No. S217763

IN THE SUPREME COURT OF CALIFORNIA

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

v.

CALIFORNIA DEPARTMENT OF FISH AND GAME,
Defendant and Appellant,

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

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

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

CONSOLIDATED REPLY BRIEF

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I. INTRODUCTION

Beginning with its first review of a case involving the California Environmental Quality Act ("CEQA") in 1972, this Court has repeatedly reaffirmed the principle that the act is "to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Friends of Mammoth v. Bd. of Supervisors of Mono County* (1972) 8 Cal.3d 247, 259.) This "foremost principle of CEQA" (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390 ["*Laurel Heights*"]) should guide the Court's review of the three issues presented here.

The first issue presents a question of statutory construction: whether the Department of Fish and Wildlife ("Department") may ignore the plain language of California's Fully Protected Species Laws in order to facilitate development. In their answering briefs, the Department and Newhall follow the appellate court in attempting to re-brand CEQA mitigation measures that would allow the capture and relocation of fully protected fish to accommodate development as "conservation measures" under the California Endangered Species Act ("CESA"). Equating "mitigation" with "conservation" not only

rewrites the statute, but also diminishes the heightened protection the Legislature provided to the unarmored threespine stickleback and 36 other fully protected species. The Department and Real Party in Interest Newhall Land and Farming Company ("Newhall") profess concern that applying the plain language of the Fully Protected Species Laws would hinder conservation efforts, but this concern is misplaced as the statutes already allow genuine conservation efforts.

The second issue arises from the Department's and Newhall's disingenuous claim that Plaintiffs and Respondents ("Plaintiffs") failed to exhaust their claims regarding the Project's effects on culturally significant resources and steelhead, even though the Department actually considered and responded to comments raising these claims in the administrative process. In its brief, the Department goes so far as to disavow its role as the CEQA lead agency for the Project, claiming that Newhall, not the Department, considered and responded to the comments in question. The Department, however, certified the Project's EIR, and cannot distance itself from its obligations as a lead agency pursuant to CEQA. As there is no doubt that the comments in fact alerted the Department to Plaintiffs' claims, the exhaustion doctrine does not bar judicial review.

The third issue involves the Department's determination that the Project's emission of about 260,000 metric tons per year of greenhouse gases – a 26 -fold *increase* over existing conditions – will assist in statewide efforts to *reduce* the pollution causing climate change. It reached this conclusion by comparing the Project to a hypothetical "business as usual" baseline: a version of the Project that could never legally be built. In so doing, the Department contravened decades of CEQA case law, culminating in this Court's decision in *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310.

The massive development contemplated by the Project is not environmentally benign. It involves building a new town of about 60,000 residents on an undeveloped and biologically sensitive six-mile stretch of the Santa Clara River. It would require extensive and permanent alteration of the river, its tributaries, natural vegetation, and wildlife communities covering thousands of acres. CEQA demands full disclosure, good-faith analysis, and effective mitigation of the Project's significant impacts. The Department has failed to fulfill these statutory obligations under CEQA and to comply with the Fully Protected Species Laws. Accordingly, Plaintiffs respectfully

request that this Court reverse the appellate court's judgment and remand this case so a writ may issue directing the Department to vacate its certification of the EIR and all approvals based thereon.

II. ARGUMENT

A. The Project's Mitigation Measures Authorizing Capture and Relocation of Stickleback Are Impermissible under the Plain Language of the Fully Protected Species Laws

The construction and operation of Newhall Ranch poses a substantial threat to unarmored threespine stickleback, a fully protected fish species, by disrupting and dewatering portions of the Santa Clara River. In response to this threat, the Department authorized CEQA mitigation measures that allow stickleback to be caught or captured and relocated to other parts of the Santa Clara River, in violation of the Fully Protected Species Laws' clear prohibition against "take" of fully protected species.

The Department and Newhall now ask this Court to create an unwritten exception to the Fully Protected Species Laws allowing, for the first time, the "take" of a fully protected species as part of a project's CEQA mitigation scheme. In so doing, they ignore the plain language of the law that prohibits the taking (including the capture) of

fully protected species as part of mitigation measures imposed under CEQA.

To avoid this plain language, the Department and Newhall embark on a convoluted exercise in statutory reconstruction, ultimately relying on a non-applicable provision of the California Endangered Species Act ("CESA") to trump specific provisions of the Fully Protected Species Laws. They argue that such an interpretation is correct because the CESA provision, Fish and Game Code Section 2061, defines "conservation" as including the trapping and transplantation of CESA-listed species for recovery purposes, and therefore allows the capture and relocation of fully protected stickleback as part of the Project's CEQA mitigation program.

This interpretation is both contrary to law and wholly unnecessary. Indeed, it would fundamentally alter the existing legal and regulatory landscape, undermining the Legislature's express intent to grant 37 fully protected species the highest level of protection under the law. This Court should instead uphold the plain language of the Fully Protected Species Laws.

1. The Unambiguous Language of the Fish and Game Code Demonstrates That CESA Does Not Supersede the Fully Protected Species Laws

As discussed in Plaintiffs' Opening Brief[1] at 12-14, the Fully Protected Species Laws prohibit "the issuance of permits or licenses to take any fully protected fish." (Fish & Game Code § 5515(a)(1).) "Take" is defined as to "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill" wildlife. (Fish & Game Code § 86.) The Fully Protected Species Laws contain an exception, inapplicable here, that authorizes take for necessary scientific research, including efforts to help species recover. However, this provision specifically excludes "*any action taken as part of specified mitigation for a [CEQA] project.*" (Fish & Game Code § 5515(a)(2).) CESA, in contrast, permits live-trapping, relocation, and regulated taking of an endangered or threatened species for "scientific resources management" purposes necessary for the species' conservation. (Fish & Game Code § 2061.) However, CESA says nothing about fully protected species.

[1] The following acronyms are used to describe the opening and answering briefs: POB (Plaintiffs' Opening Brief); DAB (Department's Answering Brief); NAB (Newhall's Answering Brief).

The Department and Newhall argue that the Legislature intended CESA's provisions for scientific resources management measures to trump the Fully Protected Species Laws' explicit prohibition against take caused by CEQA mitigation measures. According to the Department, "[h]ad [the Legislature] wanted to forbid the adoption of section 2061 conservation measures for endangered or threatened species also designated as fully protected, 'it could have easily said so. It did not.'" (DAB at 23; see also NAB at 25.) This turns the proper inquiry on its head. The question is not whether the Legislature intended to forbid CESA's conservation measures permitting take from being applied to fully protected species, but rather whether the Legislature intended Section 2061 to supersede the enhanced protection for some species provided by the Fully Protected Species Laws. Nothing in either statute evidences such an intent; indeed, the plain language of both statutes forecloses it.[2]

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[2] The chronology of the amendments is similarly definitive: Section 5515(a)(2)'s prohibition against take of fully protected species for CEQA mitigation was adopted nearly 20 years after Section 2061 of CESA. (Fish & Game Code § 5515, Stats. 2003, ch. 735, § 4, Sen. Bill No. 412 (2002-2003 Reg. Sess.) enacted Oct. 9, 2003; Fish & Game Code § 2061 (Stats. 1984, ch. 1240, § 2).)

The Department and Newhall also argue that the "dual protected status" of stickleback requires CESA's permitted take for "conservation" to override the Fully Protected Species Laws' take prohibition. (NAB at 25; DAB at 23.) Most fully protected species are also listed under CESA, and the two laws have worked together to protect the same species for decades. (Compare Fish & Game Code §§ 3511, 4700, 5050, 5515 with 14 Cal. Code Regs. § 670.5.) Prior to this litigation, the Department consistently acknowledged that fully protected species are entitled to a higher level of protection than species protected only under CESA. (See, e.g., AR:233-34, 645, 706.) Here, however, the Department contends that if a species is protected under both the Fully Protected Species Laws and CESA, only CESA's *less* protective provisions apply.

The contention is baseless. Although the Department claims its interpretation is necessary to "harmonize" the statutes and "avoid surplus language" (DAB at 22), its interpretation actually *creates* "surplus language." By reading CESA as allowing take of a fully protected species as part of a CEQA mitigation program, the Department would nullify the Fully Protected Species Laws' express exclusion of CEQA mitigation programs from provisions authorizing

take in the course of recovery efforts. (Fish & Game Code § 5515(a)(2) [scientific research exception to fully protected species take prohibition does not apply to "any actions taken as part of specified mitigation for a [CEQA] project."].) "[A]n interpretation that renders statutory language a nullity is obviously to be avoided." (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 357.) The Department and Newhall's attempts to strip away protections for fully protected species under the guise of conservation are impermissible.

The Department nonetheless argues its interpretation of the statutes is due considerable deference. (DAB at 13-15.) But the courts, not the Department, ultimately are responsible for interpreting the meaning of CESA and the Fully Protected Species Laws. The judiciary must "state the true meaning of the statute finally and conclusively" because "[t]he ultimate interpretation of a statute is an exercise of the judicial power." (*Henning v. Industrial Welfare Com.* (1988) 46 Cal.3d 1262, 1282-1283; see also *Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 7 ["Courts must, in short, independently judge the text of the statute."].) Courts "may not look to extrinsic sources if the statute is clear and unambiguous on its face... Nor may [they] add to or alter the words of

a statute to accomplish a purpose that does not appear on the face of the statute." (*Community Development Com. v. County of Ventura* (2007) 152 Cal.App.4th 1470, 1482 [citations omitted].)

Deference is particularly limited where, as here, an agency is merely interpreting a statute. "Because an interpretation is an agency's *legal opinion*, however 'expert,' rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference." (*Yamaha*, *supra*, 19 Cal.4th at 11.) Under the factors identified in *Yamaha* and other cases, deference is unwarranted here. First and foremost, as discussed above, the Department's interpretation would "plainly conflict with a statutory mandate" (*Environmental Protection Information Center v. Department of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 490) by rendering key provisions of the Fully Protected Species Laws surplus. Furthermore, because the statutes at issue here are straightforward rather than "technical, complex, [or] open-ended," the Department has no "comparative interpretive advantage" requiring deference. (*Yamaha*, *supra*, 19 Cal.4th at 13.) The Department's interpretation here is also inconsistent with its prior acknowledgments that the Fully Protected Species Laws provide greater protection than

CESA (AR:233-34, 645, 706), was not developed contemporaneously with the statutes at issue, and was advanced in an EIR and as a litigation position rather than in a formal administrative context. (See *Yamaha, supra*, 19 Cal.4th at 13.) The Department's reliance on *Yamaha* is misplaced, and its plea for deference unwarranted.

2. The EIR's Mitigation Measures Are Not "Conservation" Measures

The Department and Newhall argue that because CESA defines "conservation" as including the trapping and transplantation of CESA-listed species for recovery purposes, fully protected stickleback may be captured and relocated as part of the Project's CEQA mitigation program. In concluding that "Fish & Game Code section 2061 expressly permits the use of live trapping and transplantation if done for purposes of conservation ... in the context of the imposition of mitigation measures ..." (March 20, 2014, Slip Opinion ["Opinion" or "Op."] at 48), the appellate court similarly conflated "conservation" of endangered species under CESA with "mitigation" under CEQA.

