project's emissions (AR:7702, 13610-13611, 26377-26382); (2) followed to the letter each provision in Guidelines section 15064.4 to determine the significance of impacts from greenhouse gas emissions (AR:7647-7651, 7671-7673); (3) explained *why* a simple project-to-ground comparison was insufficient to determine significance (AR:7671-7672, 7702, 13597-13603, 13610-13611); and (4) evaluated the project against the following significance criterion: "Will the proposed Project's GHG emissions impede compliance with the GHG emission reductions mandated in AB 32?" (AR:7672.)

In making these key decisions — selecting AB 32 compliance as a significance criterion and applying the Scoping Plan methodology for implementing AB 32 — the Department acted well within its discretion. (Guidelines, §§ 15064, subd. (b), 15064.4, subd. (a); 15064.4, subd. (b)-(1), (3), 15125, subd. (e).) It is immaterial that CBD would have preferred the Department's selection of different significance criteria or its application of different methodologies for determining significance. (Slip Opn. 98-100, 111.)

B. CBD applies the wrong CEQA standard of review.

CBD contends this Court should review the Department's baseline determination not under CEQA's substantial evidence standard, but under the "failure to proceed" standard. (OBOM:59-60.) CBD is mistaken — the "substantial evidence" test applies. (Slip Opn. 98-100.)

CEQA grants the lead agency discretion to determine what constitutes the existing conditions "baseline," and that determination will not be disturbed if supported by substantial evidence:

> "'[n]either CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence.'"

(*Neighbors*, *supra*, 57 Cal.4th at p. 449.)

In addition, if determining baseline conditions requires the lead agency to choose "between conflicting expert opinions or differing methodologies, it is the function of the lead agency to make those choices

based on substantial evidence." (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 120-121.)

CBD nevertheless suggests that lead agencies have no discretion when it comes to making CEQA significance determinations. (OBOM:67-70.) According to CBD, significance determinations can *only* be made by comparing project emissions to *existing* conditions. (OBOM:54.) CBD is wrong because it ignores the substantial discretion CEQA affords a lead agency when making significance determinations relative to greenhouse gas emissions. (Guidelines, §§ 15064, 15064.4, 15125, subd. (e).)

C. The Department properly exercised its discretion.

1. Guidelines section 15064.4 vests lead agencies with discretion to select the threshold in determining the significance of a project's greenhouse gas impacts.

Although framing its argument as a "hypothetical" baseline issue (OBOM:49-50), CBD simply disagrees with the Department's discretionary decision to use AB 32 as the significance criterion in the EIR. (OBOM:60.) What matters is that substantial evidence supports the EIR's use of AB 32 compliance as the criterion for determining the significance of the project's greenhouse gas impacts. This evidence includes the following:

First, after comparing existing emissions at the site with the project's anticipated emissions, the EIR determined that the difference between the two amounts was insufficient to support a significance determination one way or the other. A different analysis had to be found.

> "there is no scientific point of reference that establishes the number of [greenhouse gas] emissions that is environmentally 'significant' on a project-by-project basis."

(AR:7702, 13611.)

The EIR also explained that greenhouse gas emissions are different from other environmental impacts:

> Relatedly, while other environmental impacts — like air quality and traffic concerns — may legitimately be significant because they are just putting too much air pollution and traffic into a *specific* area, [greenhouse gas] emissions do not have the same effect. ... [W]hen location does not matter (such as in the case of [global greenhouse gas] emissions), evaluation of project significance via an efficiency metric is appropriate.

(AR:13612, italics in original.)

Second, no federal, state, or local regulatory authority with jurisdiction over the project, such as the South Coast Air Quality Management District, had adopted thresholds for determining when a particular project's greenhouse gas emissions become significant under CEQA. (AR:13602-13603.)

Third, the EIR's analysis is consistent with *two* California air quality districts (San Joaquin Valley and Sacramento) that endorse the use of AB 32 as a CEQA significance criterion for GHG emissions. (AR:13597-13600.)

Fourth, the EIR explained that the global scale of climate change makes it difficult to assess the significance of a single project, particularly one designed to accommodate anticipated population growth (AR:7674). Climate change and the impact from greenhouse gas emissions is not a localized effect, and its magnitude cannot be quantified locally; instead, it

is an important statewide issue and a global phenomenon. (AR:7662-7671.)[12]

The EIR also addressed the negative policy implications of using a uniform numeric threshold for determining when a project's greenhouse gas emissions are "too high:"

> Finally, from a policy perspective, for a global environmental issue (such as climate change), utilizing an absolute number as a significance criterion equates to attempting to use CEQA to discourage population growth. *Of note, the future residents and occupants of development enabled by Project approval would exist and live somewhere else if this Project is not approved. Whether "here or there," [greenhouse gas] emissions associated with such population growth will occur.*

(AR:13612-13613, italics added.)

