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LIU, J.

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No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CENTRAL COAST FOREST ASSOCIATION and
BIG CREEK LUMBER COMPANY,

Plaintiffs and Respondents,

v.

CALIFORNIA FISH AND GAME COMMISSION,

Defendant and Appellant.

After an Opinion by the Court of Appeal,
Third Appellate District
(Case No. C060569)

On Petition for Review of the Decision of the Court of Appeal, No. 060569
Sacramento County Super. Ct. No. 07CS0085
Honorable Gail D. Ohanesian, Judge

PETITION FOR REVIEW

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INTRODUCTION

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Plaintiffs Central Coast Forest Association and Big Creek Lumber Company petition for review of a 2-1 decision of the Court of Appeal, Third Appellate District, reversing the judgment of the Superior Court for Sacramento County, which granted plaintiffs' petition for writ of mandate commanding the California Fish and Game Commission ("Commission") to consider plaintiffs' petition to correct error in the geographical designation of the coho salmon "species" listed under the California Endangered Species Act ("CESA"). Under the majority's decision, the Commission is precluded by its own regulation from considering a petition to correct error in the performance of its statutory listing duties.

ISSUES PRESENTED FOR REVIEW

1. Are the Commission's decisions on listing petitions under CESA akin to judicial decisions as to which the doctrine of *res judicata* applies, such that a petitioner may not, through the statutory delisting process, advance new evidence to prove any error in an initial listing?

2. Should the Commission's listing regulation be interpreted to mean that once a species has been listed, the sole ground for delisting must be that the species has recovered, without regard to error in the initial

listing?

3. May the Commission lawfully limit by regulation the scope of statutory delisting petitions to only those showing that a species has recovered?

4. Once the Commission defines a "species," is it thereafter without power to revise the initial species definition?

5. Did plaintiffs present sufficient information to demonstrate that the action they sought, redefinition of the "species" of coho salmon listed for protection in California, "may be warranted" within the meaning of Fish and Game Code § 2074.2?

6. Is the Commission legally forbidden from considering in the listing process the effect that listing one "species" might have on another listed "species"?

NECESSITY FOR REVIEW

This case raises important questions of statutory and regulatory interpretation, and review is also required to secure uniformity in the judicial review of petitions presented to the Commission.

Until the decision below, it was commonly understood, based on the plain language of CESA and numerous decisions thereunder, that review of the Commission's decisions rejecting petitions under the Act pursuant to § 2073.5 of the Fish and Game Code was governed by the "substantial

evidence" test and § 1094.5 of the Code of Civil Procedure. Faced with an extraordinarily-meritorious petition to narrow the scope of a "species" to exclude hatchery-maintained populations of coho salmon south of San Francisco—to the benefit of fragile native steelhead and perhaps the wild coho as well—the Court of Appeal overturned its own prior decision in *Natural Resources Defense Council v. Fish and Game Comm'n* (1994) 28 Cal.App.4th 1104, and declared that the Commission's decisions rejecting petitions constituted quasi-legislative action reviewable only under § 1085 of the Code of Civil Procedure. Such review, of course, utilizes only an "arbitrary and capricious" test. The majority's decision not only unsettles the law, but also makes it flatly contrary to the Legislature's express intent, as set forth in § 2076 of the Fish and Game Code, that review should be governed by the less deferential standards of § 1094.5.

The majority did acknowledge that "substantial evidence" test and § 1094.5 applied to review of the Commission's final decision on petitions it accepted. However, the majority also held these decisions were somehow afflicted with a powerful form of *res judicata* that prevented any petitioner from ever presenting newly-available scientific evidence (or indeed any evidence) demonstrating that the original listing decision was in error. According to the majority, new evidence is foreclosed on any issue considered in the initial listing decision; the only evidence permitted is

evidence showing whether or not species numbers and conditions after the listing are improving or getting worse. This extra-statutory limitation is not only contrary to fundamental principles of due process of law, but also seriously interferes with the Legislature's continuing command to revisit listing decisions based on the best available scientific evidence. The majority's procedural innovation left in place a thicket of profoundly unreasonable interpretations of CESA put forth by the Commission, which also raise important questions of public concern relating to species definition that this Court has never addressed.

In sum, this Court's guidance is required not merely to secure uniformity in the Court of Appeals, but also to reaffirm and clarify settled CESA law with respect to review of Commission decisions and the powers of the Commission and to address important questions of species definition. Application of the State's most important wildlife protection statute presents an inherently important question of law meriting this Court's review.

Plaintiffs did not seek rehearing in the Court of Appeals because the errors below were of a legal nature, and the oral argument left no doubt as to an irreconcilable division among the justices. By reason of its extraordinary limitation on the scope of delisting petitions, the majority did not reach the remaining issues in the case, or weigh the facts.

STATEMENT OF THE CASE

Plaintiffs have long been involved in fishery research and propagation activities,[1] and have even won awards for their environmental stewardship, including the prestigious Wildlife Conservation Achievement Award from the California Department of Fish and Game ("Department") in 1995. (AR1/3:727,[2] 756, 782) Their petition to redefine the geographic scope of the coho salmon "species" is perhaps the only endangered species act petition ever presented to the Commission which was supported by a peer-reviewed article in the *Fisheries* journal of the American Fisheries Society. (AR1/3:899-917.)

Notwithstanding the peculiar technical arguments invented by the majority, and the even more peculiar positions of the Commission, it was at all times obvious that the petition demonstrated at least that species redefinition "may be warranted" for purposes of requiring further review of

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[1] *See also Wall Street Journal*, "Even a Logger Praised As Sensitive to Ecology Faces Bitter Opposition", April 1, 1993; *Santa Cruz Weekly*, "Big Creek Lumber Seeks Special Consideration in Salmon Rules," June 19, 2009 (federal fisheries scientist notes that "in Big Creek Lumber's case, self-regulation works").

[2] The certified administrative record for the case consists of four parts. Parts I through III consisted of 12 bound volumes entitled "Administrative Record Concerning Rejection of Petition to Delist Coho South of San Francisco." Part IV of the record, with 13 bound volumes, consists of the certified record concerning the prior listing decision. Parts I through III of the record are cited as "AR1," and Part IV is referred to as "AR2," followed by the volume and page numbers.

its claims. Instead of giving the petition full review, the Commission sought to lock California into continuing a century of failure to establish self-sustaining coho populations south of San Francisco by artificial propagation, arguing in effect that once a hatchery was established, no matter how foolish or counterproductive it might be, the fish in it had to be protected as listed species, without regard to any further evidence presented by a petitioner. The Commission's position, and that of the majority, lacks any basis in law or policy.

A. Legal Background

Under CESA, the Commission is vested with the authority to establish and maintain a list of "endangered" and "threatened" species. Fish & Game Code § 2070. The Act defines an "endangered species" as any

> "native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant which is in serious danger of becoming extinct throughout all, or a significant portion, of its range due to one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, or disease."