However, "mitigation" and "conservation" are not the same thing. CESA defines "conservation" as "methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [by CESA] ... are

no longer necessary." (Fish & Game Code § 2061.) It thus equates "conservation" with recovery of the species. CESA's definition of "conservation" is identical to the federal Endangered Species Act's definition, which courts have consistently equated with "recovery." (16 U.S.C. § 1532(3); see *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service* (9th Cir. 2004) 378 F.3d 1059, 1070 ["conservation" means "allow[ing] a species to recover to the point where it may be delisted."]; see also *Natural Resources Defense Council v. Fish and Game Com.* (1994) 28 Cal.App.4th 1104, 1117-18 [California courts may rely on federal authority to help interpret provisions of CESA].)

In sharp contrast, the purpose of CEQA mitigation measures is to avoid or lessen the impacts of a project, not to ensure recovery of protected species. (14 Cal. Code Regs. ["Guidelines"] §§ 15370 ["Mitigation" means avoiding, minimizing, rectifying, reducing, eliminating, or compensating *for an environmental impact*], 15126.4.) The EIR's mitigation measures permit capture and relocation solely to reduce the expected damage from Newhall's development, not to "conserve" or "recover" the stickleback. (AR:4262.)

The Project will degrade the Santa Clara River ecosystem, including a portion of the stickleback's current habitat, by altering

river hydrology, decreasing available habitat during high flow conditions, removing riparian vegetation, contributing to polluted runoff, and directly eliminating habitat through construction of bridge piers in floodplain. (AR:3870, 3946, 4250-56, 4262-63.) Construction activities may also directly harm stickleback. (AR:4262.) The EIR's mitigation measures serve only to reduce these impacts (*ibid.*), not to help stickleback recover to the point where legal protection is no longer necessary. Moreover, the fact that the Project includes enhancement, maintenance, and restoration measures does not convert the mitigation measures' purpose from accommodating development to conservation. (See *McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 933 [finding that a house construction project cannot be classified as a "habitat restoration project" even though it included enhancement and restoration measures].)

Further, the record demonstrates that the so-called "conservation measures" touted by Newhall and the Department may actually *harm* stickleback on the Project site. (AR:9769 ["In some circumstances it may be impossible to clear an area of fry without killing large numbers because as soon as you take them out of the

water in the net to see if you have them, they die."].) Thus, the mitigation measures could just as well result in mortality and stress rather than "recovery" or "conservation" of decreasing stickleback populations. Section 2061's definition of conservation simply does not apply here.

Ironically, by invoking "the conservation benefits afforded by Section 2061," (NAB at 25; *see* DAB at 23) Newhall and the Department attempt to strip away the protections afforded to stickleback by the Fully Protected Species Laws. These statutes reflect the Legislature's determination to protect all fully protected species at a higher level than other species. While CESA allows for permitted take of endangered and threatened species where the effect of the take can be "minimized and fully mitigated," the Fully Protected Species Laws contain no similar exception. (Fish & Game Code §§ 2081(b)(1), 5515(a)(1).) On the contrary, the Fully Protected Species Laws are clear that protected species cannot be "taken as part of specified mitigation for a project." (Fish & Game Code § 5515(a)(2).) But the Department and Newhall's interpretation of the Fish and Game Code would have CESA's more permissive provision override the Fully Protected Species Laws' more restrictive approach.

Rather than providing "conservation benefits" to the fully protected stickleback, this interpretation would sacrifice the conservation of stickleback in order to accommodate a development project – a trade-off the Fully Protected Species Laws prohibit.

The Department and Newhall claim that Plaintiffs' argument, if accepted, would make any handling of stickleback illegal, thereby preventing other efforts to conserve or rescue stranded stickleback. (NAB at 14-15; DAB at 2-3, 18.) These arguments are patently false.

The laws should be applied as they are clearly written. Under the Fully Protected Species Laws, the Department may authorize taking "for necessary scientific research, including efforts to recover fully protected, threatened, or endangered species," but those efforts cannot include "any actions taken as part of specified mitigation for a project." (Fish & Game Code § 5515(a)(1)-(2).) The Department's worry that application of the plain language of the Fully Protected Species Laws will lead to an absurd result – by preventing relocation to safer waters of stickleback stranded by drought, for example – is misplaced because the statute itself provides that fully protected species may be captured or otherwise taken for authentic conservation purposes. (Fish & Game Code § 5515(a)(1); DAB at 2-3.) Here, the

Department authorized measures allowing the capture and relocation of stickleback not to conserve them but to mitigate the effects of the Project the Department approved. (AR:4262-63.) CEQA mitigation measures adopted solely to reduce the damage from development cannot be disguised as "conservation."

3. By Approving the Capture and Relocation of Stickleback as Part of the Project, the Department Impermissibly Authorized the Take of Stickleback

The Department and Newhall argue that because the Department did not issue a permit explicitly allowing take of stickleback, there can be no violation of the Fully Protected Species Laws. (DAB at 8; NAB at 20-21.) This claim ignores the substance and effect of the mitigation measures. While it is true the Department did not issue an incidental take permit for stickleback, it nonetheless authorized "take" within the meaning of Fish and Game Code Section 86 when it adopted mitigation measures requiring the "capture" and relocation of stickleback. (AR:92-93, 95.) Just as the Department cannot disguise impermissible mitigation measures as conservation, it also cannot circumvent the protections of the Fully Protected Species Laws by ignoring the consequences of its own mitigation measures. By approving the capture and relocation of stickleback as part of the

Project, the Department authorized an action that will result in take of stickleback in violation of the Fully Protected Species Laws.

a. The Department's Attempt to Distinguish the Project's Mitigation Measures from Take is Unavailing

The Fish and Game Code defines "take" as an attempt to "hunt, pursue, catch, capture, or kill." (Fish & Game Code § 86.) Nonetheless, the Department and Newhall argue for a construction of Section 86 that ignores the plain meaning of "catch" and "capture" and instead narrows the meaning of "take" to activities associated with "hunting" and "killing" wildlife. The argument fails.

The activities required to implement the Department's mitigation measures constitute prohibited take. (Fish & Game Code §§ 86, 5515(a)(2).) In the Department's own words, the Project's mitigation measures require "relocating any stranded stickleback." (DAB at 13.) "Stranded stickleback" refers to fish stranded by Project construction, not by a natural accident. (AR:93 [discussing relocating fish stranded during construction of temporary or permanent crossing over the Santa Clara River].) Moving or relocating fish necessarily requires physically catching and capturing them. (AR:116547-48 [describing the use of blocking nets and other techniques to trap,

capture, remove and transfer fish to other portions of the river].) There can be no doubt that any stickleback relocated after being stranded by Project construction must be "seized" and "take[n] by force," which fall within the definitions of "pursue," "capture," and "catch" referenced by the Department. (See Fish & Game Code § 86; DAB at 18.) The capture and removal of a fully protected fish from its natural habitat in order to facilitate the destruction of that habitat, and the transportation and eventual release of the fish into a new, potentially hostile, and likely foreign environment falls within the definition of catch and capture of a species. (See Fish & Game Code § 86; AR:116547-50 [describing potential harmful effects of capturing and relocating stickleback into new habitat].)

The Department also argues the mitigation measures cannot be considered "take" because they are "intended to move fish and wildlife out of harm's way." (DAB at 17.) Yet this ignores the obvious: the fish are in "harm's way" solely because the Department approved the Project. Similarly, the fact that the Department's efforts "substantially lessen other, adverse impacts on fish generally during project construction" is not evidence that it has fully complied with the requirements of the Fish and Game Code. (DAB at 24-26.)

Section 5515 requires the Department to *avoid* take of stickleback, not merely to *reduce* the number of takes. (Fish & Game Code § 5515.)

b. Newhall's Attempt to Narrow Section 86's Definition of Take is Baseless

Newhall additionally argues that because the definition of take under Section 86 of the Fish and Game Code does not include the terms "collect" or "collection," unlike the federal definition, the Project's mitigation measures cannot be considered to authorize "take." (NAB at 22.) This is nonsensical. In order to "collect" stickleback from their existing habitat and relocate them away from Project construction, the fish must be pursued and captured. (AR:92-93; 116547.) Adding the term "collect" to Section 86's definition of take would be redundant since "collecting" an animal requires catching or capturing it, both of which are already included in the definition.

Newhall also argues that because the Legislature did not amend Section 86 in 1984 to match the federal definition of take, it narrowed the state's definition. Again, the argument is baseless. The fact that the federal definition of take is broader than the state definition is irrelevant. The Legislature rejected the more expansive federal definition in 1984 primarily because the federal definition also

encompassed indirect harm through habitat destruction. (78 Ops.Cal.Atty.Gen. 137, 140-41 (1995) [concluding the Legislature was aware of the federal definition's inclusion of indirect harm through habitat destruction and declined to adopt it].)

There is no evidence in either the plain language of Section 86 or the accompanying legislative history that the Legislature intended to create a new exception to take that would allow the removal and relocation of wildlife from their current habitat. The *expressio unius est exclusio alterius* canon of statutory construction precludes such an assumption. (*Mutual Life Ins. Co. v. City of Los Angeles* (1990) 50 Cal.3d 402, 410 ["where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed."].) Pursuit and capture of a protected species for the sake of its relocation has always fallen, and continues to fall, within Section 86's definition of take.

c. The U.S. Fish and Wildlife Service's Biological Opinion Evidences the Likelihood of Take

The U.S. Fish and Wildlife Service's ("FWS") 2011 Biological Opinion concluded that the Project will likely result in capture and lethal take of stickleback, both of which are prohibited by the Fully Protected Species Laws. (Fish & Game Code § 86.) The Department

argues that the Biological Opinion should be disregarded because it was issued after the certification of the EIR and applies the federal definition of take. Both claims misconstrue the reasons why the trial court admitted the Biological Opinion and why Plaintiffs have cited to it throughout the litigation.

The trial court admitted the Biological Opinion for the limited purpose of evaluating the Department's claim that the Project will be constructed in a manner that avoids any taking of stickleback.[3] (AA:1579.) The Biological Opinion analyzed the same data that was before the Department, including the environmental analysis and description of mitigation measures in the EIR. (AA:824-25.) Based on this information, it concluded that Project construction and operation will result in mortality and capture of stickleback. (AA:838-39 ["we anticipate that take from the proposed action will result from individual unarmored threespine sticklebacks being killed or injured ... as a result of capture for relocation purposes."].) The

[3] The Department additionally contends that because Plaintiffs did not challenge the appellate court's refusal to consider the Biological Opinion, they may not raise it now. (DAB at 27.) The trial court's exercise of discretion to admit the Biological Opinion, however, is necessarily related to the merits of the fully protected species issue, and while the appellate court declined to consider the Biological Opinion, it did not rule that the trial court abused its discretion in considering it. (Op. at 50.)

differences between the state and federal definitions of "take" are irrelevant here because both capture and mortality fall within the *state* definition of take. (Fish & Game Code § 86.)

d. Newhall's Argument That There is No Violation of the Fully Protected Species Laws is Without Merit

Newhall argues that because "only the U.S. Fish and Wildlife Service or its agents can 'collect' and 'relocate' stickleback" under the Project's mitigation measures, there can be no violation of the Fully Protected Species Laws. (NAB at 16.) This theory is based on the flawed premise that the Department may avoid responsibility for take prohibited by the Fully Protected Species Laws by delegating execution of the take to the FWS and its agents. The Department issued the Master Streambed Alteration Agreement and approved the Final EIR for the Project, including the mitigation measures at issue here. By adopting mitigation measures that allow take of stickleback as part of these approvals, the Department authorized a take prohibited under Section 5515, even though the Department did not issue a take permit. (Fish & Game Code § 5515 ["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].) The issue

before the Court is not who will ultimately cause take of stickleback during Project construction but rather whether the Department's authorization of take is proper under the Fully Protected Species Laws. As Newhall notes, "the Department is the presumptive expert agency on matters affecting fish and wildlife" and is charged with "the task of implementing the Fish and Game Code." (Fish & Game Code § 1802; NAB at 18.) The Department cannot escape that duty and cannot authorize FWS to engage in an illegal take.