Fifth, the California legislature, in enacting AB 32, established the first measurable standard for greenhouse gas reductions statewide (Health & Saf. Code, § 38550; AR:106760-106911), and the EIR properly determined whether or not the project will impede implementation of AB 32.

Sixth, the Air Resources Board had recently adopted a Scoping Plan for achieving the AB 32 emission reduction mandate, thereby providing objective guidance to agencies seeking to evaluate the significance of projects that emit greenhouse gas emissions. (AR:18876-18880.)

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[12] This explains *why* Guidelines section 15064.4 defers to lead agencies the discretion in assessing the significance of impacts from greenhouse gas emissions. (Guidelines § 15064.4.)

Seventh, three appellate courts have approved an EIR's use of the AB 32 significance criterion: *Friends of Oroville*, *supra*, 219 Cal.App.4th at pages 839-841 (approving the use of AB 32 as the "threshold-of-significance standard"); *North Coast Rivers Alliance*, *supra*, 216 Cal.App.4th at pages 650-654 (using a similar significance criterion based on AB 32); and *CREED*, *supra*, 197 Cal.App.4th pages 335-337 (using the AB 32 standard to determine the significance of the project's greenhouse gas emissions).

The evidence and the law provide ample support for the Department's decision to use AB 32 as the significance criterion for the project's greenhouse gas impacts.

2. Guidelines section 15064.4 vests lead agencies with discretion to select the methodology in determining the significance of a project's greenhouse gas impacts.

As stated in the EIR, the project's greenhouse gas impacts would be deemed significant if they would "impede statewide compliance with the greenhouse gas emissions mandate of AB 32." (AR:7672.) The difficulty, however, is finding a methodology for quantitatively determining the point at which this project begins to "impede" California's effort to bring 2020 emissions down to 1990 levels. Fortunately, the Scoping Plan prepared by the experts at the Air Resources Board incorporates a methodology that the Department could use to answer this fundamental question. The methodology compares the 1990 emissions cap to the projected 2020 emissions under business-as-usual conditions to determine the percent reduction in emissions the State needs to achieve to reduce its 2020 emissions to 1990 levels, even with population growth. (AR:26255-26258, 106765, 106787, 106789-106791, 106798-106799.)

It is this methodology that CBD claims cannot be used for purposes of determining significance under CEQA. (OBOM:68.) CBD is wrong. The Department, as lead agency, had the discretion to select the methodology by which it would determine whether project impacts triggered the selected significance threshold. (*Save Our Peninsula Committee*, *supra*, 87 Cal.App.4th at pp. 120-121.) That methodology is considered adequate under CEQA if supported by substantial evidence, even if CBD does not like it and would prefer the use of a different methodology. (*Ibid.*)

In a related argument, CBD contends Guidelines section 15064.4, subdivision (b) "forbids" the use of a "business as usual" methodology. (OBOM:64.) The subdivision (b) factors do *no* such thing, largely because they are not mandatory.

Moreover, those factors must be harmonized with section 15064.4, subdivision (a), which vests the lead agency (e.g., the Department) with discretion to "select the ... methodology it considers most appropriate provided it supports its decision with substantial evidence." (Guidelines, § 15064.4, subd. (a)(1).)

Section 15064.4, subdivision (b) does not identify any numeric or rigid criteria for determining the significance of a project's greenhouse gas impacts; instead, subdivision (b) identifies three factors a lead agency "*should consider*" in assessing the significance of impacts from greenhouse gas emissions. (Guidelines, § 15064.4, subd. (b); AR:20339-20341.) To begin, a lead agency *should* evaluate the extent to which "the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting." (Guidelines § 15064.4, subd. (b)(1).) Additionally, the lead agency *should* determine whether "the project emissions exceed a

threshold of significance that the lead agency determines applies to the project." (*Id.* subd. (b)(2).) Finally, the lead agency *should* evaluate the extent to which "the project complies with regulations or requirements adopted to implement a statewide ... plan for the reduction or mitigation of greenhouse gas emissions." (*Id.* subd. (b)(3).)