Id. § 2062. A "threatened species" is defined in similar fashion, except that "although not presently threatened with extinction, [it] is likely to become an endangered species in the foreseeable future in the absence of the special protection and management efforts required by this chapter." *Id.* § 2067. The Act prohibits the "take" of any endangered or threatened species,

id § 2080, with "take" defined as to "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill." *Id.* § 86.

Any interested person may petition to list or delist any species. *See id.* § 2071. Within 90 days of receipt of a petition, the Department must recommend to the Commission whether the petition contains sufficient information to indicate that the petitioned action may be warranted. *Id.* § 2073.5. This case concerns a petition rejected by the Commission in this initial review.

If the Commission determines that the petition provides sufficient information, the matter is referred back to the Department, which must then recommend within 12 months whether the petitioned action, in light of the best available scientific information, is warranted. *See id.* § 2074.6. Upon receipt of the Department's recommendation, the Commission must then make the final determination whether to proceed with the petitioned action. *Id.* § 2075.5. If the Commission determines that the petitioned listing or de-listing is warranted, it must then issue a notice of proposed rulemaking in anticipation of the adoption of a regulation listing or de-listing the species. *See id.* § 2075.5(2).

B. Procedural history

As the majority emphasized, the Commission had initially listed coho salmon south of San Francisco in 1995 as a "species" on the basis of a

status report by the Department which concluded:

> "These southernmost populations experience and respond to the unfavorable, adverse environmental conditions associated with the fringe of any distribution. In such areas, environmental conditions can become marginal, harsh or extreme for coho survival and, *presumably*, these southernmost populations have adapted to the less-than-optimal environments." (*Quoted in* ROA:563; BX10,[3] at 47; emphasis added.)

As set forth below, plaintiffs ultimately discovered that the presumption of the Department and Commission was simply wrong; in fact, the only reason coho populations were present at all south of San Francisco was by virtue of repeated artificial propagation, which whenever halted led to rapid extirpation, because this "fringe" habitat was entirely unsuitable for coho.

By 2002, the Commission had completed a second status report which also proceeded on the false premise that the native range of coho salmon extended below San Francisco. It appears that the Commission did not get around to implementing the 2002 status review until August 2004. *See California Forestry Ass'n v. California Fish & Game Comm'n* (2007) 156 Cal.App.4th 1535, 1544.

On June 17, 2004, plaintiffs Central Coast Forest Association and

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[3] The Commission designated the Superior Court file as the Record on Appeal. References to that record are designated as "ROA," followed by the page number. Because of potential page numbering problems with the Record on Appeal, we include a parallel cite to the primary factual submission before the Superior Court, exhibits to the Declaration of James L. Buchal ("BX"), where appropriate.

Big Creek Lumber Company submitted their Petition to redefine the southern boundary for CESA protection of coho salmon to the Department. (AR1/3:828-896.) Plaintiffs lodged further materials in support of the Petition with the Commission on January 26, 2005 (ROA:517-71; BX10), and on February 3, 2005 lodged the testimony of an independent, certified, Ph.D. fisheries scientist Dr. Victor Kaczynski (AR1/3:785-798).

Among other things, the petition, as supplemented, demonstrated that:

- The streams south of San Francisco frequently have sandbars blocking salmon migration entirely.
- The drier and "flashier" nature of precipitation south of San Francisco has been widely noticed in the scientific literature and is widely recognized to impair coho survival.
- A century of attempts to establish self-sustaining hatchery populations had failed because the coho were repeatedly wiped out by impossible habitat conditions.
- All available scientific and popular literature prior to the establishment of hatcheries in the early 1900s recognized that coho

were not native to the area.[4]

- Extensive archeological investigation had failed to identify the presence of coho bones in Native American middens south of San Francisco, though steelhead bones were often found.[5]

As a matter of historical accident, the petition, lodged on June 17, 2004, slightly preceded the Commission's final 2004 decision expanding the coho "species" to a larger unit termed "central coast coho". But the Commission did not address the allegations of the petition in its 2004 final decision; at all relevant times it responded to the petition as representing an entirely separate proceeding.

On March 17, 2005, the Commission issued written findings rejecting the Petition. (AR1/3:810-815.) The Commission declared that "all recent genetic analyses support the genetic distinctiveness of coho salmon from [creeks south of San Francisco]" (AR1/3:814) and did not offer any suggestion that it was without legal power to grant the petition.

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[4] After the petition was filed, certain dubious specimens of fish, allegedly gathered in 1895, were re-identified as representing coho presence south of San Francisco, an event that does not constitute conclusive, if indeed any, evidence that the fish were native to the area. (*See generally* Plaintiffs and Respondents' Brief at 37-41.)

[5] Scientists would later purport to discover a coho bone in 2006 in the remains of an ancient Native American ocean fishing camp on Año Nuevo Point, a finding that has no bearing on whether the fish were native. (*See generally* Respondents' Brief at 33-37.)

Nor did the Commission argue that plaintiffs should have presented such evidence as was contained in the initial petition (or indeed any subsequent evidence) exclusively during the 1995 or 2004 rulemaking processes.

In response to the Commission's rejection of the petition, plaintiffs filed their initial suit on December 5, 2005. On September 26, 2006, the Superior Court overturned the Commission's rejection of the Petition. *Central Coast Forest Association and Big Creek Lumber Company v. California Fish & Game Commission*, Case No. 05CS01617 (Sac. Cty. Sept. 22, 2006). On November 22, 2006, the Superior Court issued a writ of mandate to the Commission directing it to reconsider its rejection of the Petition. The Commission did not appeal the decision.

In connection with the Commission's renewed consideration, plaintiffs supplemented the petition with substantial new expert analyses of "the most up-to-date and reliable survival data". (ROA206: BX34, at 17.) By this time, it had become apparent that the Department's own estimates of coho freshwater and ocean survival proved that no self-sustaining populations could persist in the area. (AR1/3:973-975; *see generally* petitioner's Opening Brief at 15-19 (reviewing evidence).) Plaintiffs' research efforts culminated in an August 2006 article in *Fisheries* magazine, a peer-reviewed publication of the American Fisheries Society, which supported the allegations of the petition, and was also lodged in

support of the petition. (ROA633-50.[6])

Because the Department and Commission had placed weight in 2002 upon genetic testing of California coho populations, plaintiffs also supplemented their petition with a far more thorough and comprehensive genetic analysis completed in October 2005 by the National Oceanic and Atmospheric Administration. (ROA598-621: BX15, at 1-24.) This evidence is discussed at length in the Brief of Respondents, Oct. 1, 2009, at pp. 49-54.

After an extraordinarily unfair process[7] that even involved the unlawful destruction of documents (as detailed at pp. 7-10 of plaintiffs' opening brief before the Court of Appeals), the Commission held that "the Petition to delist Coho Salmon South of San Francisco does not provide

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[6] The Commission's bias against the petition was further demonstrated by its shocking finding that the peer-reviewed publication failed to provide any "credible information . . . upon which a reasonable person would rely". (AR1/4:1223; *see also* ROA:1013-14 (Superior Court cites this as evidence of the Commission's failure to apply the appropriate legal standard in reviewing the evidence advanced in the Petition).)