The Department and Newhall's efforts to nullify important provisions of the Fully Protected Species Laws and pave the way for agencies to authorize take of fully protected species as part of a CEQA approval should be rejected. This Court should instead uphold the plain language of the Fully Protected Species Laws.

B. Plaintiffs Exhausted Their Administrative Remedies

When the Department's Final EIR was circulated for public review, Plaintiffs filed timely comments addressing inadequacies in the document. The revised Final EIR certified by the Department several months later contained detailed responses to those comments along with responsive new material. This is undisputed.

The Department argues that despite these uncontested facts, Plaintiffs' comments on the Final EIR do not suffice to exhaust remedies because they were not submitted during what the Department contends was a single public comment period held more than a year before the issuance of the revised Final EIR. (DAB at 30-31.) Three assertions by the Department underpin this argument.

First, the Department says that despite its circulation of the Final EIR for public review, and its incorporation of both the comments received in that review period and the responses to those comments into the certified revised Final EIR, there was somehow no "public comment period" on the Final EIR. (DAB at 28, 30-32; NAB at 29-30.)

Second, the Department contends that its inclusion of Plaintiffs' comments in the revised Final EIR is irrelevant to whether Plaintiffs satisfied the exhaustion doctrine with respect to the issues raised in those comments. (DAB at 34-35.) The Department claims it merely engaged in "review and concurrence" with the responses to comments and other material in the Addendum, including changes to the Final

EIR prior to certification, and thus was not responsible for that content.[4] (DAB at 34-35.)

And finally, the Department asserts that the only EIR comment period that counts for exhaustion of remedies is the one that the lead agency designates, and all issues raised by Plaintiffs in comments after the close of that comment period are immune from legal challenge. (DAB at 30-32; NAB at 28).

These contentions are meritless. The Department provided an opportunity for review and comment on the Final EIR. As the CEQA lead agency, the Department is responsible for all of the content in the documents it certifies. (Pub. Resources Code §§ 21082.1(c)(3); 21151(a).) Judicial review is thus available for issues brought to the Department's attention during the Final EIR comment period.

Beyond that, the Answer Briefs ignore Plaintiffs' demonstration that neither the purposes of the exhaustion doctrine nor the plain language of CEQA's exhaustion statute would be served if Plaintiffs'

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[4] Despite its name, the "Addendum" is a substantive document, consisting largely of new and revised pages of the EIR document, added or revised before certification of the Department's EIR. The Addendum is part of the certified EIR (sometimes referred to herein as the "revised Final EIR"), since the actual EIR text, as certified, includes the new and revised matter from the Addendum that was added to the EIR in November 2010.

comments were forfeited. (POB at 29-41.) And they do not address the odd and pernicious impact that would result from affirming the appellate court's broad holding, which forecloses judicial consideration of comments that address changes to an EIR's analysis, mitigation, or circumstances made after the close of the Draft EIR comment period. The Department and Newhall cling to a cramped interpretation of the exhaustion doctrine that would foreclose consideration of all comments received and considered by a lead agency after the Draft EIR comment period ends if there happens to be no public hearing before the agency certifies the EIR.

1. There Was a Comment Period on the Final EIR

Despite the Department's and Newhall's assertion that "there was no public comment period on the Final EIR for purposes of CEQA" (DAB at 28; see also NAB at 29), it is beyond dispute that the Department accepted public comments on the Final EIR and incorporated those comments into the revised Final EIR. CEQA allows for public review and comment on a final EIR prior to project approval at the discretion of the lead agency. (Guidelines § 15089.) The Department provided just such a comment period. It circulated the Final EIR to the public. (AR:2418, 122299-300, 122321.) It

responded to the comments submitted during the comment period. (AR:10227, 10723, 12075 ["Responses to Final EIS/EIR Comments"]; AR:12079 ["lead agencies (Corps/DFG) ... incorporate by reference those responses"].) And it amended its Final EIR, prior to certification, based on the comments and responses. (Compare AR:17889 [Final EIR] with AR:6693-94 [revised Final EIR].)

The Department's own words and conduct belie its assertion that there was no comment period on the Final EIR. It referenced the comment process in its own Superior Court brief:

> In preparing response [sic] to comments, the Corps *and CDFG* required a second iterative process, which resulted in a Final EIS/EIR that the Corps *and CDFG also circulated for public review.*

(AA:946 [Department's Opposition Brief] [emphasis added].) Courts have interpreted the phrase "public review" in Guidelines Section 15089(b) as referring to a "public comment period." (See *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th 1109, 1114-1120 [treating the two concepts and phrases as interchangeable].) This is consistent with the use of that phrase to refer to public comment periods elsewhere in CEQA. (*See, e.g.*, Guidelines §§ 15087, "Public Review of Draft EIR" [referring to Draft EIR public comment period]; 15085(b)(4) [referring to "[t]he

review period during which comments will be received on the draft EIR"].)

Moreover, as demonstrated below and in Plaintiffs' Opening Brief (POB at 30-31), the Department incorporated the Final EIR comments and responses into the certified EIR and changed text in the Final EIR in response. (Compare AR:17889 [Final EIR] with AR:6693-94 [revised Final EIR].) The Department thus participated in a joint Final EIR comment period. (See Guidelines § 15089(b) [lead agencies may provide public review period on Final EIR]; see also § 15226 [federal and state public review should coordinate to reduce duplicative efforts].)

Comments provided during a Final EIR comment period satisfy the exhaustion requirement. (*Galante Vineyards*, *supra*, 60 Cal.App.4th at 1120.) The Department's attempt to distinguish *Galante Vineyards* is unavailing. The Department cites *Central Delta Water Agency v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 245, 274 for the proposition that *Galante Vineyards* does not mean what it plainly says: that a contrary interpretation of Public Resources Code Section 21177(e) would render "the phrase 'during the public comment period provided by this division,' which includes

optional comment periods, meaningless." However, *Central Delta* involved a completely different situation, in which there was only a Draft EIR comment period and no opportunity for public review of the Final EIR. And comments were submitted just one day before certification of the EIR. (*Id.* at 273.) Here, by contrast, the Department considered and responded to all comments it received during the Final EIR comment period. (AR:16-17; 123817.)

2. By Certifying the Revised Final EIR, the Department Acknowledged and Approved its Contents

Straining to distance itself from its own certified EIR, the Department asserts that it was not responsible for the responses to comments on the Final EIR and changes in the EIR prior to certification because Newhall authored the responses. (DAB at 30, 34-35.) But authorship is not the critical fact; the Department, as CEQA lead agency, is responsible for the adequacy of *its* certified EIR. An agency that allows an applicant's consultant to prepare EIR materials faces a "heavy demand for independence, objectivity, and thoroughness." (*Friends of La Vina v. County of Los Angeles* (1993) 232 Cal.App.3d 1446, 1457-58.) The EIR must be "a document of accountability." (*Id.* [internal quotation omitted].)

a. The Department, as Lead Agency, is Responsible as a Matter of Law for All the Material in the Certified EIR

The Department argues that "Newhall, not the Department, prepared responses to Final EIS comments," and refers to the Addendum that revised the Final EIR prior to the Department's certification as "the Newhall-prepared Addendum." (DAB at 34.) The Department now suggests for the first time that it was engaged only incidentally in "review" of comments and "concurrence" in revision of the Final EIR's contents. (DAB at 34-35.) But upon certification, the full revised Final EIR, including the Addendum and the responses to Final EIR comments, became the Department's product as a matter of law. (Pub. Resources Code § 21100(a) ("All lead agencies shall prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project that they intend to carry out or approve ..."); Pub. Resources Code § 21082.1(c)(3) (lead agency must find that certified EIR reflects agency's independent judgment).) The Addendum itself confirms this:

> The Final EIS/EIR that will be considered by the U.S. Army Corps of Engineers (Corps) and California Department of Fish and Game (CDFG), the lead agencies for the proposed Project, consists of: (i) the Draft EIS/EIR (April 2009), the Final

> EIS/EIR (June 2010), *and this Addendum;* (ii) the list of agencies, organizations, and individuals that *commented on the Draft EIS/EIR (April 2009) and the Final EIS/EIR (June 2010)*; (iii) *all comments, written and oral, and responses to those comments prepared by, or at the direction of, the lead agencies...*

(AR:7868 [emphasis added].)

While the Department appears to contend that Newhall was acting pursuant to delegation from the Corps (DAB at 29-30), the EIS and the EIR were the same document, and all changes made to the EIS were also made to the EIR before certification. (AR:7868-69, 16-19.) As a matter of law, these changes *also* must have been made pursuant to a delegation from the Department. (Pub. Resources Code § 21151(a).) The Department chose to certify the EIR, and no *post-hoc* transfer of its legal responsibilities to Newhall or to the Corps is defensible.

b. The Department Responded to Comments on the Final EIR

In the record and in the litigation below, Newhall and the Department consistently took the position that the responses to Plaintiffs' comments on the Final EIR were the Department's. The Department's contention that it did not respond to these comments is a complete about-face. (DAB at 30, 34-35.)

First, responses to comments on the Final EIR spoke on the Department's behalf. For example, the responses to Ventura Coastkeeper's [VCK's] comments on the Final EIR unequivocally convey the Department's own conclusions as a "lead agency":

> First, the comments from Heal the Bay [cited in VCK's comments on the Final EIR] relate to a different EIR, project, and lead agency; therefore, *the lead agencies (Corps/CDFG) do not believe* that the comments are applicable. Nonetheless, the Corps *and CDFG incorporate by reference* the County of Los Angeles' written responses to the comments contained in Heal the Bay's letter, dated January 22, 2007. (AR 12087 [emphasis added; parenthetical in original].)

This is not mere "review and concurrence." Nor does it convey only the opinions of Newhall and the Corps. Rather, it is an unambiguous statement that the responses were made by, or on behalf of, the Department as the CEQA "lead agency."

Second, in their briefs below, both the Department and Newhall argued that the Department was directly involved in responding to the comments on the Final EIR prior to certification. (AA:946-47, 1038-39.) Indeed, this position was central to their defense of the Department's EIR below.

Newhall – which briefed both of these issues on the Department's behalf in Superior Court[5] – argued vigorously that the Department had reviewed the materials submitted by Plaintiffs after release of the Final EIR. (AA:1039.) In fact, the first heading in Newhall's argument for the validity of the EIR's cultural resources analysis states that "CDFG Considered the Ethnographic Studies Submitted by Petitioners After Release of the Final EIR." (AA:1038.)

In the appellate court, both the Department and Newhall continued to assert that the Department actively participated in reviewing and responding to comments. (Department Opening Brief on Appeal at 7 ["(t)he Corps, *with input received from the Department*, Newhall, and the consulting team, drafted responses to all comment letters"]; Newhall Reply Brief on Appeal, at 39 ["(a)lthough Mr. Waiya's comments were submitted after the close of the EIR's public comment period, *the Department did not disregard them*," because "[t]he comments were the subject of thorough responses ..."] [emphasis added].) Newhall further argued to the appellate court that an 18-page written response to comments from

[5] In its opposition brief in Superior Court, the Department incorporated by reference Newhall's Superior Court brief on the cultural resources and steelhead issues, and did not separately brief these issues. (AA:940.)