The EIR examined the project in light of each of the subdivision (b) factors and disclosed the results of that examination to the decision makers and the public. (AR:7671-7674, 7702-7705, 13610-13611, 18876-18877.) The EIR explained the significance threshold it was using, the methodology it employed to determine significance, and why both were appropriate given the state of global climate change science and regulations. (*Ibid.*)

Further, the subdivision (b) factors are not exclusive — subdivision (b) itself provides that a lead agency "*should* consider" the three factors listed therein, "*among others*, when assessing the significance of impacts" from greenhouse gas emissions. (Guidelines, § 15064.4, subd. (b), italics added.)[13]

Additionally, *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1067-1068, strongly endorsed a lead agency's discretion to develop its own, project-specific significance thresholds in an EIR — and the Department did just that.

The Department devised its own EIR significance threshold for this project (AR:7672); it did so relying upon AB 32, the 2006 Global Warming

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[13] Subdivision (b) uses the term "should" throughout in the context of the factors to be considered. "Should" connotes only "guidance" agencies are "advised" to follow (Guidelines, § 15005, subd. (b)) — they are not exclusive, CEQA-mandated factors.

Solutions Act, and the Board-adopted Scoping Plan and methodology (AR:7702-7705).

The EIR and record assess whether project emissions would impede California's compliance with the AB 32 reduction mandate implemented through the Scoping Plan — an adopted statewide plan identifying "reductions" in greenhouse gas emissions and other strategies to "mitigate" climate change. (AR:106765-106787.) CBD concedes the Scoping Plan is "arguably such a 'statewide plan'" under subdivision (b)(3) of Guidelines section 15064.4. (OBOM:63.)

3. The 2008 Scoping Plan methodology for achieving the AB 32 mandate.

Contrary to CBD's contention, the EIR did not use a "hypothetical" project to evaluate the significance of the project's greenhouse gas impacts. (OBOM:49-54.) Instead, the EIR used the same methodology reflected in the Scoping Plan.

The Scoping Plan represents the Air Resources Board's effort to use science and quantitative analysis to help the State meet AB 32's reduction mandate. (Health & Saf. Code, § 38550.) To determine how many metric tons of greenhouse gas must be eliminated from California's inventory to reach 1990 levels by 2020, the Board had to find a way to make 1990 conditions and 2020 conditions comparable. The Board concluded that this could be accomplished by assuming emissions controls remain static between 1990 and 2020. Thus was born the "2020 business-as-usual"

baseline case.[14] It is an analytical construct developed expressly to help measure statewide compliance with AB 32. (AR:13610-13611, 26257, 106787.)

Once the Air Resources Board developed this methodology, it was able to determine the following:

> (1) statewide emissions under 2020 business-as-usual conditions calculate to 596 million metric tons per year (AR:13610-13611, 26268, 106798-106799);
>
> (2) statewide emissions under 1990 conditions calculate to 427 million metric tons per year (*ibid.*);
>
> (3) the "difference" between 1990 and 2020 business-as-usual calculated emissions is 169 million metric tons per year (*ibid.*); and
>
> (4) therefore, a reduction of 169 million metric tons per year is needed (596-427=169), or about 29 percent — as compared to the Scoping Plan's 2020 business-as-usual base case emissions — to put California on track to meet AB 32's reduction mandate (*ibid*).

As discussed below, the EIR applied this same methodology to the project's estimated emissions to determine whether those emissions would impede statewide compliance with AB 32.

4. Applying the 2008 Scoping Plan methodology to the project.

The Scoping Plan confirmed that emissions must be reduced by about 29 percent from the Air Resources Board's 2020 "business-as-usual"

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[14] The 2020 business-as-usual base case is described in the EIR's technical addendum prepared by ENVIRON. (AR:26257.) The Scoping Plan, Appendix F, pages F-3 through F-10, also explains staff's estimated 2020 business-as-usual emissions. (http://www.arb.ca.gov/cc/scopingplan/document/appendices_volume1.pdf [last accessed October 6, 2014].)

horizon for California to meet the greenhouse gas emission reduction mandate of AB 32. (AR:106787-106790.)[15] The EIR, using the Scoping Plan's methodology, found the project's greenhouse gas impacts would be less than significant because the project's estimated emissions were 31 percent below the level that would be expected if no actions were taken to reduce emissions by 2020 — the very *same* metric used in the Scoping Plan:

> The proposed [project] would result in the emission of about 269,000 metric [tons] of [greenhouse gases] on an annualized basis (and incorporating vegetation and construction emissions). These emissions are 31 percent below the level that would be expected if the proposed [project] and resulting development were constructed consistent with [Air Resources Board's] assumptions for the [Board's] 2020 [business as usual] scenario. Because this reduction exceeds the 29 percent reduction required for California to achieve the AB 32 reduction mandate, the proposed [project] would result in a less-than-significant impact.