[7] As several federal district courts have explained, "those petitions that are meritorious on their face should not be subject to refutation by information and views provided by selected third parties solicited by FWS [the U.S. Fish and Wildlife Service]". *Center for Biological Diversity v. Morgenweck*, 351 F. Supp.2d 1137, 1143 (D. Colo. 2004); *see also Colorado River Cutthroat Trout v. Kempthorne*, 448 F. Supp.2d 170, 175-77 (D.D.C. 2006) (setting aside rejection of petition because the Service "solicited information from limited outside sources"); *see also Western Watersheds Project v. Hall*, 2007 WL 2790404, *6 (D. Idaho 2007).

sufficient information to indicate that the petitioned action may be warranted [and] denied the petition". (Supplemental Return to the Writ, March 8, 2007.)

Again the Commission made no argument that any of the information supplied could only have been presented in the 1995 or 2004 listing proceedings. (As explained below, this issue was first raised in subsequent appellate proceedings by the Court of Appeal's *sua sponte* request for additional briefing.) The Commission did, however, for the first time take the position that it was powerless, as a matter of law, to grant the relief requested, no matter what the factual showing in the petition.

Plaintiffs returned to the Superior Court, which in a thorough and well-reasoned opinion (ROA:1012-1017), *again* found the Commission's rejection of the Petition as unsupported by substantial evidence in light of the whole record (ROA:1015), and also noted that it was unclear that the Commission had even employed the correct legal standard to evaluate the petition (ROA:1013). Accordingly, a second writ of mandate issued compelling the Department to "accept Petitioners' delisting petition pursuant to § 2074.2(a) of the Fish and Game Code, and to proceed to further review as provided in §§ 2074.4 *et seq.* . . ." (ROA:1033-1034.)

This time, the Commission appealed. Following the completion of briefing, the Court of Appeals invented *sua sponte* a new and even more

far-reaching defense: that once any listing was made, doctrines of *res judicata* meant that the only lawful basis on which it ever might be changed was a change in the status of the species once defined. The majority even overruled the Third Appellate Districts's own prior case invoking § 1094.5 of the Code of Civil Procedure to applying a "substantial evidence" test to the rejection of CESA petitions at the threshold stage of review.

REASONS FOR GRANTING REVIEW

I. THE MAJORITY'S ERROR CREATES CONFUSION CONCERNING THE MEANS OF JUDICIAL REVIEW OF COMMISSION LISTING DECISIONS, AND UNLAWFULLY LIMITS REVIEW THEREOF.

A. The Majority Establishes the Wrong Writ and Wrong Standard of Review for CESA Decisions.

Until the decision below, it was well-established that review of both the initial decision concerning the sufficiency of a petition, and the ultimate listing decision based on the petition, both proceeded under § 1094.5 of the Code of Civil Procedure. Reviewing courts have properly applied the "substantial evidence" test utilized in § 1094.5 cases. *See, e.g., Natural Resources Defense Council v. Fish and Game Comm'n* (1994) 28 Cal.App.4th 1104, 1114-17; *accord Center for Biological Diversity v. Fish & Game Comm'n* (2008) 166 Cal.App.4th 597 (reviewing petition rejection); *see also Center for Biological Diversity v. California Fish and Game Comm'n* (2011), 195 Cal.App.4th 128, 132 (reviewing fee award).

Specifically, "the standard, at this threshold in the listing process, requires only that a substantial possibility of listing could be found by an objective, reasonable observer." *Center for Biological Diversity*, 166 Cal.App.4th at 611.

The Court of Appeals, however, reasoned that the Commission's threshold factual review of a petition was a "quasi-legislative action of the Commission" (slip op. at 12), apparently because the final listing decisions are set forth in a rule, and appeared to suggest that review of the Commission's decision was by ordinary mandamus pursuant to § 1085 of the Code of Civil Procedure (*id.* at 13). But no California court reviewing a CESA decision has ever employed the highly-deferential "arbitrary and capricious" test which is utilized in § 1085 cases. *See generally American Coatings Ass'n v. South Coast Air Quality Management* (2012) 54 Cal.4th 446, 461 (distinguishing "substantial evidence" and "arbitrary and capricious" tests).

Review under § 1094.5 of the Code of Civil Procedure was not appropriate, according to the majority, because the Commission's rejection of a petition was not a final action. But there were no further administrative proceedings available after the Commission rejected the petition; the Commission's decision was final and reviewable.

The majority opinion has it backwards: in rejecting a petition, the

Commission makes a specific quasi-judicial decision reviewable under § 1094.5; its final listing decision enacted by quasi-legislative rulemaking would be reviewable under § 1085 but for the Legislature's specific grant of more probing review under § 1094.5.[8]

B. The Majority's Invocation of *Res Judicata* in a Quasi-Legislative Context Is Utterly Inappropriate.

The dissent noted that if indeed the rejection of a petition was a quasi-legislative decision, it was odd indeed for the majority to be importing considerations of finality that have weight, if at all, in the context of attacks upon a *judicial* decision. (Dissent at 1*see also id.* at 5 ("Res judicata does not bar new legislative action").) The Commission's coho rulemaking decisions in 1995 and 2004 were not specifically directed at the rights of plaintiffs or even at the rights of any particular group to which plaintiffs belong. Rather, the Commission was creating new law for the treatment of a particular class of fish, a law applicable to all Californians.

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[8] The majority found the Legislature's intent for less deferential review to apply only to the final listing decision because § 2076 refers to § 1094.5 review of findings "pursuant to this section;" the majority interpreted "this section" to mean "the preceding section," which governed final listing decisions. In the Court of Appeal, plaintiffs filed an extensive collection of the legislative history to show that the Legislature had intended to have the heightened standard of review apply to all listing decisions under the Act, and by accident had left § 2076 as self-referential and formally meaningless if read literally, because it was at the last minute chopped out of a larger section that contained both the initial and final listing decisions. *See generally* Respondents' Motion for Judicial Notice, Feb. 24. 2012; Respondents' Supplemental Brief, Feb. 26, 2012, at 8-11.

This is quintessentially legislative decisionmaking, not judicial decisionmaking.

The majority's decision is contrary to a large body of law holding that issue preclusion can only apply when the proceedings are "of a sufficiently judicial character." *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 867; *see also Y.K.A. Industries, Inc. v. Redevelopment Agency of the City of San Jose* (2009) 174 Cal.App.4th 339, 357. This Court has explained that:

> " '. . . [i]ndicia of [administrative] proceedings undertaken in a judicial capacity include a hearing before an impartial decision maker; testimony given under oath or affirmation; a party's ability to subpoena, call, examine, and cross-examine witnesses, to introduce documentary evidence, and to make oral and written argument; the taking of a record of the proceeding; and a written statement of reasons for the decision.' "

Murray, 50 Cal.4th at 867-68 (quoting *Pacific Lumber Co. v. State Water Resources Control Board* (2006) 37 Cal.4th 921, 944).