Plaintiff Wishtoyo Foundation was "*part of the EIR* (Guidelines, § 15132(d)) and constitute[d] substantial evidence of the consideration given to the Ethnographic studies." (Newhall Opening Brief on Appeal at 38 [emphasis added].) The Department should not now be heard to disclaim involvement in responding to Plaintiffs' comments on the Final EIR.

c. The Department and Newhall Mischaracterize Plaintiffs' Arguments

Newhall mischaracterizes Plaintiffs' arguments as assertions that the Department was required to provide a formal comment period on the Final EIR and that the Department must meet the National Environmental Policy Act's (NEPA's) procedural requirements in addition to CEQA's.[6] (NAB at 27-30.) But Plaintiffs made neither argument. On the contrary, Plaintiffs agree that the Department was neither legally required to have an official Final EIR comment period nor obliged to comply with the requirements NEPA imposes on federal agencies. Rather, Plaintiffs argue that where, as here, a state agency solicits and responds to comments on a Final EIR, the

[6] Newhall also incorrectly argues that the availability of a remedy under federal laws is relevant to whether Plaintiffs have their day in California courts to consider whether the Department violated state law. (NAB at 30-31.) Any federal remedy for NEPA violations, or other violations of federal law, is irrelevant here.

exhaustion requirement is necessarily satisfied as to issues raised in those comments.

Newhall also argues that "[f]ew state or local agencies would agree to partner with the federal government if cooperation forced the state and local agencies to assume federal obligations ..." (NAB at 30.) This rhetoric is detached from reality. Plaintiffs do not suggest that state agencies must "assume federal obligations," but rather acknowledge that cooperation between state and federal agencies is routine and often non-discretionary. "NEPA applies to projects which are carried out, financed, or approved in whole or in part by federal agencies" (Guidelines § 15220), so that "projects which involve one or more state or local agencies and one or more federal agencies" require coordination. (*Id.*) Agencies frequently coordinate CEQA and NEPA review under Guidelines Sections 15220-15229. It is fatuous to suggest that coordinating CEQA and NEPA comment periods will deter state agencies from cooperating with federal agencies.

3. Even If the Final EIR Comment Period Was Not an Official "Comment Period," the Exhaustion Doctrine Does Not Bar Plaintiffs' Claims

Assuming for argument's sake that there was no official comment period on the Final EIR, Plaintiffs' comments still satisfied the exhaustion requirement. The Department and Newhall's argument misses the fundamental purpose of the exhaustion doctrine: to ensure that courts do not review legal claims that the lead agency had no chance to address in the administrative process. Here, the Department was aware of Plaintiffs' claims raised in the Final EIR comments, and had the opportunity to address those claims. Newhall and the Department attempt to distract this Court from the fact that the Department had an opportunity to resolve these claims in the administrative process by championing a hypertechnical reading of Section 21177 that defies legislative intent and common sense.

As Newhall and the Department themselves have noted, the "essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories *before* its actions are subjected to judicial review." (AA:1277 [Newhall and the Department's Sur-Reply in Superior Court at 4, quoting *Coalition for Student Action v. City of Fullerton* (1984) 153

Cal.App.3d 1194, 1198 (emphasis in original)].) Here, the Department actually "receive[d] and respond[ed] to" Plaintiffs' Final EIR comments before certifying the EIR. (*Ibid.*; AR:16-17; 10227, 10723, 12075 ["Responses to Final EIS/EIR Comments"]; 12079 ["lead agencies (Corps/DFG) ... incorporate by reference those responses"]; 123817 [Department received Final EIS/EIR Comments].) Plaintiffs satisfied the exhaustion requirement.

a. In Light of the Department's Opportunity to Respond to Plaintiffs' Final EIR Comments, the Exhaustion Doctrine Was Fully Satisfied

This Court noted recently, in a CEQA case, that the "basic purpose for the exhaustion doctrine is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief." (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 291 [citations omitted].) The doctrine "facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency," and "can serve as a preliminary administrative sifting process unearthing the relevant evidence and providing a record which the court may review." (*Ibid.*) By contrast, barring claims for lack of exhaustion serves no purpose

where "the administrative record has been created, the claims have been sifted, the evidence has been unearthed, and the agency has already applied its expertise and made its decision as to whether relief is appropriate." (*Sierra Club v. San Joaquin LAFCO* (1999) 21 Cal.4th 489, 501.) That is the case here.

The Department responded to Plaintiffs' Final EIR comments by substantially changing the Final EIR. For example, the Department developed Mitigation Measure CR-6 as a response to Plaintiff Wishtoyo's comments. (DAB at 35.) The Department argues that "[t]he Addendum containing this mitigation was not 'issued' by the Department, although the Department did independently review it." (*Id.*) This quibble over who "issued" the Addendum is irrelevant. Measure CR-6 is a new CEQA mitigation measure added to the Department's EIR before certification in response to one of Plaintiffs' comments that the Final EIR failed to protect against the unanticipated disturbance of human remains:

> [I]*n response to this comment and others, the following new mitigation measure is recommended for adoption and is included in Revised Section 4.10, Cultural Resources*, found in the Addendum ...

(AR:10724-25 [emphasis added]).

As discussed above, the Department – not Newhall – was responsible for all content in the EIR that it certified. Mitigation measure CR-6 definitively demonstrates that the Department had the opportunity to consider Plaintiffs' comments and amend the EIR in direct response. For CEQA's exhaustion statute to bar Plaintiffs' claims, the Department would have had to have no "opportunity to receive and respond" to the comments. (*Coalition for Student Action v. City of Fullerton* 153 Cal.App.3d at 1198.)

b. In the Alternative, Pursuant to Section 21177(e) Plaintiffs Were Not Required to Exhaust Remedies

Were this Court nonetheless to find that Plaintiffs somehow failed to exhaust administrative remedies, it should still reverse the appellate judgment, based on the exception to exhaustion articulated in Public Resources Code Section 21177(e). That section requires an "opportunity for members of the public to raise" particular objections as a prerequisite to barring an action for failing to exhaust remedies. Plainly, if a Final EIR includes new material not circulated at the time of the Draft EIR comment period, it is impossible to comment on that

material during the Draft EIR comment period.[7] The Legislature's intent in enacting Section 21177 was to "codify the exhaustion of remedies doctrine, but not to limit or modify any exception ... contained in case law." (*Endangered Habitats League v. State Water Resources Control Bd.* (1997) 63 Cal.App.4th 227, 238 ("*EHL*") [citation omitted].) Accordingly, where a lead agency fails to provide a "mechanism for the receipt of ... objections," a long-recognized exception to the exhaustion doctrine applies. (*Ibid.*)

In contrast, the purported "plain meaning" rule urged by the Department (DAB at 38) would categorically bar judicial review even for agency actions that change an EIR after circulation of the draft.

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[7] The Department argues that this Court should ignore this and other arguments because they are "new." (DAB at 32.) But the Department ignores the posture of this case. Plaintiffs prevailed in the Superior Court, based on the trial court's view that there was a comment period on the Final EIR and that, regardless, having responded to the comments, the Department could not then claim that the comments were too late. (AA:1590-92, fn. 24.) Plaintiffs defended that decision in the appellate court. It would have made no sense for Plaintiffs to have raised then-irrelevant arguments at that point. After the appellate court based its decision on the theory that there was no Final EIR comment period and that Section 21177 barred the Court from considering these issues at all (Op. at 58-59, 60, 70-71), Plaintiffs raised these arguments at every opportunity, including in their Request for Rehearing (Petition for Rehearing at 8-12), and in their Petition for Review (Petition for Review at 22-27).

If the Department's interpretation of the rule were correct, an agency could radically change a project between the draft and final EIRs and the public would not under any circumstances be able to challenge any resulting legal deficiencies. Moreover, CEQA requires that a Draft EIR must be recirculated where there is "significant new information" added after the close of the Draft EIR comment period. (Pub. Resources Code § 21092.1.) This provision would become unenforceable in cases where there is no final hearing before EIR certification and no Final EIR comment period, since any claims not brought in the Draft EIR comment period would be forfeited. No one has ever suggested this result before. (Cf. *Laurel Heights Improvement v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1129 [recognizing that the recirculation requirement can apply where an agency adds "new information to an EIR after the close of the public comment period"].)

To avoid exactly this type of result, the court in *EHL* sensibly held that exhaustion requirements should apply only where there is an opportunity to object to the agency action. The Department attempts to distinguish *EHL* by arguing that the factual context there, which involved tiered environmental review, was "akin to an agency's

reliance on a CEQA exemption or addendum, which have no public review component, or an agency's failure to comply with CEQA at all." (DAB at 33.) But there is no principled way to distinguish *EHL* from this case. Issue exhaustion is issue by issue; if the agency did not provide an opportunity for comments on a particular issue arising during the administrative process, that issue cannot be waived by failure to exhaust.

There is no question that the June 2010 Final EIR contained important information not included in the Draft EIR. As explained in Plaintiffs' Opening Brief, the new material incorporates, for example, disclosures of new significant impacts on cultural resources, including impacts rendering it less likely that CEQA's preference for preservation in place could be achieved to mitigate impacts to sacred Chumash and Tataviam remains (for example, at site CA-LAN-2233, from the widening of Highway 126). (AR:17869-70, 30831-32, 17864; POB at 48.)[8] Objections relating to these issues and to the

[8] As noted in Plaintiffs' Opening Brief, this is evidence of new impacts not considered in the Draft EIR. (POB at 48.) If this Court holds that Plaintiffs' claims were exhausted, remand should include consideration of the issues raised by these comments, including whether they indicate that the Final EIR included "significant new information" that would warrant recirculation. (See Pub. Resources Code § 21092.1.)

sufficiency of the EIR's mitigation measures presented in Plaintiffs' Final EIR comments have not been waived. (AR:122797-801, 123134-46.)

c. Plaintiffs Raised Their Steelhead Argument in Comments on Both the Draft EIR and the Final EIR

In their 2009 comment letter on the Draft EIR, Plaintiffs commented on impacts to steelhead sufficiently to exhaust remedies, independent of later comments. (See POB at 42-44.) The Department dismisses these comments as "[b]land and general references to environmental matters" and "isolated and unelaborated comments." (DAB at 36-37.) In fact, there is nothing "general" about the 2009 comments on steelhead, which, among other things, noted that "stormwater discharges from the Proposed Project's urban runoff" would cause acute and chronic toxicity impacts to aquatic life, including "the Southern California Steelhead." (AR:10958-59 [Comments 8, 9, 12, 13, 14], 10963 [Comment 28]; see POB at 42-46 [detailed discussion of all Plaintiffs' comments on impacts to steelhead].) To the extent that any more specificity was necessary, Plaintiffs filed even more specific Final EIR comments, (AR:122386-89, 122396-97 [Final EIR Comment Letter]; 122906-915, 122934-35

[NOAA technical memorandum]), to which the Department responded. (AR:12075-76, 12079-82, 12088.)