(AR:7704.)

For example, in terms of the project's *residential* component, if no action were taken to reduce emissions consistent with the Air Resources Board's Scoping Plan criteria, 86,607 tons of greenhouse gases would be released into the environment in 2020. (AR:26255.) The project's design commitments and mitigation measures, along with improved vehicle fuel efficiency and cleaner electricity, enable the project to reduce its residential

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[15] The term "no action taken" is used in the same manner that the Scoping Plan used the term "business as usual." Both signify the Scoping Plan's methodology to help the Air Resources Board determine how to realistically achieve the State's mandated emission reductions by 2020. (AR:106789-106790; Slip Opn. 93-94.)

emissions by 59,499 tons annually. This results in a 31 percent reduction in *residential* emissions from 2020 "business-as-usual" conditions.

Other actual project-related emissions reductions — based on the project's quantified "greenhouse gas inventory" — also will occur relative to the project's non-residential, vehicle, municipal/water, and recreational components. (AR:26264-26270.)

Thus, the EIR's significance determination was not based on a "fabricated" or "hypothetical" future project (as CBD suggests). (OBOM:53; Slip Opn. 111.) It was based on a methodology devised by the Air Resources Board to establish how much the State must reduce greenhouse emissions in order to satisfy the mandate of AB 32. In other words, it is a methodology pegged directly to the selected significance criterion and supported by the experts who prepared the Air Resources Board's Scoping Plan. (AR:26255-26273.)

5. Greenhouse gas impacts in context.

Some real-world context is needed here. The science of *global* climate change and the regulatory framework to monitor and reduce greenhouse gas emissions are continuously evolving. (AR:7632, 18873-18880.) The record reflects the EIR's good-faith efforts at full disclosure in this emerging area. (*Ibid.*) Indeed, even after the Department completed the EIR's global climate change section in 2010 (AR:7632-7782), other EIRs in this state were concluding that global climate change and greenhouse gas impacts were "too speculative" to even make a significance determination — a finding affirmed in *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 934.

Nonetheless, in this case, the EIR disclosed existing emissions, compared them to project emissions, acknowledged the increase, explained why the comparison itself was insufficient to make a significance determination, and turned to the AB 32 "impairment" criterion to assess the significance of a project's greenhouse gas impacts. (AR:7671-7673, 7702-7705, 13597-135603, 13610-13611, 18876-18880.) That CBD wants something more or different is not material under the applicable substantial review standard — because an agency's approval of an EIR will not be set aside on the ground that "an opposite conclusion would have been equally or more reasonable, for, on factual questions, [the court's] task is not to weigh conflicting evidence and determine who has the better argument." (*Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 944-945; *California Native Plant Society v. Rancho Cordova* (2009) 172 Cal.App.4th 603, 626.)

Moreover, CBD's disagreement is problematic in the *global* climate change context. The EIR discloses that, in 2004, global emissions were 26.8 billion metric tons per year, national emissions were about 7 billion metric tons per year, and statewide emissions were about 0.480 billion metric tons per year. (AR:7711.) In contrast, project emissions will be about 0.001 percent of global emissions, 0.0038 percent of national emissions, and 0.056 percent of statewide emissions. (*Ibid.*) As noted by the Court of Appeal (Slip Opn. 102-103), this EIR analysis does *not* suggest

that the project's emissions are *de minimis*. (AR:7711.) Instead, the EIR analysis is provided for overall context only. (AR:7702; Slip Opn. 108.)[16]

Nonetheless, the global nature of climate change illustrates *why* CBD's subjective determinations about whether project emissions (about 269,000 metric tons per year) constitute a "high" number is a factual determination for the Department, *not* CBD. The Court of Appeal recognized this fact and deferred to the Department. (Slip Opn. 102-107.) CBD's disagreement with the EIR's significance threshold, methodology, and significance determination is insufficient to invalidate it (Guidelines § 15064.4, subd. (a)(1); 15064.4, subd. (b)(2)).

D. CBD's claims are nothing more than an impermissible attack on the Scoping Plan and its methodology.

1. The Scoping Plan already has survived legal challenge.

CBD's claim is little more than an impermissible attack on the assumptions used to generate the Air Resources Board's 2020 "business-as-usual" emissions estimate, as set forth in the Scoping Plan. (OBOM:52; but see AR:26257, 106789-106790.)