The premise of this line of cases is that those bound by quasi-judicial proceedings participate in them, directly or by representation. Serious questions of due process of law arise in holding, as did the majority, that citizens might be legally bound by proceedings of which they may not even have been aware.[9] And even if they did participate, the requisite

[9] One plaintiff, Big Creek Lumber Company, did participate in coho listing rulemaking.

procedural indicia for *res judicata* discussed above are not present here, in either the procedures for 90-day review of petitions (§ 2074.2), or for final review of accepted petitions (§ 2075.5). Even the statute concerning final action merely directs the Commission to make findings "[a]t the meeting scheduled pursuant to Section 2075." (§ 2075.5.) There is no testimony given under oath, and no ability to subpoena, call, examine, and cross-examine witnesses—none of the traditional indicia of an evidentiary hearing.

Neither proceeding is a "decision made as the result of a proceeding in which by law a hearing is required" within the meaning of § 1094.5 of the Code of Civil Procedure § 1094.5. Significantly, the majority agreed that but for the legislature's determination in § 2076 of the Fish and Game Code to provide more searching judicial review for petition-related findings through § 1094.5, review of the Commission's findings would otherwise arise under § 1085.

The whole rulemaking design of the statute is based upon the premise that the status of species is not like a set of rights that may be fixed under existing law; it is a policy decision based on an ever-expanding pool of knowledge concerning species status. Like any rule, a listing decision can and should always be subject to legislative revision in the light of new

evidence. This is clear from the design of the statute, to which we now turn.

II. THE CALIFORNIA ENDANGERED SPECIES ACT REQUIRES THE BEST AVAILABLE SCIENTIFIC INFORMATION TO BE CONSIDERED IN DECISIONMAKING, WITHOUT THE EXTRA-STATUTORY LIMITATIONS IMPOSED BY THE MAJORITY.

The core of the majority decision is the holding that "the delisting procedure is not a means by which new information may be submitted on the merits of a final [listing] determination." (Slip op. at 4.) No limitation on the nature or subject of information that may appear in a delisting petition appears in the statute. Rather, the statute provides for a perfect symmetry between listing and delisting decisions:

> "§ 2070. The commission shall establish a list of endangered species and a list of threatened species. The commission shall add or remove species from either list if it finds, upon the receipt of sufficient scientific information pursuant to this article, that the action is warranted.
>
> "§ 2071. The commission shall adopt guidelines by which an interested person may petition the commission to add a species to, or to remove a species from either the list of endangered or the list of threatened species."

The Legislature's concern is that sufficient scientific information support whichever determination the Commission makes, to list, or delist, and to that end the Legislature gave specific guidance containing the contents of a

petition—with the same information relevant to both listing and delisting petitions:

> "§ 2072.3. To be accepted, a petition shall, at a minimum, include sufficient scientific information that a petitioned action may be warranted. Petitions shall include information regarding the population trend, range, distribution, abundance, and life history of a species, the factors affecting the ability of the population to survive and reproduce, the degree and immediacy of the threat, the impact of existing management efforts, suggestions for future management, and the availability and sources of information. The petition shall also include information regarding the kind of habitat necessary for species survival, a detailed distribution map, and any other factors that the petitioner deems relevant."

The Department of Fish and Game is bound by these same standards whatever recommendation it might make (*see* § 2072.7), and the Commission is bound to review species listings every five years "based on information which is consistent with the information specified in Section 2072.3 and which is the best scientific information available to the Department" (§ 2077(a)).

The Legislative command for continuing review on the best available scientific information demonstrates an understanding that the relevant information available concerning listing decisions may change over time, and the Department is bound to respond with listing decisions based on new information, if any. According to the majority, however,

> "An interested person has ample opportunity to tender scientific information to the department for consideration by the department and the Commission during the administrative

> process leading to a final [listing] decision. *What an interested person may not do is tender new information in a later proceeding that challenges the grounds upon which the initial decision has been rendered."*

(Slip op. at 13-14; emphasis added & footnote omitted.) The majority advanced no arguments in favor of this somewhat extraordinary position other than general concerns of finality. But solicitude for finality is manifestly inappropriate in the context of a statute that calls for repeated application of the best available scientific information.

It should be noted that any challenge to the Commission's prior listing determination based on new information coming to light after the decision would never be appropriate under the majority rule. After all, in a review of a listing decision under § 1094.5, judicial review "is conducted solely on the record of the proceeding before the administrative agency." *Sierra Club v. California Coastal Comm'n* (2005) 35 Cal.4th 839, 863 (citing and quoting multiple cases). New information is not admissible. So even if plaintiffs had all the evidence ultimately advanced in support of their petition in hand before the statute of limitations had run on the time to challenge the 1995 or 2004 listing decisions, none of that evidence could have been used at all.

The Legislature provided no such anti-scientific procedure for the management of California's wildlife. Rather, citizens can compel the Commission to consider new information by the express remedy in the

statute: the petition process. The dissent properly recognized that exclusion of new evidence was not consistent with the language, structure, goals of CESA:

> "The majority opinion is simply wrong in holding judicial finality bars legislative reconsideration. As can be seen, the statute clearly provides for reconsideration of prior listing decisions even when the listing decision is final for purposes of judicial review. The Commission's prior decisions are not irrelevant to a later reconsideration, but neither are they res judicata; otherwise they would undermine the statutory structure and policy allowing for revising legislative listing decisions based on new or previously undiscovered scientific knowledge."

(Dissent at 2.)

The majority cited a regulation enacted by the Commission in which the Commission had declared that a species might be delisted only "if the Commission determines that its continued existence is no longer threatened". (Cal. Code. Regs. tit. 14, § 670.1.) The Court of Appeals interpreted this regulation to embody an overarching command that a petition to delist a species be limited to "events that occur after the listing of the species." (Slip op. at 15.) The Court of Appeals did not explain why new scientific information that became available after the listing of the species was not such an "event". For example, subsequent to the 2004 listing, an extraordinarily extensive study of the genetics of California coho salmon became available which undermined entirely the premise that the coho south of San Francisco were properly considered part of some larger

coho ESU.[10] The "continued existence" of coho south of San Francisco is "no longer threatened" within the meaning of the regulation if the new information shows they had no "continued existence" in the first place.

To the extent the regulation is read to forbid such an argument—limiting petitioner to presenting only information about changes in species numbers, habitat, etc. after the listing—it is invalid. As the dissent noted, "[a]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." (Dissent at 3 (quoting *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 16 (Mosk, J., concurring).) As the dissent explained, "limiting delisting to when a species is no longer threatened arbitrarily limits the Commission's statutory authorization to delist whenever it is warranted." (*Id.*)

It is particularly arbitrary for the Commission now to insist that its authority is artificially limited, when it repeatedly and successfully defended a broad vision of its authority to list groups of animals extending far below the taxonomic or common understanding of the statutory term "native species." It is odd indeed to grant the Commission virtually

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[10] In adopting their "ESU" listing policy, federal listing authorities have properly emphasized that genetic information, though the only evidence cited by the majority is of very limited utility in species definition. A full exposition of the significance of the available genetic information concerning coho is beyond the scope of this petition for review.

unlimited power to define any particular group of animals as a "native species," and at the same time declare that the power once exercised is beyond all challenge or correction no matter what advances in scientific knowledge may arise thereafter. The history of determinations shows the plastic and evolving nature of species definition. Here, the Commission first identified the coho south of San Francisco in 1995 as a "species," then later determined in 2004 that they were part of a larger "evolutionarily significant unit" that could also be a "species;" and there is every indication that scientific knowledge concerning species definition will continue to evolve.