4. The Department's New Theory Requires the Conclusion That the Department Did Not Exercise Its Independent Judgment

As discussed above, the Department was legally responsible for preparing the content of the certified EIR. (Pub. Resources Code § 21151(a).) It nonetheless has asserted in its Answer Brief, for the first time, that it is not actually responsible for all the content of the certified EIR. (DAB at 34-35 ["CBD mistakenly claims the Department responded to the Final EIS comments and prepared an Addendum. Not so."].) If this is true, the Department failed to fulfill CEQA's requirement that it exercise "independent judgment" with respect to Plaintiffs' comments on the Final EIR and other content in the certified EIR. (Pub. Resources Code § 21082.1(c)(3) ["The lead agency shall ... find that the report or declaration reflects the independent judgment of the lead agency."].)

> Implicit in the requirement that the agency exercise independent review, analysis, and judgment when using EIR materials submitted by an applicant's consultant is a heavy demand for independence, objectivity, and thoroughness. Moreover, this standard pursues the prescription that an EIR be "a document of accountability."

(*Friends of La Vina, supra*, 232 Cal.App.3d at 1457-58 [citing *Laurel Heights,* 47 Cal.3d at 392].)

The Department cannot have it both ways: either it properly fulfilled its role as CEQA lead agency by exercising its independent judgment, in which case it was responsible for the entire content in the Final EIR as certified, or it did not exercise its independent judgment and thus failed to fulfill its legally-required role. (See *Friends of La Vina, supra*, 232 Cal.App.3d at 1455 ["The foregoing cases consistently confirm that the 'preparation' requirements of CEQA (§§ 21082.1, 21151) and the Guidelines turn not on some artificial litmus test of who wrote the words, but rather upon whether the agency sufficiently exercised independent judgment over the environmental analysis and exposition that constitute the EIR."].)

Notably, while the Department breezily claims that it "independently reviewed" the Final EIR prior to certification (DAB at 34-35), it contradicts itself in claiming that the new and revised content in the revised Final EIR, including responses to Plaintiffs' FEIR comments, reflect only the judgment of the Corps and Newhall. (DAB at 34-35.) The Department cannot selectively abdicate its responsibility as CEQA lead agency.

5. If this Court Finds That the Issues Were Not Forfeited, the Appellate Court's Analysis of the Merits Must Be Revisited

Contrary to the Department's and Newhall's view (DAB at 39, NAB at 31), the appellate court's analysis of the merits of the cultural resources and steelhead claims was intertwined with its mistaken decision not to consider Plaintiffs' Final EIR comments. The Opinion failed to consider these comments. Thus, this Court should remand for new review of Plaintiffs' claims on their merits.[9]

First, contrary to the Department's and Newhall's arguments, the appellate court did not reach an "alternative holding" on the cultural resources issues that reflected consideration of the arguments and evidence in Plaintiffs' comments on the Final EIR. (DAB at 39; NAB at 31; Op. at 58-59, 60.) Rather, the court's analysis of the merits of the claims ignored those arguments and evidence, based on its view that the comments were forfeited. For example, in its discussion of the merits, the court stated:

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[9] The Petition for Review (Petition for Review at 18-19, 21, 27) and Opening Brief on the Merits (POB at 27-28, 29, 34-37, 38-41, 42, 45-46, 47, 49) contemplated that reversal on the exhaustion issue would require revisiting the merits of these claims. With limited briefing space and a focused issue for the Court, Plaintiffs could not have been expected to articulate in detail all the arguments on the merits that would have to be revisited if the appellate court considered Plaintiffs' Final EIR comments.

> [D]uring the extended comment period provided for by federal law, Mr. Waiya and the Wishtoyo Foundation provided documentation concerning past Native-American occupancy of the project site. None of the evidence cited in the two letters may serve as a basis for setting aside the environmental impact report certification. As noted [in the section of the Opinion holding the issue was not exhausted], it was not presented during the comment period mandated by California law.

(Op. at 60.) The Opinion never articulated how the court would have decided the merits if that evidence were considered. (Op. at 58-63.) The appellate court's ruling on the merits was intertwined with, and limited by, its decision to ignore the purportedly late comments. This Court should require reconsideration of the evidence in light of the comments.

Nor did the appellate court reach a bona fide "alternative holding" on the merits that considered all the arguments and evidence in Plaintiffs' Final EIR comments regarding impacts to steelhead. The court's analysis is confusing; in contrast with its treatment of cultural resources, which as detailed above clearly did not consider Plaintiffs' comments, it is more difficult to parse how the court's steelhead analysis did or did not consider the comments. But the best view of the Opinion is that it did not.

First, the discussion on pages 71-72 of the Opinion completely ignored Plaintiffs' Final EIR comments. The court stated flatly that "nothing in the comments referenced any issue regarding steelhead smolt" (Op. at 72), even though Plaintiffs' Final EIR comments were directly focused on steelhead smolt. (AR:122396-97) And the Opinion thus concluded that there was "substantial evidence the project impacts on steelhead smolt would be less than significant," with no consideration of the Final EIR comments. (*Ibid.*)

Then, after finding there was substantial evidence to support the EIR's conclusion with no consideration of the Final EIR comments, the Opinion finally referenced those comments, noting that "while the corps was receiving comments, the issue of steelhead smolt and copper levels was raised by Mr. Weiner." (Op. at 73.) Plaintiffs' Final EIR comment letter demonstrated, and the trial court held, that substantial evidence indicated the project would have sub-lethal impacts on juvenile steelhead smolt, and that a new analysis needed to be conducted to properly analyze these impacts. (AA:1592 [trial court ruling]; AR:122386-89, 122396-97 [Final EIR comment letter]; 122906-915, 122934-35 [NOAA technical memorandum].) But the Opinion failed to address any of this. Instead, it simply recited the

Department's conclusions – which themselves ignored Plaintiffs' comments, constituting prejudicial error – without further evaluation or analysis. The Opinion made no determination as to whether the Department's conclusions were legally or factually supported. (Op. at 73.) In the end, the court did not articulate a view of the merits of the argument in Plaintiffs' Final EIR comments about the significant sub-lethal impacts to steelhead smolt and the need for further analysis. (Op. at 73-74.) This issue still requires resolution.

Plaintiffs thus request that this Court remand the cultural resources and steelhead claims so the lower courts can address Plaintiffs' arguments in light of the evidence and comments submitted on the Final EIR.

C. The Department Unlawfully Determined the Significance of the Project's Greenhouse Gas Emissions by Reference to a Hypothetical, Higher "Business As Usual" Baseline

The EIR concluded that the Project's 26-fold increase in greenhouse gas ("GHG") emissions was not significant, based solely on a comparison between the Project and a hypothetical, higher-emitting version of the project constructed in accordance with legally impossible "business as usual" assumptions. (POB at 50-53.) This contravenes decades of CEQA case law culminating in this Court's

decision in *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310 ("*CBE*").

The Department did not brief the greenhouse gas issue in the appellate court. Here, aside from a single paragraph (DAB at 4), the Department once again offers no defense of the EIR's greenhouse gas analysis and no argument in support of its conclusion that the EIR's errors caused no prejudice. A footnote in the brief references the Department's and Newhall's choice to "divide the labor" of briefing (DAB at 7, fn. 5), but nowhere does the Department's brief adopt or incorporate Newhall's arguments on the greenhouse gas issue. Thus, the Department fails to defend its own EIR's GHG analysis.

For its part, Newhall devotes much of its brief to mischaracterizing Plaintiffs' argument variously as an attack on the California Air Resources Board's "Scoping Plan," adopted to implement the Global Warming Solutions Act of 2006, Health and Safety Code section 38500 *et seq.* ("AB 32"), or on an agency's general ability to consider AB 32's emissions reduction mandates in determining the significance of GHG emissions. (See NAB at 34-37, 45-50.) Stripped of these mischaracterizations, Newhall's argument boils down to two basic assertions: (1) the EIR used existing

conditions as a baseline for evaluating the Project's increased GHG emissions, and explained why the Department could not determine the significance of that increase; and (2) the Department turned instead to AB 32, which courts have endorsed as a "significance criterion," and used the Scoping Plan's "methodology" to evaluate the Project's emissions. Both assertions are wrong.

1. Standard of Review

Newhall's plea for substantial evidence review (NAB at 33-34) lacks merit. Newhall relies primarily on *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439 ("*Neighbors*"). The passage Newhall cites from *Neighbors*, however, states only that factual determinations as to "exactly how *the existing physical conditions without the project* can most realistically be measured" are reviewed for substantial evidence. (*Id.* at 449 [emphasis added]; see also *Save Our Peninsula Committee v. Board of Supervisors* (2011) 87 Cal.App.4th 99, 120-21 [discussing agency's discretion to choose best method for determining water usage on property without project].) There is no factual dispute here over the EIR's description of "existing physical conditions without the project"

or its estimation of the Project's emissions.[10] The quote from *Neighbors* in Newhall's brief is inapposite.

Nor does the modified substantial evidence test announced in *Neighbors* apply here. *Neighbors* held that a project may be assessed solely in relation to *projected future* "physical conditions," as opposed to *presently existing* "physical conditions," provided the lead agency justifies its departure from the normal CEQA baseline with substantial evidence that a comparison to presently existing conditions would be misleading or uninformative. (See *Neighbors*, *supra*, 57 Cal.4th at 449, 456-57.) Here, in contrast, the Department did not determine the significance of the Project's emissions in relation to *any* set of "physical conditions." Rather, the Department determined significance solely by reference to a hypothetical "business as usual" version of the Project itself. This plain error of law should be reviewed *de novo*. (See POB at 59-61; *CBE*, *supra*, 48 Cal.4th at 319, 322, 326-27.)

[10] Emissions from the existing site total about 10,000 metric tons per year of carbon dioxide-equivalent greenhouse gases. (AR:7702). The Project will emit 269,000 metric tons per year of GHGs. (*Ibid.*)

2. The EIR Did Not Use Existing Conditions as a Baseline

As shown in Plaintiffs' Opening Brief (POB at 54-59), the EIR's hypothetical "business as usual" project baseline is closely analogous to the inherently misleading baselines invalidated as a matter of law in *CBE* and the appellate cases affirmed therein. (*CBE*, *supra*, 48 Cal.4th at 322 ["An approach using hypothetical allowable conditions as the baseline results in illusory comparisons that can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts, a result at direct odds with CEQA's intent."] [internal quotations omitted].) If anything, the CEQA violation here is even more egregious; unlike the "hypothetical allowable conditions" improperly used as a baseline in *CBE*, the "business as usual" version of the Project used as a baseline here could never lawfully be built. (See POB at 61-62; AR:13615, 48085.)

Rather than confront *CBE*, Newhall mainly tries to avoid it by contending that the EIR *also* used existing conditions as a "baseline" for assessing the significance of the Project's greenhouse gas emissions. (NAB at 53-54.) Newhall's argument contradicts the record and distorts the term "baseline" beyond recognition.

The "fundamental goal" of an EIR is to inform decision-makers and the public of "any significant adverse effects a project is likely to have on the physical environment." (*Neighbors*, *supra*, 57 Cal.4th at 447.) To assess the scale and significance of these environmental changes, an EIR must identify the "baseline" – that is, the set of "environmental conditions prevailing absent the project … *against which predicted effects can be described and quantified.*" (*Ibid.* [emphasis added]; see also *CBE*, *supra*, 48 Cal.4th at 315; Guidelines § 15125(a) [defining "baseline" as the "physical conditions by which a Lead Agency determines whether an impact is significant"].) The CEQA "baseline" is thus the set of conditions *actually used to determine the significance* of the physical change wrought by a project.