The time to bring such an attack has long since passed. The Scoping Plan was mandated by statute (Health & Saf. Code, § 38561, subd. (h)) and

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[16] Unlike *Friends of Oroville*, *supra*, 219 Cal.App.4th at page 842, the Department's EIR *did not make a significance determination* based upon the *above* comparison. (Slip Opn. 103.) Instead, the Department turned to the "relevant question to be addressed in the EIR," namely, "whether the Project's GHG emissions should be considered significant in light of the threshold-of-significance standard of [AB 32], which seeks to cut about 30 percent from business-as-usual emission levels" projected for 2020." (*Ibid.*)

subject to "extensive and rigorous" public scrutiny. Moreover, it was challenged in court and its adequacy was affirmed in *Association of Irritated Residents v. California Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1491, 1506 (*AIR*). CBD cannot challenge it now.

2. The Scoping Plan is not "hypothetical" but based on the best available data.

The Scoping Plan's "business-as-usual" methodology is based on the best available scientific, technological, and economic information on greenhouse gas emissions. (Health & Saf. Code, § 38550, 38561; AR:106787, 106788-106791; see also, *AIR*, *supra*, 206 Cal.App.4th at pp. 1447, 1491 [discussing Scoping Plan's 2020 "business as usual" scenario and stating the Scoping Plan was adopted *only* after its technical analyses were submitted to academic peer review].)

The Air Resources Board estimated California's projected 2020 business-as-usual emissions at 596 million metric tons based on anticipated population growth. (AR:106790-106791.) The Plan called for emission reduction strategies to eliminate 169 million metric tons — thereby allowing California to attain the 2020 emissions limit of 427 million metric tons. (AR:106790, 106798-106799.)

There is nothing "hypothetical" about the Air Resources Board's methodology. It documents an approved base assessment of 2020 business-as-usual emissions and provides mechanisms for reaching AB 32's mandate to roll back those emissions to 1990 levels by 2020. The Scoping Plan — prepared specifically to identify the strategies needed to reduce greenhouse gas emissions to 1990 levels by 2020 (*AIR*, *supra*, 206 Cal.App.4th at p. 1490) — aligns fully with CEQA's objective to promote the long-term protection of the environment. (§ 21001, subd. (d).)

3. The Scoping Plan is consistent with recent CEQA cases addressing greenhouse gas impacts.

The AB 32-mandated Scoping Plan — and a lead agency's use of it to determine significance — is consistent not only with Guidelines section 15064.4, but also three Court of Appeal decisions.

CREED v. City of Chula Vista, *supra*, 197 Cal.App.4th at pages 336-337, confirmed the propriety of using AB 32 as a significance criterion in the CEQA context. Project opponents claimed the EIR's analysis should have used *other* recognized thresholds. In rejecting that argument, the Court of Appeal cited Guidelines section 15064.4, and confirmed that lead agencies retain the discretion to determine the significance of greenhouse gas emissions and "under the new guidelines, lead agencies are allowed to decide what threshold of significance it will apply to a project." (*CREED*, *supra*, 197 Cal.App.4th at p. 336.)

Friends of Oroville, *supra*, 219 Cal.App.4th at pages 839-841, approved an agency's adoption of AB 32 as the proper threshold-of-significance standard, explaining that the relevant question to be addressed in the EIR is whether the project's greenhouse gas emissions should be considered significant in light of the threshold-of-significance standard of AB 32, "which seeks to cut about 30 percent from *business-as-usual* emission levels projected for 2020." (*Id.* at p. 842, italics added.)

North Coast Rivers Alliance, *supra*, 216 Cal.App.4th at pages 650-653, upheld the adequacy of the significance threshold the water district used, which was "based on" AB 32 standards and the district's own reduction goals. The EIR analyzed whether the project's workforce vehicle emissions and power use would interfere with the goal of reducing

countywide greenhouse gas emissions by 15 percent, in comparison to 1990 levels, by the year 2020. (*Id.* at p. 651-652.) The EIR concluded the project would not interfere with achieving that goal. This analysis, the appellate court found, "*more than* satisfied the requirements of CEQA." (*Id.* at p. 651, italics added.)

E. CBD's repeated attacks on the California Air Resources Board's "business-as-usual" methodology should be rejected.

CBD contends the Air Resources Board's "business-as-usual methodology" was "never intended" to be used in the CEQA context. (OBOM:63-67.) Its support for this? A page from the California Natural Resources Agency's 2009 "final statement" for amendments to the Guidelines relative to greenhouse gas emissions. (OBOM:64; AR:12808-12809.) The claim lacks merit.