The majority also repeatedly cites language in the five-year reconsideration provision asking the Commission "to determine if the conditions that led to the original listing are still present". (Slip op. at 10, 14, 16; emphasis deleted.) The Court of Appeals interpreted this language to mean that after a listing, all further consideration was "limited to the 'present' condition of the species" (slip op. at 16), fundamental questions such as whether or not the group of animals even constituted a species could never again be considered. No such limitation appears in the statute. If the Commission were in fact forbidden from any further consideration of species definition, the coho south of San Francisco would still be their own species. Put another way, if the Commission can lump two species together

later on, why can't it split them apart?

III. THE EVIDENCE AND ISSUES RAISED BY THE PETITION ARE IMPORTANT AND WORTHY OF CONSIDERATION.

The majority did not discuss or review the new evidence presented by plaintiffs, brushing off their evidentiary showing with a reference to its subsequent decision affirming the 2004 coho listing in *California Forestry Ass'n v. California Fish & Game Commission* (2007) 156 Cal.App.4th 1535 (*CFA*). The Court referred to the "wide discretion" the Commission enjoys in listing determinations, and simply declared the 2004 decision "binding on respondents"[11]

As the dissent explained,

> "the dispositive issue is not whether the 1995 and 2004 listing decisions are final and section 2076 bars further judicial review. That statute does not apply here. Contrary to the holding of the majority opinion, the dispositive issue is whether plaintiffs petition to the Commission includes sufficient scientific information that the delisting 'may be warranted,' regardless of when the listing decision was made. (§§ 2072.3, 2074.2, subd. (a).) This was the standard which the trial court on two occasions ordered the Commission to

[11] There is a suggestion by the majority that plaintiffs "also challenge the 2004 determination" (slip. op at 17) in these proceedings, but no such relief was ever sought; at all relevant times, plaintiffs have merely sought full and fair consideration of their petition, and judicial review of the Commission's rejection of that petition. *See also* Dissent at 1 (dissent notes that "no complaint or petition was filed in a court challenging the Commission's 1995 and 2004 decisions").

> apply and also correctly determined the Commission had failed to apply."

(Dissent at 2.)

We do not in this petition for review discuss in detail the evidence presented in the petition to the Commission. As noted above, the fact that its contentions are supported by a peer-reviewed article published by the American Fisheries Society should convince any reasonable observer that the petition met the somewhat lenient standard to secure further, in-depth review by the Commission. Rather, we discuss the important legal issues raised by the Commission's response to the petition.

First and foremost in importance are the issues related to species definition. Notwithstanding CESA's limitation to "species," the Commission has previously persuaded the Court of Appeals that it had discretion to list (or not list) any particular subgroup of animals as a "species" within the meaning of the Fish and Game Code by reference to what the Court of Appeals called the Commission's "longstanding adherence to the policy that the CESA allows listings of evolutionarily significant units." *CFA*, 156 Cal.App.4th at 1546 (emphasis added). The Court of Appeals held, in substance, that the Commission could follow a federal policy developed to focus administrative discretion in exercising express statutory authority under the federal Endangered Species Act for listing "distinct population segments" of larger species.

Specifically, the federal government has through formal notice and comment procedures, outside any particular listing decision, promulgated what it calls the "evolutionarily significant unit" ("ESU") approach to determining whether any particular group of animals qualifies for protection. The cornerstone of this federal policy is that to list a group of animals as an ESU two findings are required: "(1) It must be substantially reproductively isolated from other conspecific population units; and (2) It must represent an important component of the evolutionary legacy of the species." 56 Fed. Reg. 58,612, at 58,618.

Salmon tend to return to their native streams or rivers, but significant straying rates cast doubt upon the first criterion. The primary dispute in this case involves the second criterion. An ephemeral local population that can only persist south of San Francisco with constant hatchery supplementation, because natural habitat conditions inevitably wipe them out, cannot possibly be "an important component of the evolutionary legacy of the species." *See id.* ("if the population became extinct, would this event represent a significant loss to the ecological/genetic diversity of the [entire coho salmon] species?"); *see also id.* at 58,616 ("loss of isolates . . . would generally not represent an irreversible loss of genetic diversity because most

of the genetic diversity . . . would still reside in the parent population").[12]

Before the Court of Appeals in this case, the Commission's brief on one hand asserted that its coho listing decisions were "[p]aralleling the federal approach" (Appellant's Br. at 14). But the Commission also denied entirely that it follows the federal definition of an ESU. (Appellant's Br. at 26 n. 7.) As best plaintiffs can tell, the Commission now articulates the view that an "evolutionarily significant unit" need not be *significant* at all. (*Id.*) This position undermines entirely the Court of Appeal's earlier rationale in the *CFA* case for granting the Commission the power to list groups of animals that may be far less extensive than a "species."[13]

The majority decision is also utterly contrary to the proclamation in the *CFA* case that "the Legislature intended that 'wild fish,' as opposed to

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[12] When Congress was considering whether to give federal regulators ESU listing authority, the General Accounting Office warned that the squirrels in a single park might be listed (*see* S. Rep. No. 96-151, 96th Cong., 1st Sess. 7 (1979)); the federal ESU policy's insistence upon the listed group represent an important component in the evolutionary legacy of the species was intended, in part, to respond to that criticism. NOAA Technical Memorandum, "Definition of "Species" under the Endangered Species Act: Application to Pacific Salmon" (Mar. 1991) (http://www.nwfsc.noaa.gov/publications/techmemos/tm194/waples.htm). There is no indication that the California Legislature ever considered granting the Commission the power to list groups of animals that did not constitute an "entire" species.

[13] Here there are thousands of populations of coho salmon stretching from northern California around the Pacific rim to Siberia, and abundant exemplars of the species can be purchased for a few dollars a pound at any supermarket.

hatchery fish, be protected under the CESA." *CFA*, 156 Cal.App.4th at 1552. A cornerstone of the petition was the demonstration that coho south of San Francisco were only maintained by hatcheries, since it was not their native habitat, and that operation of these hatcheries not only threatened native steelhead (the coho eat them), but also drained recovery resources from self-sustaining coho populations to the north.

The Commission declared that plaintiffs' concern for the steelhead they have long worked to protect was entirely irrelevant to the listing decision. But at the least, the Commission owes a duty under *Topanga Ass'n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 to explain why it insists on extending CESA to protect what can only be properly understood as hatchery fish, particularly given the undisputedly adverse effects on genuinely native wild steelhead (*e.g.*, AR1/2:583.)