Here, the EIR expressly declined to assess the Project's significance in relation to an existing conditions baseline. (AR:7702 [finding existing conditions comparison "not sufficient to support a significance determination"]; 13609 ["the analysis considered existing conditions, and concluded that due to the still nascent understanding of when particular quantities of GHG emissions become significant, it is not possible to determine whether the Project-related increase in

GHGs is significant"]; and 13610 [finding increase over existing conditions "not sufficient to support a significance determination"].)[11] Rather, the Department reached its significance determination solely by comparing the Project with an alternate, hypothetical version of the Project constructed in accordance with counterfactual "business as usual" assumptions. The EIR could not be clearer on this point. Because Project emissions would be "31 percent below the level that would be expected *if the proposed Project and resulting development were constructed consistent with CARB's assumptions* for the CARB 2020 NAT scenario,"[12] and "[b]ecause this reduction exceeds the 29 percent reduction required for California to achieve the AB 32 reduction mandate," the EIR concludes the Project "would result in a less-than-significant impact." (AR:7704 [emphasis added]; see also AR:7672-73, 13611, 18877-78, 26273.) This hypothetical "business

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[11] Newhall cites AR:26377-82 (NAB at 32), but this represents only the EIR consultant's attempt to quantify existing emissions, not a *determination of the significance* of the Project's emissions.

[12] With at least one notable exception (discussed in Part III.C.3 below), the EIR used the phrase "CARB 2020 NAT scenario" to describe the 2020 "business as usual" scenario the California Air Resources Board developed in the AB 32 Scoping Plan to assess statewide reductions necessary to meet AB 32's emissions target. (AR:7704, 26257.) As in their Opening Brief, Plaintiffs use the "business as usual" terminology except where directly quoting the EIR or supporting documents.

as usual" version of the Project was the only point of comparison actually used for determining significance. Accordingly, it was the only "baseline" used in the EIR.

Newhall's reliance on the "two-baselines approach" discussed in *Woodward Park Homeowners Ass'n v. City of Fresno* (2007) 150 Cal.App.4th 683, is therefore unavailing. As Newhall concedes, this approach "only works if the EIR actually carries out both comparisons." (*Id.* at 707; see NAB at 53-54.) Notably, the EIR in *Woodward Park* failed to do so. There, the EIR described existing conditions and used them as a point of comparison in evaluating some impacts. (*Woodward Park, supra*, 150 Cal.App.4th at 708.) The *Woodward Park* court found this "scattered, partial discussion of some of the project's impacts relative to vacant land" insufficient because the EIR's "dominant theme" and "bottom line conclusions ... emphasized" a comparison between the proposed project and "buildout under existing zoning." (*Id.* at 707-08.)

So it is here. The Department's EIR described existing GHG emissions and quantified Project emissions, but did not evaluate significance based on this comparison. Rather, the EIR's "dominant theme" and "bottom line conclusions" emphasized only the

comparison between the Project and a higher-emitting, hypothetical "business as usual" version of the Project. Again, what matters is the manner in which significance is assessed. Here, the EIR expressly refused to assess the significance of the Project's increased GHG emissions in relation to any baseline other than an even higher-emitting, hypothetical "business as usual" version of the Project.

In short, this is not a "two-baselines" case. Even if it were, consideration of an existing conditions baseline could not excuse the concurrent use of a hypothetical project baseline that results in "illusory" comparisons, misleads the public as to the severity of impacts, subverts consideration of actual effects, and violates CEQA's intent. (*CBE*, *supra*, 48 Cal.4th at 322.) Neither *Woodward Park* nor this Court's *Neighbors* decision should be read as countenancing such a result. (See *Neighbors*, *supra*, 57 Cal.4th at 457, 462 [discussing analysis of a project in relation to both existing and future projected environmental conditions without the project].)

3. Newhall Cannot Save the Department's Unlawful Hypothetical Baseline by Calling It a "Methodology" Derived from the Scoping Plan

Newhall mischaracterizes the EIR's hypothetical project baseline as a "methodology" developed by "experts" at the California

Air Resources Board. (See, e.g., NAB at 4.) The record shows otherwise. The EIR based its significance determination solely on a comparison between the Project's emissions and those of a version of the Project constructed according to counterfactual "business as usual" assumptions. (AR:7704, 13611, 26273.) These assumptions were used to create an alternate, fictitious version of the Project – one that could never lawfully be built. (See POB at 51-53.)

Newhall repeatedly implies that the "business as usual" scenario in the AB 32 Scoping Plan was developed specifically to provide a "methodology" for CEQA review of individual development projects. (See, e.g., NAB at 4, 36, 40, 42-43.) In reality, the Scoping Plan projected a "business as usual" scenario solely to quantify the emissions reductions across all sectors of the California economy necessary to achieve AB 32's 2020 goals.[13] (AR:106789-91.) The Scoping Plan then identified dozens of measures from various economic sectors that could contribute to the necessary reductions. (AR:106795.) The Scoping Plan recognized CEQA's important role in mitigating greenhouse gas emissions. (See

[13] Newhall concedes as much. (See *id.* at 41 [describing business as usual scenario as "an analytical construct developed expressly to help measure *statewide* compliance with AB 32"] [emphasis added].)

AR:106803-04, 106843, 106889.) But nowhere did the Scoping Plan recommend or even contemplate that assumptions used to determine the overall economy-wide reductions from "business as usual" necessary to meet AB 32's 2020 goal should be transferred wholesale to evaluation of individual projects under CEQA. The Scoping Plan's "business as usual" scenario is not a "methodology" for CEQA compliance, and was never designed to be one.

Newhall's claim that Plaintiffs are somehow attacking the Scoping Plan (NAB at 45-50) is utterly unfounded. The California Air Resources Board's decision to consider a "business as usual" scenario in calculating necessary statewide emissions reductions for purposes of developing its statewide plan for meeting *AB 32's* emissions reduction mandate is irrelevant here. Plaintiffs are challenging the Department's decision *under CEQA* to evaluate the significance of a particular development project's emissions in relation to a hypothetical "business as usual" version of that project. This Court has recognized that techniques used for planning under other statutory schemes do not necessarily satisfy CEQA's requirements for analysis of individual projects' impacts. (*Neighbors*,

supra, 57 Cal.4th at 462). "[A]n EIR must be judged on its fulfillment of CEQA's mandates, not those of other statutes." (*Ibid.*)

Newhall also fails to mention that some of the EIR's "business as usual" assumptions had nothing to do with the Scoping Plan. For example, the Department's consultant used "[t]he area of Santa Clarita Valley *at full build-out*, excluding the Newhall Ranch development" as the basis for the residential density assumptions in the EIR's so-called "CARB 2020 NAT scenario," even though nothing in the Scoping Plan addressed residential density in the Santa Clarita Valley. (AR:26360 [emphasis added]; see also AR:26269 [assuming "business as usual" development would "remain at a density that is consistent with existing development in the Santa Clarita Valley"].) Because the Project has a larger percentage of multifamily houses than the rest of Santa Clarita Valley, the consultant concluded it would reduce both vehicle trips per dwelling unit and overall mobile source greenhouse gas emissions by six percent compared to business as usual. (AR:26269, 26360-61.)

This conclusion was not derived from any "methodology" in the Scoping Plan. Rather, the EIR compared the proposed Project to a hypothetical scenario assuming "full build-out" at current residential

densities, and derived a six-percent reduction in emissions from the comparison. This is *exactly* the kind of hypothetical comparison repeatedly held unlawful in the long line of appellate cases affirmed by this Court in *CBE*. (See, e.g., *Woodward Park, supra*, 150 Cal.App.4th at 707-11; *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 246-47; *Environmental Planning and Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 355-58.) It is also fatal to Newhall's argument that the EIR merely adopted the Scoping Plan's "methodology."

In this context, *CBE* and the appellate cases affirmed therein are controlling. Newhall's attempts to distinguish *CBE* fail. (NAB at 52-53.) First, as discussed above, the EIR did not evaluate the significance of the Project's emissions against existing conditions; rather, it expressly declined to do so. Second, Newhall points out that the air district in *CBE* had adopted a numeric significance threshold for the pollutant at issue there (NAB at 53), but the distinction is immaterial. None of the appellate cases affirmed in *CBE* turned on potential violations of a numerical significance threshold. (See *CBE, supra*, 48 Cal.4th at 321 & fn.6 [collecting cases].) Rather, this Court's observation in *CBE* that the use of an existing conditions

baseline may reveal impacts in excess of an adopted threshold merely illustrated its broader legal conclusion that comparing project impacts to hypothetical permitted conditions "subvert[s] full consideration of ... actual environmental impacts." (See *CBE*, *supra*, 48 Cal.4th at 322.)

4. Guidelines Section 15064.4 Does Not and Cannot Confer Discretion to Determine Significance in Relation to an Otherwise Impermissible Hypothetical Project Baseline

Newhall attempts to use the EIR's selection of consistency with AB 32 as a "significance criterion" to obscure the EIR's reliance on an impermissible hypothetical "business as usual" baseline. (NAB at 32-37, 39-40.) Whatever discretion an agency may have in choosing a "significance criterion," nothing in CEQA permits an agency to determine whether that criterion is met by comparing a project to a hypothetical, higher-emitting version of the project.

Newhall's argument begins with a fundamental misreading of Guidelines Section 15064.4, which addresses analysis of GHG emissions.[14] Subdivision (a)(1) of Section 15064.4 grants agencies

[14] Newhall suggests its reading of Guidelines Section 15064.4 finds support in a reference to the need for "new provisions" of CEQA in legislative findings for SB 375, an unrelated statute governing transportation planning. (See NAB at 49 [citing Stats. 2008, ch. 728

discretion to choose the method for "quantify[ing] greenhouse gas emissions *resulting from a project.*" (Guidelines § 15064.4(a)(1) [emphasis added].) Newhall omits the critical language with an ellipsis in its brief. (NAB at 38.) Newhall's attempt to transmute the narrow discretion conferred in subdivision (a)(1) into a sweeping grant of discretion throughout subdivision (b) does not "harmonize" the section (NAB at 38), but rather distorts it.

In the same vein, Newhall contends subdivision (b) of Section 15064.4 does not forbid reliance on a hypothetical "business as usual" baseline because it is not phrased in mandatory terms. (NAB at 38-39.) But the use of non-mandatory language in a regulation cannot create discretion to violate the fundamental goals of the governing statute as articulated in applicable caselaw. The Guidelines cannot be interpreted in a manner that would conflict with CEQA itself. (See *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205-206; see also *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 108 [regulation cannot alter or impair the scope of the governing statute or controlling caselaw].)

(SB 375), § 1(f)].) These "new provisions," however, were CEQA streamlining provisions for urban infill and transit-oriented developments enacted *in SB 375 itself.* (See SB 375, §§ 13-15, codified at Pub. Res. Code §§ 21061.3, 21155-21155.3, 21159.28.)

By the same token, because the EIR's baseline conflicts with controlling caselaw, Newhall cannot save the EIR by invoking the Department's general discretion to choose a project-specific significance threshold. (NAB at 38-39 [citing Guidelines § 15064.4(b)(2)] and *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059.) Whatever general discretion the Department had under Guidelines section 15064.4(b)(2) to choose a project-specific "significance criterion," the Guidelines cannot confer discretion to evaluate that criterion in relation to an unlawful baseline. (See *Communities for a Better Environment, supra,* 103 Cal.App.4th at 108.) Nor does *Save Cuyama Valley* aid Newhall. In that case, the court upheld a project-specific significance threshold against various procedural challenges, but did not consider whether it substantively conflicted with the statute. (*Save Cuyama Valley, supra,* 213 Cal.App.4th at 1067-68.)