First, CBD takes the Agency's comment out of context. The Agency stated that subdivision (b)(1) of Guidelines section 15064.4 was prepared to ensure that use of a "business as usual" methodology would not result in the failure to comply "with CEQA's *separate* requirement for analyzing project effects in comparison to the [existing] environmental baseline." (AR:12808-12809, italics added.)

Here, the EIR properly analyzed the project's greenhouse gas emissions in comparison to on-site *existing* emissions. It acknowledged the project increase in emissions over existing conditions, and it explained why that comparison was insufficient to make a significance determination. (AR:7702.) The Agency never criticized the EIR's greenhouse gas analysis at any time during the project's lengthy, open, and public environmental review process. Also important, CBD's reference to the Resources

Agency's so-called warning conflicts with the plain language of Guidelines section 15064.4, subdivision (a)(1) and subdivision (b); therefore, it is not entitled to any "weight." (OBOM:70.)

Second, after AB 32 was enacted in 2006, the Governor confirmed that "new provisions" in CEQA should be enacted to encourage "developers to submit applications and local governments to make land use decisions that will help the state achieve its climate goals under AB 32." (Stats. 2008, Ch. 728 (SB 375), § 1(f), Historical and Statutory notes to Gov. Code, § 14522.1.)

Guidelines section 15064.4 was added to CEQA effective March 18, 2010. Although the Department (and not the local government) made the decision that this EIR's analysis will help California achieve its AB 32 mandate, its decision fell squarely within the "new provisions" of Guidelines section 15064.4 and, therefore, *within the context of CEQA*.

Undaunted, CBD contends that, *in 2009*, the Attorney General's office "echoed" the Agency's concerns about the use of the "business-as-usual" methodology as a CEQA significance criterion in comments to the San Joaquin Valley air district. (OBOM:64-65.) Not so.

CBD ignores *other* Attorney General record references to the contrary. When commenting on a city's EIR in *June 2007*, the Attorney General endorsed the very *same* significance criterion used in the Department's EIR as a "*relevant benchmark for determining significance.*" (AR:7672, 117386-117387, italics added.) In *July 2007*, the Attorney General commented on another city's EIR, acknowledging that "*the requirements of AB 32 create a point of reference for determining significance.*" (AR:117739.) The Department's EIR used the very *same*

benchmark in assessing the significance of the project's greenhouse gas emissions. (AR:7671-7672.)

CBD's affection for the *2009* Attorney General letter is irrelevant because this Court's task is not to weigh conflicting evidence to determine who has the better argument (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 393 (*Laurel Heights I*)), but rather to uphold the Department's decision because it is supported by substantial evidence. (*Id.* at p. 407.)

Moreover, there can be no prejudicial abuse of discretion on this point because the Department considered and responded to the 2009 Attorney General letter in the Final EIR (AR:13599, 13603-13604), fully apprising the decision makers and public (Guidelines, § 15151). The Department has the discretion to rely on its own greenhouse gas expert — ENVIRON — and to accept ENVIRON's substantiated findings over those set forth in an Attorney General letter. (§ 21082.2, subd. (c); Guidelines, §§ 15064, subd. (f)(5), 15064.4, subd. (a)(1), 15384, subd. (b); *Laurel Heights I, supra*, 47 Cal.3d at pp. 407-408.)

In passing, CBD contends the Department "declined to consider" other "potential significance standards." (OBOM:72.) This *same* argument was rejected in *CREED, supra*, 197 Cal.App.4th at page 336-337, and by the Court of Appeal in this case (Slip Opn. 111). In fact, the EIR considered several draft and other significance thresholds. (AR:7650, 7660-7661, 13597-13603, 13605-13606, 13612-13613, 20345-20348, 20357-20358, 20360.)

F. CBD's speculation about the "business-as-usual" methodology being used to "game" the system should be flatly rejected.

CBD contends that the Attorney General, in his 2009 letter, cautioned the San Joaquin Valley air district that its approach could allow project opponents to "game" the system. (OBOM:65.) There is no evidence that anyone was allowed to "game" the system, or that anyone even tried to do so, and there is nothing in the Court of Appeal's opinion to support such speculation. In fact, the EIR's climate change analysis was thorough and transparent.