The Commission's ever-changing views of its listing powers and responsibilities confirm the desperate need for this Court's guidance on the fundamental questions presented. The Commission has never conducted any formal rulemaking process concerning any of these questions, instead stumbling from listing to listing and articulating arbitrary litigation positions. If the Commission's *ad hoc* decisions once made can never be reconsidered in light of advances in scientific knowledge, the purposes of CESA will be utterly subverted.

CONCLUSION

The Court of Appeals decision replaces CESA's plain meaning, and established law confirming that meaning, with an extraordinarily-limited construction contrary to the plain language and broader purposes of the Act. Plaintiffs therefore request that this Court grant review of the Court of Appeals decision. If review is not granted, at the least, the decision should be ordered depublished, to prevent continuing confusion in CESA application.

DATED: January 22, 2013.

Respectfully submitted,

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

CENTRAL COAST FOREST ASSOCIATION et al.,	C060569
Plaintiffs and Respondents,	(Super. Ct. No. 07CS00851)
v.	
CALIFORNIA FISH AND GAME COMMISSION,	
Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Sacramento County, Gail D. Ohanesian, Judge. (Retired Judge of the Sacramento Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Mary E. Hackenbracht and Kathleen A. Kenealy, Senior Assistant Attorneys General, Sara J. Russell, Supervising Deputy Attorney General, Tara L. Mueller and Cecilia Dennis, Deputy Attorneys General for Defendant and Appellant.

Deborah A. Sivas and Robb W. Kapla for Environmental Law Clinic, as Amicus Curiae on behalf of Defendant and Appellant.

Murphy & Buchal and James L. Buchal for Plaintiff and Respondent.

SEE DISSENTING OPINION

The California Endangered Species Act (Fish and G. Code, § 2050 et seq.; hereafter CESA)[1] provides that a wild, native, species may be added to or removed from the regulation listing endangered species by a finding of the Fish and Game Commission (Commission) based on scientific information from the Department of Fish and Game (department)[2]. (§§ 2074.6, 2075.5.) The finding constitutes a final, quasi-legislative, determination to enact a regulation listing or delisting a species as endangered.[3] (§ 2070.) The standard for adding a species is that it is in serious danger of extinction. (§ 2062.) The standard for removing (delisting) a species is that its "*continued* existence is no longer threatened [with extinction] . . . ." (Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1)(B), italics added.)

The procedure for adding or removing a species from the list of endangered species has two stages. It is initiated by a petition from an interested person or a recommendation from the department. (§§ 2071, 2072.7.) The petition or recommendation must contain scientific information relating to the present ability of the species to survive and reproduce. (§ 2072.3.) The petition is in effect an application for consideration of a proposal to adopt or amend a rule. In the first or preliminary stage the petition and the department's evaluation of it are submitted to the Commission for it to decide whether to accept the petition for consideration. (§§ 2073.5, 2074.2.) If accepted, the department submits a recommendation and written report to the Commission "based upon the best scientific information available . . . ." (§ 2074.6.) In the final stage, the

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1 Undesignated statutory references are to the Fish and Game Code.

2 Effective January 1, 2013, the department will be renamed the Department of Fish and Wildlife. (Stats. 2012, ch. 559, § 5.)

3 The CESA provides for two lists, a list of endangered species and a list of threatened species. (§§ 2062, 2067, 2070.) Since the procedure is the same for both lists and this case concerns only endangered species we refer to that list in the opinion.

Commission determines, based on the department's scientific report, whether the petitioned action is warranted. (§§ 2075, 2075.5.)[4] A final determination is judicially reviewable pursuant to Code of Civil Procedure section 1094.5. (§ 2076.)

The Commission added coho salmon in streams south of San Francisco (Santa Cruz County) to the list of endangered species in 1995 pursuant to a petition from the Santa Cruz County Fish and Game Advisory Commission. The Commission joined them with coho salmon north of San Francisco (to Punta Gorda) in 2004 as members of the Central California Coast (CCC) evolutionary significant unit (ESU)[5] pursuant to a petition from the Salmon and Steelhead Recovery Coalition.

The respondents Central Coast Forest Association and Big Creek Lumber Company own and harvest timber from lands in the area of the coho salmon spawning streams in the Santa Cruz Mountains. The respondent Big Creek Lumber Company received notice of the 1995 proceeding and participated in the 2004 proceeding but did not seek review of the final decision in either case. However, just before the 2004 decision became final, the respondents filed a petition seeking to redefine the southern boundary of the CCC ESU to remove (delist) coho salmon in coastal streams south of San Francisco from the register of endangered species.[6] The respondents sought review in the superior court, which ruled that the petition should be accepted for consideration.

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[4] The CESA also provides for the adoption of emergency regulations. (§ 2076.5.)

[5] An ESU is a population of organisms that is considered distinct for purposes of conservation. The determination whether the coho salmon constitute an ESU is a matter of judgment and expertise. An ESU is included within the term "species or subspecies" in sections 2062 and 2067. (*California Forestry Assn. v. California Fish & Game Commission* (2007) 156 Cal.App.4th 1535, 1548-1549.)

[6] The 2004 decision was the subject of review by this court, which affirmed the decision of the Commission. (*California Forestry Assn. v. California Fish & Game Commission, supra,* 156 Cal.App.4th 1535.)

The court directed the Commission to reexamine the petition. The Commission did so and rejected the petition a second time. The trial court again ruled for the respondents and the Commission appeals from that decision.

The respondents do not claim that the coho salmon became extinct after the 1995 decision of the Commission, the regulatory standard for delisting. Rather, their delisting petition seeks to show that there was no basis for the Commission's 1995 finding that coho salmon is an endangered species. The respondents assert that there never were wild, native, coho salmon south of San Francisco and that the 1995 decision was "undertaken without benefit of the information in the 2004 Petition [and] proceeded on the false premise that the native range of coho salmon extended below San Francisco." They argue that "[t]he Petition may be understood . . . as demonstrating that the presumption [that wild, native, coho existed] which backed up the 1995 listing was simply wrong." (Italics omitted.)

The petition fails at the outset because a petition to delist a species may not be employed to challenge a final determination of the Commission. The delisting procedure is not a means by which new information may be submitted on the merits of a final determination. The exclusive means of judicial review of the merits is by administrative mandamus. (§ 2076.) Any other conclusion would undermine the finality of the administrative decision and bypass the standard by which a delisting decision is to be judged. Since a delisting petition may not be employed at all to challenge a final decision of the Commission it need not be reviewed at the preliminary stage.

We shall reverse the judgment of the superior court.[7]

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[7] We have no occasion to determine the applicable period of limitations for review of a final determination of the Commission.

Facts

A. The 1995 Commission Decision

In 1993 the Santa Cruz County Fish and Game Advisory Commission filed a petition requesting the listing of coho salmon in Scott and Waddell creeks in Santa Cruz County south of San Francisco as endangered. In 1994 the Commission designated the coho salmon as a candidate species. (§ 2068.) It provided notice thereof to respondent Big Creek Lumber Company. The department conducted a status review and prepared a rulemaking file for the Commission setting forth scientific information showing that the coho salmon was an endangered species and recommending that it be listed as endangered.