The Resources Agency recognized as much in drafting Section 15064.4. In its Final Statement of Reasons, the Resources Agency clarified that its reference to "existing environmental conditions" in subdivision (b)(1)

> reflects existing law requiring that impacts be compared to the environment as it currently exists. (State CEQA

> Guidelines, § 15125.) This clarification is necessary to avoid a comparison of the project against a "business as usual" scenario as defined by ARB in the Scoping Plan. Such an approach would confuse "business as usual" projections used in ARB's Scoping Plan with CEQA's separate requirement of analyzing project effects in comparison to the environmental baseline.

(AR:12808-09.) In its brief, Newhall inserts the word "existing" in brackets before "environmental baseline" and proceeds to argue – erroneously, as discussed above – that the Department complied with this "separate" requirement by comparing the Project to existing conditions. (NAB at 48.) In context, however, the word "separate" clearly expresses the Resources Agency's correct view that CEQA's "environmental baseline" requirements – which include a long-standing prohibition against hypothetical project baselines – cannot be satisfied by comparison with a "business as usual" scenario derived from the Scoping Plan. Indeed, the Resources Agency explicitly contrasted the Scoping Plan's statewide strategy with cases holding that CEQA requires a comparison with existing conditions. (AR:12809 [comparing Scoping Plan's statewide reduction goals with *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1278].) Newhall cannot amend the Resource Agency's Final Statement of Reasons to suit its own argument.

Furthermore, Newhall's claim that the Final Statement of Reasons conflicts with the "plain language" of Guidelines Section 15064.4 (NAB at 48-49) is unsupported by any argument or authority. It is also wrong. Again, the "plain language" of Section 15064.4 grants discretion only to select a methodology "to quantify greenhouse gas emissions *resulting from a project.*" (Guidelines § 15064.4(a)(1) [emphasis added].) It does not – and, as discussed above, cannot – confer discretion to use a hypothetical "business as usual" project *baseline.* Subdivision (b)(1), in contrast, does refer to the CEQA baseline in stating that agencies should consider "the extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting" when assessing the significance of GHG impacts. (Guidelines § 15064.4(b)(1).) In emphasizing CEQA's "separate" baseline requirements, the Final Statement of Reasons is entirely consistent with Section 15064.4.

Finally, cases addressing the role of AB 32 in determining the significance of greenhouse gas emissions do not sanction the Department's approach. (See NAB at 47-48 [citing *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327 ["*CREED*"]; *Friends of Oroville v.*

City of Oroville (2013) 219 Cal.App.4th 832; and *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614].) Each of these cases affirms an agency's decision to consider the emissions reduction mandates of AB 32 in evaluating the significance of a project's GHG emissions. Despite their broad language, however, none of these cases squarely holds that an agency may do so by comparing the proposed project's emissions to the higher emissions that might be generated by a hypothetical "business as usual" version of the project.[15] (POB at 67-71.) Indeed, *Friends of Oroville* acknowledges the Scoping Plan's conclusion that achieving AB 32's goals will require emissions reductions from existing levels, not just gains in relative efficiency as compared to "business as usual." (See *Friends of Oroville*, *supra*, 219 Cal.App.4th at 841-42.)

Rather than respond to Plaintiffs' arguments, Newhall mischaracterizes them. Plaintiffs do not contend that agencies cannot consider the significance of climate impacts in light of AB 32's

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[15] *North Coast Rivers Alliance* did not address a comparison between the proposed project and a hypothetical "business as usual" project at all. Rather, the decision simply approved use of AB 32's 2020 goals for reduction of emissions to 1990 levels (in conjunction with more aggressive local goals) as a significance threshold, and found the challenged EIR provided substantial evidence the project would not interfere with those goals. (*North Coast Rivers Alliance*, *supra*, 216 Cal.App.4th at 651-52.)

emissions reduction mandate. Nor do Plaintiffs contend that an existing conditions comparison will always suffice for analysis of climate impacts. Indeed, given the steep post-2020 emissions reductions necessary to stabilize the climate, assessment of consistency with the more aggressive longer-term targets incorporated into the Scoping Plan may be necessary to provide accurate disclosure and analysis of a project's impacts. (AR:106895-96.) But *CREED* and *Friends of Oroville* cannot confer discretion to determine significance in relation to an impermissible, hypothetical, and illusory baseline. On the contrary, evaluating a project's significance in relation to such a baseline has long been recognized as an *abuse* of discretion – one resulting in misleading and illusory comparisons that downplay the significance of impacts. (*CBE*, *supra*, 48 Cal.4th at 319, 321-22.) To the extent *CREED* or *Friends of Oroville* suggest otherwise, those cases are inconsistent with this Court's baseline decisions and should be disapproved.

Whatever discretion the Department had to select a "significance criterion" for the Project as a general matter, it had no discretion to actually determine significance in relation to a hypothetical "business as usual" project baseline clearly

impermissible under *CBE* and the long line of appellate cases approved therein. It is possible, in some other case, that an agency might lawfully apply an AB 32-derived significance criterion to the comparison of an existing-conditions baseline to actual project emissions. But that is not the question before this Court, because the Department expressly declined to do that here.

5. The Department Improperly Ignored the Attorney General's Legal Objections to a "Business As Usual" CEQA Baseline

As described in Plaintiffs' Opening Brief, the Attorney General explicitly warned that using the Scoping Plan's "business as usual" scenario as a baseline for evaluating individual project impacts would violate CEQA. (POB at 64-67.) Although the Attorney General's objections arose in response to a San Joaquin Valley Air Pollution Control District proposal to use a Scoping Plan-derived "business as usual" project baseline for CEQA review of development projects (AR:12772-76), those objections are equally applicable here.

Newhall does not directly respond to the Attorney General's criticisms. Instead, Newhall claims the Attorney General "endorsed" using AB 32 as a "significance criterion" in comment letters on other projects. (NAB at 49-50 [citing AR:117386-87, 117739].) Critically,

however, these letters were written in *2007*, before adoption of the Scoping Plan, and thus could not have "endorsed" deriving a hypothetical "business as usual" project baseline from Scoping Plan assumptions. When the San Joaquin Air District later chose to recommend such a baseline in *2009*, the Attorney General strongly criticized – not "endorsed" – that decision. (AR:12772-76.)

Newhall also dismisses the Attorney General's objections as "conflicting evidence" the Department may disregard in favor of its own "expert" analysis. (NAB at 50.) Although the Attorney General pointed out several reasons why a Scoping Plan-derived "business as usual" baseline would be inaccurate – for example, because it ignores the need for greater reductions from new as opposed to existing development – the letter's core objections are *legal*, not factual. (See AR:12774-75 & fn.9 ["The appropriate baseline under CEQA is not a hypothetical future project, but rather existing physical conditions."].) The Attorney General's concern, for example, that project proponents could "game the system" by "artificially inflat[ing] the hypothetical project to show that the proposed project is, by comparison, GHG efficient" (*ibid.*), echoes long-standing caselaw recognizing the

potential for baseline manipulation. (See *Save Our Peninsula Committee*, *supra*, 87 Cal.App.4th at 126.)

This is not a "battle of the experts" over "methodology." It is an example of the State's lead law enforcement office issuing a clear warning that an agency's approach – nearly identical to the Department's here – was contrary to law. Substantial weight should be accorded to the interpretation of the Attorney General, who is charged with enforcement of both CEQA and AB 32. (See West's Ann.Cal.Const. Art. 5, § 13 ["It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced."]; *Yamaha*, *supra*, 19 Cal.4th at 13-15.) Newhall dismisses the Attorney General's interpretation of CEQA too lightly.

Finally, Newhall claims there can be no abuse of discretion because the EIR "considered and responded to" the Attorney General's criticisms. (NAB at 50 [citing AR:13599, 13603-04].) Tellingly, however, the EIR's summary of the Attorney General's letter omitted any mention of the warning that a "hypothetical future project" baseline is unlawful. (Compare AR:13599 with AR:12775 & fn.9.) More fundamentally, Newhall's premise is wrong. If Newhall were correct, an agency could violate CEQA's legal and procedural

mandates at will so long as it expressly disagreed with comments alerting the agency to the illegality. "[F]ully apprising the decision makers and public" (NAB at 50) that an agency intends to violate the law does not excuse the violation.

6. Even if Examined Under the Substantial Evidence Test, the EIR Cannot Survive Review

Newhall's entire argument can be summarized as an attempt to frame a clear legal error as a factual dispute warranting deferential review. As explained above, Newhall is wrong. But even under the deferential standard Newhall seeks, the EIR's approach would fail.

a. The Department's Choice of Baseline Fails the Substantial Evidence Test Announced in *Neighbors*

Newhall – like the appellate court – misconstrues the substantial evidence test announced by this Court in *Neighbors*. As discussed above, the *Neighbors* test is inapplicable here. But if it were, the relevant question would not be whether substantial evidence supported the Department's "business as usual" projections. (See NAB at 33-34, 41-43; Op. at 99.) Rather, the question would be whether the Department justified its decision *not* to use an "existing conditions" baseline. To do so, the Department would have to demonstrate (1) that its departure from the normal baseline was

"justified by unusual aspects of the project or the surrounding conditions," and (2) that substantial evidence supported its conclusion that an existing conditions analysis "would be misleading or without informational value." (*Neighbors*, *supra*, 57 Cal.4th at 451, 457.) The Department neither made the required showing nor made findings in the administrative record that would support such a showing.

Thus, even if this test applied here, the Department's hypothetical baseline would fail. First, the EIR's departure from the norm cannot be justified by "unusual aspects" of the Project or surrounding conditions. Newhall's and the EIR's statements about purported uncertainty in determining the significance of a greenhouse gas emissions increase are so generalized as to apply to every single project in California – hardly an "unusual" situation.

Second, even if the Department had made a determination that an existing conditions analysis would have been misleading or without informational value, it would fail for lack of substantial evidence. Again, the EIR contained only highly generalized, conclusory assertions that it was not possible to determine the significance of the Project's increase in emissions over existing conditions. (See, e.g., AR:7702, 13609, 13610.) The EIR's bare

assertions do not constitute substantial evidence that a significance determination based on the Project's increased emissions would have been misleading or uninformative. (Pub. Resources Code § 21082.2(c).)

Indeed, these assertions are not even true. California air districts and air pollution control officials have found it possible to determine the significance of increases in greenhouse gas emissions without comparing them to a hypothetical project baseline. (See, e.g., AR:105414-21 [California Air Pollution Control Officers Association white paper examining range of numeric thresholds], 110023-35 [Bay Area Air Quality Management District project-level thresholds].) The California Air Pollution Control Officers Association's exhaustive analysis of significance thresholds ranging from zero to 40,000-50,000 metric tons per year concluded that only the zero and 900 metric tons per year thresholds were both highly effective at analyzing emissions from residential development and highly consistent with AB 32. (AR:19912, 105428-29.)

The EIR rejected these and other criteria because they did not categorically require any single numeric standard and because some proposals remained in draft form. (See AR:13611-13.) However, the

various criteria recommended by air quality experts show that it is possible to assess the significance of a project-level increase in greenhouse gas emissions. The Department's conclusory assertions to the contrary (AR:7702, 13609, 13610) cannot satisfy its burden under *Neighbors* to provide evidence that *any* comparison with existing conditions, by reference to *any* standard whatsoever, would have been misleading or entirely devoid of informational value. (See *Neighbors*, *supra*, 57 Cal.4th at 460-61 [holding that arguable superiority of alternate future conditions baseline was insufficient to support omission of analysis based on existing conditions].)