G. CBD's "illusory" project baseline argument is without merit.

CBD contends the EIR used an "illusory" project baseline (OBOM:53), and insists that an analysis against an existing conditions baseline is required. (OBOM:54.) That is not the law, a fact clarified by this Court in *Neighbors*, *supra*, 57 Cal.4th at page 439.

Neighbors, supra, 57 Cal.4th at page 445 involved a CEQA challenge to an EIR prepared for a light-rail project extending service between Culver City and Santa Monica — an EIR that used *only* a 2030 future conditions baseline for its traffic and air quality impact analysis, and did not disclose the effects of the project measured against *existing* traffic and air quality conditions. (*Id.* at p. 446.)

The petitioner in *Neighbors* challenged the use of a future baseline, insisting that, under CEQA, the significance of a project's impacts had to be determined exclusively by reference to an existing conditions baseline. (*Neighbors*, *supra*, 57 Cal.4th at pp. 447-448.) This Court rejected that claim, holding that a lead agency may, under certain circumstances, use

projected future conditions in the EIR as the sole baseline for assessing the significance of a project's impacts — but the agency must justify its decision by showing that an analysis based on existing conditions would be "uninformative" or "misleading" to the decision makers and the public. (*Id.* at pp. 451-452, 457.) As this Court emphasized, the "burden of justification" exists *only* when "an agency *substitutes* a future conditions analysis for one based on existing conditions, omitting the latter, and not to an agency's decision to examine project impacts on *both* existing and future conditions." (*Id.* at p. 454, italics in original.)[17]

Here, substantial evidence supports the Department's EIR, which describes and estimates both existing and project emissions (AR:7674, 26377-26382, 7703-7704), explains that the numeric difference between existing and project emissions did not itself provide a meaningful basis to determine significance (AR:7702, 13609-13610), and then evaluates the significance of project emissions, using AB 32 as the threshold-of-significance benchmark (AR:7672).[18] In short the EIR's analysis of greenhouse gas impacts complies with *Neighbors*.

CBD simply disregards *Neighbors,* contending instead that *CBE, supra,* 48 Cal.4th 310 is the controlling authority. (OBOM:55-59.) *CBE* is inapposite for two reasons.

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[17] *Neighbors* disapproved *Sunnyvale West Neighborhood Association v. City of Sunnyvale* (2010) 190 Cal.App.4th 1351 and *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 48, both of which had held that "an agency may never employ predicted future conditions as the sole baseline for analysis of a project's environmental impacts." (*Neighbors*, *supra*, 57 Cal.4th at p. 457.)

[18] The EIR's additional analysis could be described as a "second" baseline that considered whether project emissions were significant using the Global Warming Solutions Act (AB 32) as the benchmark.

First, *CBE* held that the air quality effects associated with expanding a petroleum refinery should have been measured against existing emission levels rather than against the levels allowed under the refinery's existing permit. (*CBE, supra,* 48 Cal.4th at pp. 322-327.) Here, however, the EIR considered the significance of project emissions measured against existing, on-site emissions. (AR:7702-7705, 18876-18877.)

Second, the evidence in *CBE* established that the refinery project's nitrogen oxide (NOx) would violate the air district's *adopted numeric significance threshold* for NOx emissions. (*CBE, supra*, 48 Cal.4th at pp. 317-318, 320.) Here, however, there was (and is) no adopted, numeric significance threshold for greenhouse gas emissions. Accordingly, the EIR's greenhouse gas analysis *does not circumvent application of an established significance threshold through its use of AB 32's reduction mandate.*

CBD's reliance on *Woodward Park Homeowners Assn. v. City of Fresno* (2007) 150 Cal.App.4th 683 (OBOM:57) is misplaced. *Woodward Park* invalidated an EIR because it compared the project's impacts *only* with those of the maximum buildable development allowed under the current zoning, and did not perform a project-to-ground analysis. (*Id.* at p. 707.) *Woodward Park* held the EIR did not conduct the *dual* baseline analysis permitted under Guidelines section 15125, subdivision (e), which allows a project to be compared with an adopted plan, provided the analysis examines "the existing physical conditions ... *as well as* the potential future conditions discussed in the plan." (*Woodward Park, supra,* 150 Cal.App.4th at pp. 706-707.) *Woodward Park* states unequivocally

that the "two-baselines approach" is legally acceptable provided the EIR "actually carries out both comparisons." (*Ibid.*)[19]