The Commission accepted the recommendation and enacted a rule listing the coho salmon as endangered, effective December 31, 1995. (Cal. Code Regs., tit. 14, § 670.5, subd. (a)(2)(N), Register 95, No. 48 (December 31, 1995).) The Commission's determination states it was "based on the best available scientific information regarding the distribution, abundance, biology and nature of threats to coho salmon south of San Francisco Bay . . . ." The Commission found that "[c]oho salmon numbers south of San Francisco Bay have declined over 98 percent since the early 1960's and currently are restricted to one remnant population in Waddell Creek, one small naturalized (hatchery-influenced) population in Scott Creek, and a small hatchery-maintained, non-native run in the San Lorenzo River, Santa Cruz County. There is minimal possibility of successful natural expansion of the remnant Waddell and Scott Creek populations to neighboring drainages due to the functional extinction of two of the three brood year lineages, inadequate numbers of adult coho to naturally produce the necessary founder populations for successful recolonization of streams, loss of genetic and population viability, and general lack of secure adjacent suitable habitat."

The department recommended recovery measures. "The first priority should be to set minimum flows necessary to sustain the coho salmon on Scott and Waddell Creeks.

. . . [¶] Following the establishment and maintenance of minimum flows, restoration of coho salmon habitat should be initiated to produce enough habitat to allow for more juvenile coho to be reared in Scott and Waddell Creeks. Instream habitat restoration in Scott and Waddell Creeks is a viable option [because] County and State regulations, land ownership patterns, and improvement in present land use practices can bring about better control of accelerated erosion in the watershed."

The Commission published a notice of its determination and distributed it to a list of interested persons including respondent Big Creek Lumber Company.

B. The 2004 Commission Decision

Five years later, in July 2000, the Commission received a petition from the Salmon and Steelhead Recovery Coalition to add coho salmon from the area north of San Francisco Bay to the Oregon border to the list of endangered species. In November of 2000, the department recommended to the Commission that it accept the petition for consideration. In April of 2001 the Commission held a hearing and took testimony from numerous persons including a representative of respondent Big Creek Lumber Company. In April of 2002 the department submitted a status report identifying two groups of coho salmon, one from Punta Gorda to the Oregon border, referred to as the Southern Oregon/Northern California Coasts ESU (SONCC ESU) and the other from south of Punta Gorda to the San Lorenzo River in Santa Cruz County, referred to as the CCC ESU.

The department based its determination on the scientific analysis of the reproductive isolation and genetic differences between the two groups. In April of 2002 the department submitted a written report on the status of the species to the Commission as required by section 2074.6. On May 28, 2002, the department recommended to the Commission that it "list coho salmon north of Punta Gorda (Humboldt Co.) as a threatened species and coho salmon south of Punta Gorda (Humboldt Co.) . . . as an endangered species . . . ." Coho salmon south of Punta Gorda were joined in the report

with coho salmon south of San Francisco as the CCC ESU. On August 30, 2002, the Commission found "that coho salmon north of Punta Gorda and coho salmon south of Punta Gorda warrant listing as [respectively] threatened and . . . endangered," but delayed rulemaking for one year while the department prepared a recovery plan. On February 11, 2004, the Commission proposed a rule to "add the populations of coho salmon between San Francisco Bay and Punta Gorda, California, to the [California Code of Regulations, title 14,] Section 670.5 list as an endangered species . . . ." On February 25, 2004, the Commission staff issued a notice of intent to begin the "rulemaking process to add coho salmon north of Punta Gorda and coho salmon south of Punta Gorda to the list [respectively] of threatened and endangered species."

On August 5, 2004, the Commission amended the 1995 regulation that listed coho salmon south of San Francisco as endangered by joining them with coho salmon north of San Francisco. The rule, to be found at California Code of Regulations, title 14, section 670.5, subdivision (a)(2)(N), declares that the following species are endangered: "Coho salmon . . . south of Punta Gorda (Humboldt County), California." The context of the regulation makes clear that south of Punta Gorda included the streams south of San Francisco, the subject of the 1995 final determination of the Commission.

As noted, this court upheld the 2004 listing in *California Forestry Assn. v. California Fish & Game Commission, supra,* 156 Cal.App.4th 1535.

C. The Delisting Petition

Although the respondent Big Creek Lumber Company was given notice of the 1995 proceeding and participated in the 2004 proceeding it did not seek review of the Commission's findings in either matter pursuant to Code of Civil Procedure section 1094.5. Rather, the respondents initiated a separate, delisting proceeding asking that the Commission redefine the southern boundary of the CCC ESU to remove coho salmon in streams south of San Francisco from the rule listing endangered species.

The respondents' delisting petition was filed on June 17, 2004, two months before the Commission's final action in the 2004 proceeding. It states that "the petitioners hereby request that the California Fish and Game Commission redefine the southern boundary of the Central California Coast coho salmon evolutionary significant unit [ESU] to exclude coastal waterways south of San Francisco, thereby delisting coho salmon south of San Francisco from the list of endangered or the list of threatened species." The petition makes clear that it was challenging the facts underlying the 1995 decision placing the coho salmon on the list of endangered species. It stated: "[T]he status review prepared by the California Department of Fish and Game indicating whether the petitioned action is warranted must be based on the best scientific information available.[8] The preponderance of previously unconsidered scientific and historical evidence presented herein clearly shows that the legal standard for listing under the California Endangered Species Act has not been met. [¶] Archeological evidence strongly supports the concept that coho salmon populations were not present prehistorically in coastal streams south of San Francisco. . . . [H]arsh environmental conditions for coho survival beyond the fringe of their range (south of San Francisco) prevented the establishment of permanent populations in this area. The scientific and historical record since the arrival of Europeans substantiates the absence of coho populations. In particular, professional ichthyologic surveys in the latter part of the 1800s report the absence of coho south of San Francisco." Further, "[a]lthough no single scientific disciplinary source may be sufficient to conclude unequivocally that coho are or are not native south of San Francisco, the mutually consistent patterns disclosed

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8 The reference to "status review" is to the written report of the department upon which a final determination by the Commission is based. (§§ 2074.6, 2075) In this case it refers to the rulemaking files underlying the 1995 and 2004 final determinations by the Commission.

independently by multiple scientific disciplines and historical records provide a preponderance of evidence. This same evidence also indicates that populations of coho salmon south of San Francisco are not an important component in the evolutionary legacy of the species. Most importantly, no petition or [department] status review presents any legitimate or compelling evidence to the contrary. Therefore, coho salmon populations south of San Francisco do not constitute nor are part of any evolutionary significant unit."