Newhall's (and the EIR's) unsupported assertion that population growth and associated emissions will occur anyway (NAB at 35-36; AR:13612-13) similarly fails to demonstrate that an existing conditions analysis would have been uninformative or misleading. (See *Neighbors*, *supra*, 57 Cal.4th at 461 [mere "expectation of change" in population does not constitute substantial evidence existing conditions analysis would be misleading].) Neither Newhall nor the EIR offer any support for the implicit assertion that all methods of accommodating population growth produce exactly the same emissions – an assertion directly at odds with state policy

articulated in SB 375. (See Stats. 2008, ch. 728 (SB 375), § 1(c) ["Without improved land use and transportation policy, California will not be able to achieve the goals of AB 32."].)

CEQA's requirement that agencies determine the significance of environmental impacts is not contingent on the availability of adopted numeric thresholds. (See, e.g., Pub. Resources Code §§ 21002.1(a), 21082.2 (a).) As long ago as 2007 – in a letter cited in Newhall's own brief (NAB at 49) – the Attorney General cautioned that an agency may not refuse to determine the significance of an emissions increase simply because there are no uniform, established thresholds for doing so. (AR:117738-39.) In light of the emissions reduction mandates of AB 32, moreover, the Attorney General concluded that an emissions increase of hundreds of thousands of tons per year was obviously significant. (AR:117739-40.) Newhall seeks to perpetuate similar errors here. Its excuses for ignoring the significance of this Project's 26-fold increase in emissions over existing conditions must fail.

b. Newhall's Defense of the EIR Would Fail Even Under the Most Deferential Standard of Review

Even under the deferential standard of review sought by Newhall, the Department's choice of a baseline would fail. There is

no substantial evidence that the Department's hypothetical "business as usual" project baseline comparison can provide an accurate answer to the question posed by the EIR's "significance criterion": whether this Project conflicts with AB 32's emissions reduction mandates.

First, although Newhall offers several "contextual" comparisons in a transparent effort to trivialize the Project's impact (NAB at 43-45), it tellingly fails to compare the Project's *increase* in emissions with the *reductions* necessary to achieve compliance with AB 32. California emissions in 2004 totaled about 480 million metric tons. (NAB at 44 [citing AR:7711].) Meeting AB 32's 2020 target of 427 million metric tons (AR:26268) will require a net *reduction* of 53 million metric tons from 2004 levels. By contrast, this Project would *increase* annual emissions by about 260,000 metric tons per year (AR:7702) – about 0.5 percent of the *reductions* necessary to meet AB 32's 2020 goals. In a similar context, the Attorney General found a project's increase in emissions presumptively significant, precisely because that increase would "cancel out" other emissions reduction measures required under AB 32. (AR:117739-40.)

Newhall and the EIR use the hypothetical "business as usual" baseline to sweep this conflict under the rug. The Scoping Plan's

"business as usual" assumptions were not developed to guide CEQA analysis of individual projects, but rather to measure economy-wide reductions necessary to meet AB 32's emissions reduction mandates. Accordingly, the Department would have to identify substantial evidence that the EIR's "business as usual" version of the Project provided "a realistic baseline that will give the public and decision makers the most accurate picture practically possible of the project's likely impacts." (See *Neighbors*, *supra*, 57 Cal.4th at 449.)

There is no such evidence here. First, there is no evidence this specific project – in contrast to any other kind of project necessary to accommodate population growth – was included in the Scoping Plan's "business as usual" projection. Second, there is no evidence the state can meet AB 32's goals – which require a total 29 percent reduction from "business as usual" projections from *all* sources, new and existing – if *new* developments achieve only that same 29 percent reduction. Rather, the record is replete with contrary evidence that new projects must achieve greater emissions reductions because it is much more difficult to reduce emissions from existing sources. (See, e.g., AR:12774-75, 19991.)

The EIR dismissed this evidence, citing potential measures for reducing emissions from existing buildings, but failed to identify any evidence that existing buildings also can achieve the 29 percent reduction from "business as usual" necessary to meet AB 32's mandate. (See AR:13603-06.) In fact, many of the EIR's citations point to measures for existing buildings that are highly generalized, aspirational, or duplicative of other measures. (See, e.g., AR:106819-21 [Scoping Plan discussing reductions anticipated from aggressive energy efficiency measures, but not identifying proportion of reductions expected to come from new development]; 106835-37 [green building standards for existing buildings not yet adopted, and also not counted toward AB 32 reduction goals because already accounted for in other sectors].)

In short, substantial evidence does not support the EIR's core conclusion that the Project's emissions "reductions" in comparison to an alternate, "business as usual" version of the Project will ensure consistency with AB 32. The EIR simply *assumes* the Scoping Plan's "business as usual" assumptions can be wrenched into an entirely different context, and be used to create a hypothetical version of the Project, even though that version could not legally be built, in order to

determine whether its Project's increase in emissions conflicts with AB 32. None of these assumptions is supported by substantial evidence. Deferential review is unwarranted here – but even if it were, the EIR would fail.

7. The Department's Error Was Prejudicial

In accordance with numerous decisions of this Court and the Courts of Appeal, Plaintiffs' Opening Brief demonstrated that the EIR prejudicially misled decision-makers and the public by using an impermissible hypothetical project baseline to portray the Project's substantial emissions *increase* as consistent with statutes requiring substantial emissions *reductions*. (POB at 71-73.)

Newhall responds only that "[a]ll the information required by CEQA is found in this EIR and the record," and that "[t]here are no relevant 'omissions.'" (NAB at 55.) By these statements, Newhall apparently means that because the EIR quantified and disclosed the Project's emissions, there can be no prejudice from its failure to consider the significance of those emissions in relationship to existing emissions from the property. The argument fails. This Court in *CBE* found prejudice despite the fact that the negative declaration invalidated in that case quantified and disclosed the refinery project's

emissions increase. (See *CBE*, *supra*, 48 Cal.4th at 320; see also *Woodward Park*, *supra*, 150 Cal.App.4th at 707-08.) Mere disclosure of factual data in an EIR is insufficient unless "presented in a manner calculated to adequately inform the public and decision makers." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442; see also *Laurel Heights*, *supra*, 47 Cal.3d at 404-05.) Moreover, an agency's failure to determine significance properly in the first instance "precludes both identification of potential environmental consequences arising from the project and also thoughtful analysis of the sufficiency of measures to mitigate those consequences [and] cannot be considered harmless." (*Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 658.)

The cases Newhall cites are inapposite. In *Neighbors*, for example, this Court found no prejudice where an analysis of traffic impacts against existing conditions would not have produced "any substantially different information," and where the project itself was expected to have a beneficial impact on long-term traffic and air quality conditions. (See *Neighbors*, 57 Cal.4th at 463-64.) Here, an existing conditions analysis would have produced "substantially

different information" by requiring the Department to assess the significance of the Project's emissions increase rather than use an illusory comparison to portray that increase as consistent with required statewide reductions. Moreover, there can be no argument that the Project's emissions increase will somehow benefit the climate.

In *Save Cuyama Valley*, the court found an EIR's error in "classifying the severity of an environmental impact" non-prejudicial where a required condition of approval "would be wholly effective in negating the [project's] adverse impact." (*Save Cuyama Valley, supra*, 213 Cal.App.4th at 1073-74.) Here, in contrast, Newhall has not adopted any similar condition that will eliminate the Project's increase in greenhouse gas emissions. Finally, the court in *City of Long Beach v. Los Angeles Unified School District* (2009) 176 Cal.App.4th 889, found no error in the challenged EIR, and thus had no occasion to determine whether any error was prejudicial. (See *id.* at 894-95.)

The Department, for its part, asserts in the introduction to its brief that Plaintiffs have failed to demonstrate prejudice, but fails to support the assertion with any argument. (DAB at 4.) Moreover, the

Department's own misstatements actually illustrate how its error was prejudicial. The Department claims it found the Project's emissions, "*after mitigation*, were not significant." (*Ibid.* [emphasis added].) This erroneously implies that the Department adopted mitigation measures to reduce the Project's otherwise significant climate impacts to a less-than-significant level. (See Pub. Resources Code § 21081(a)(1).) In reality, the Department determined that the Project's emissions would be less than significant because they were 31 percent lower than those of a different, hypothetical "business as usual" version of the Project. (AR:7672-73, 7704-05, 13611, 18877-78, 26273.)

The Department's failure to determine significance in relation to a lawful baseline resulted in a prejudicial failure to consider and adopt feasible mitigation measures. An EIR need not identify *any* mitigation for less-than-significant impacts. (See, e.g., *Santa Clarita Org. for Planning the Env't v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042, 1058.) Here, the EIR recommended that certain measures – including requirements from previous reviews and a handful of voluntary "project design" measures – be "incorporated" as if they were mitigation measures. (See AR:7762-64.) But this is a far

cry from what CEQA requires when an impact is found significant in the first instance: identification and incorporation of *all* feasible measures to avoid or lessen the impact. (Pub. Resources Code §§ 21002, 21002.1(b), 21081(a); see *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1233 ["CEQA compels government first to identify the environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives."]; *Lotus*, *supra*, 223 Cal.App.4th at 656 [failure to properly determine significance before proposing mitigation measures "subverts the purposes of CEQA" and "cannot be considered harmless"].)

The EIR's conclusion that the Project's greenhouse gas emissions were not significant – based entirely on an impermissible comparison between the Project and a "business as usual" hypothetical – resulted in the Department's failure even to consider, much less implement, all feasible measures to mitigate those emissions. Plaintiffs have demonstrated prejudice.

III. CONCLUSION

There are three separate grounds on which the appellate court's decision should be reversed. First, the CEQA mitigation measures adopted by the Department to accommodate development along the stretch of the Santa Clara River occupied by the stickleback constitute a take within the meaning of the Fully Protected Species Laws, which expressly preclude authorization of take through CEQA mitigation measures. Nothing in CESA trumps that prohibition.

Second, comments made during the comment period on the Final EIR exhausted Plaintiffs' remedies with regard to impacts on cultural resources and steelhead, and should be considered in any decision on the merits. Alternatively, if the Department's circulation of the Final EIR with a notice seeking public comment is not considered a comment period for purposes of CEQA, then Public Resources Code section 21177(e) provides that the exhaustion provisions of CEQA do not apply. These comments and the EIR's responses should be considered on the merits of the cultural resource and steelhead arguments that were made below.

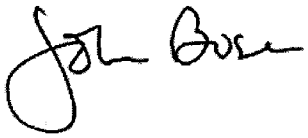
Finally, the EIR determined the significance of the Project's greenhouse gas analysis by comparing the Project's emissions to those

of a hypothetical "business as usual" version of the Project that could not be built under laws existing at the time of the Project's approval. Analysis against this hypothetical "baseline" – precluded by decades of CEQA caselaw – misled the public and decision makers as to the Project's actual contribution to climate change.

For each of these reasons, the decision of the appellate court should be reversed and remanded so a writ may issue directing the Department to set aside the EIR and its Project approval.

Respectfully Submitted,

November 25, 2014 By:



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CERTIFICATION REGARDING WORD COUNT

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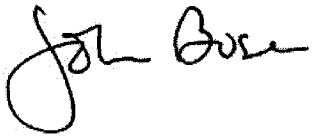

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_____
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