Here, the two-baseline approach was used in the Department's EIR. The EIR's *first* baseline analysis compares existing on-site emissions to project emissions, which the EIR determined was insufficient to make a significance determination (AR:13609-13611); it then conducted a *second* baseline analysis comparing project emissions against the 2020 project business-as-usual emissions derived from the Air Resources Board's Scoping Plan (*ibid.*). Thus, the EIR's analysis is consistent with both *Neighbors* and *Woodward Park.*

CBD's reliance on *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350 and *City of Carmel-by-the-Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229 (OBOM:56-58) is similarly misplaced. These general plan and zoning cases disapproved EIRs that *only* compared project impacts to impacts expected under general plans or some allowable zoning. Here, in contrast, the EIR quantified on-site, existing greenhouse gas emissions and project increases in emissions over existing conditions. It also explained *why* that comparative analysis itself was insufficient to make a significance determination.

H. There was no *prejudicial* abuse of discretion.

CBD contends the Department's decision to use the Air Resources Board's "business-as-usual" methodology constitutes a prejudicial abuse of

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[19] In *Neighbors*, this Court cited *Woodward Park* with approval, confirming that "nothing in CEQA law precludes an agency ... from considering both types of baseline — existing and future conditions — in its primary analysis of the project's significant adverse effects." (*Neighbors*, *supra*, 57 Cal.4th at p. 454.)

discretion (OBOM:71-72). But CBD has made no showing of prejudice; nor can it.

The EIR disclosed that the project would increase the existing, on-site emission level, acknowledged the "obvious change" between existing and project emissions, explained *why* that comparison was insufficient to support a significance determination, and then looked for guidance to AB 32 — a significance criterion approved by three Courts of Appeal. (*Friends of Oroville*, *supra*, 219 Cal.App.4th at p. 841; *North Coast Rivers Alliance*, *supra*, 216 Cal.App.4th at pp. 650-652; *CREED v. Chula Vista*, *supra*, 197 Cal.App.4th at p. 336.)

All of the information required by CEQA is found in this EIR and the record. There are no relevant "omissions." Accordingly, CBD fails to carry its burden to prove prejudice, which is an *independent* basis for affirming the Court of Appeal's opinion. (§ 21005, subd. (b); *Neighbors, supra*, 57 Cal.4th at p. 463 [insubstantial or merely technical omissions not grounds for relief]; *Save Cuyama Valley*, *supra*, 213 Cal.App.4th at pp. 1073-1074; *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 898 [prejudice must be shown].)

CONCLUSION

For the reasons set forth in this brief and in the Department's Answer Brief on the Merits, Newhall urges this Court to reject the cramped and tortuous statutory interpretations advanced by CBD and to adhere to its longstanding practice of harmonizing the statutory schemes enacted by the people through their elected representatives. As both this Court and the Legislature have cautioned, the legal system should not permit the vital safeguards that have been enacted to protect California's environment to be subverted into instruments employed to obstruct or delay the social,

economic, and recreational development of our state. The judgment of the Court of Appeal should be affirmed.

October 8, 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 13,812 words. Counsel relies on the word count of the computer program used to prepare this brief.

October 8, 2014

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CERTIFICATE OF SERVICE

I declare that I am employed with the law firm of Gatzke Dillon & Ballance LLP, whose address is 2762 Gateway Road, Carlsbad, California 92009. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on October 8, 2014, I served a copy of the following document(s):

NEWHALL'S ANSWERING BRIEF ON THE MERITS

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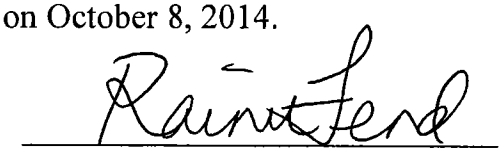
	X	Electronic Service

Tina A. Thomas Thomas Law Group 455 Capitol Mall, Suite 801 Sacramento, CA 95814 Telephone: (916) 287-9292 E-mail: tthomas@thomaslaw.com *Counsel for California Department of Fish and Wildlife*		Facsimile
		U.S. Mail
	X	Overnight Delivery
		Personal Service
	X	Electronic Service
Clerk, California Court of Appeal Second Appellate District Division Five 300 S. Spring Street 2nd Floor, North Tower Los Angeles, California 90013		Facsimile
		U.S. Mail
	X	Overnight Delivery
		Personal Service
		Electronic Service
Clerk Los Angeles County Superior Court 111 N. Hill Street Los Angeles, California 90012 (Los Angeles No. BS131347)		Facsimile
		U.S. Mail
	X	Overnight Delivery
		Personal Service
		Electronic Service

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Carlsbad, California on October 8, 2014.



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