The respondents further assert that the department's "status reviews of coho salmon in 1995 and 2002 . . . were undertaken without benefit of the information in [their] 2004 Petition." The 2004 petition explains that "[i]n order to qualify for listing under the [CESA], a species or subspecies must be native and represent an important component in the evolutionary legacy of the species. Additionally, the status review prepared by the [department] indicating whether the petitioned action is warranted must be based on the best scientific information available. The preponderance of previously unconsidered scientific and historical evidence presented herein clearly shows that the legal standard for listing under the [CESA] has not been met." The respondents assert that "[s]cientific and historic research unequivocally establishes that there have never been permanent colonies of native coho in these streams. The artificially introduced and hatchery maintained coho populations south of San Francisco are not native, carry no important genetic heritage and do not qualify for listing as an ESU or part of an ESU under the CESA."

In February of 2005 the Commission considered the delisting petition and denied it consideration on the ground that it did not contain sufficient scientific information that delisting may be warranted. It ratified the denial in March of 2005 and published a notice of its findings. The petitioners challenged the rejection of the petition in the superior court which remanded the matter to the Commission in November 2006. The Commission again denied the petition in March of 2007 and filed a notice of its findings and statement of reasons in April of 2007. The Commission joined issue with the

respondents in considering the petition pursuant to the threshold test of section 2072.3, whether the petition contained sufficient information to indicate that the petitioned action may be warranted. The Commission said: "One of the most obvious omissions in the petition is a failure to include specific information that the species in question is 'no longer threatened by any one or any combination of the . . . factors' " set forth in California Code of Regulations, title 14, section 670.1, subdivision (i)(1)(A). As noted this is the standard for judging the substantive merits of a petition to delist a species.

The superior court again overturned the Commission's decision and the Commission's appeal is taken from the resulting judgment.

DISCUSSION

I

The Administrative Procedure for Review of a Petition to Add or Remove a Species from the List of Endangered Species

The dispositive issue in this case is the statutory means for judicial review of the Commission's final decision to list a species as endangered. We begin with an overview of the CESA procedure.

The procedure for the listing or delisting of a species as endangered is a rulemaking procedure and must comply with the rulemaking procedures of the Administrative Procedure Act (Gov. Code, § 11340 et seq.). (§ 2075.5, finding (2).) The CESA sets forth the procedure by which the facts may be determined whether a native (§ 2062), wild (§ 45) species is threatened with extinction. The procedure is initiated by a petition from an interested person. (§ 2071.) It also may be initiated by the department, either by a direct recommendation to the Commission (§ 2072.7) or by a recommendation occasioned by the department's periodic review "to determine if the conditions that led to the original listing are *still present*." (§ 2077, subd. (a), italics added.) A petition or recommendation initiating an action must set forth "scientific information [on] the population trend, range, distribution, abundance, and life history of [the] species."

(§ 2072.3.) A recommendation from the department initiating a proceeding is treated as a petition and must include the information in section 2072.3. (§§ 2072.7, 2077.) A petition is in the nature of an application to the Commission to consider a proposal to adopt or amend a rule. (See *American Board of Cosmetic Surgery v. Medical Board of California* (2008) 162 Cal.App.4th 534.) The Commission shall publish notice in the California Regulatory Notice Register of the receipt of the petition. (§ 2073.3.)

The procedure has two stages. At the first or preliminary stage the department is directed to evaluate a petition "*on its face* . . . in relation to other relevant information the department possesses or receives . . . ." (§ 2073.5, subd. (a), italics added.) Any "person may submit information to the department relating to the petitioned species during the [department's] evaluation of the petition . . . ." (§ 2073.4.) The department then shall recommend to the Commission in a written report whether the "information contained *in the petition* . . . is sufficient . . . to indicate that the petitioned action may be warranted . . . ." (§ 2073.5, subd. (a)(2).) The Commission must decide whether to accept the petition for consideration. (§ 2074.2, subd. (a)(2).)

If accepted for consideration by the Commission, a second or final stage requires that the Commission decide whether to grant the petition (§ 2075.5) based upon a written report by the department containing "the best scientific information available to the department" (§ 2074.6). Although "affected [or] interested parties" are entitled to notice of the proceeding and may submit "data and comments" to the department for inclusion in the department's report, in making a final determination the Commission considers only the department's recommendation and scientific data in the report. (§§ 2074.4, 2074.6, 2075; Cal. Code Regs., tit. 14, § 670.1, subd. (h).) It is clear from these procedures that the Commission must depend upon the department's expertise in making a decision. If the petition is granted, the Commission is directed to publish a notice of proposed rulemaking and comply with the rulemaking provisions of the Government Code. (§ 2075.5, finding (2).)

II
The Exclusive Means of Review of a Final Commission Decision Is by Administrative Mandamus

Section 2075.5 provides for a final decision of the Commission whether a species is endangered. The next section provides that "[a]ny finding pursuant to *this section* is subject to judicial review under Section 1094.5 of the Code of Civil Procedure." (§ 2076, italics added.) The use of the singular "this section" logically refers to the immediately preceding section 2075.5. The statutory term which encompasses more than one section is "article" and the CESA is organized on that principle. Hence, the exclusive means of review of the merits of a final decision of the Commission is by administrative mandamus as provided in section 1094.5 of the Code of Civil Procedure.[9] "[I]t follows that [the agency decision] can be vacated only in the manner and upon the grounds that would justify the vacation of a judgment rendered by a court of record, and a mere error in the adjudication of a question of fact, not procured by fraud extrinsic or collateral to such question, is not a ground upon which it may be vacated, since, if it were, no adjudication of a question of fact would ever become final, so long as new evidence could be had . . . ." (*People v. Los Angeles* (1901) 133 Cal. 338, 342-343.)

The action under review is the quasi-legislative action of the Commission. The Commission is granted the authority to "establish [by rule] a list of endangered species

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[9] Code of Civil Procedure section 1094.5 provides, in relevant part: "(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. [¶] (c) Where it is claimed that the findings are not supported by the evidence [in the absence of a vested right] abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record."

and a list of threatened species." (§ 2070.) A final decision to list a species gives rise to "a notice of proposed rulemaking pursuant to Section 11346.4 of the Government Code." (§ 2075.5, finding (2).) And the list of endangered species is embodied in a regulation. (Cal. Code Regs., tit. 14, § 670.5.)

The review of an ordinary case of rulemaking is by ordinary mandamus. (Code Civ. Proc., § 1085.) "As to the quasi-legislative acts of administrative agencies, 'judicial review is limited to an examination of the proceedings before the [agency] to determine whether [the] action has been arbitrary, capricious, or entirely lacking in evidentiary support, or . . . failed to follow the procedure and give the notices required by law." (*Pitts v. Perluss* (1962) 58 Cal.2d 824, 833.) The CESA substitutes review by Code of Civil Procedure section 1094.5 for review whether the Commission's action is arbitrary and capricious. Nonetheless, it is a review of quasi-legislative action, and is limited to the question whether substantial evidence supports the exercise of quasi-legislative authority. (§ 2076; Code Civ. Proc., § 1094.5, subd. (c).) A substantial evidence review preserves the facts as determined by the agency and leaves for the court the question whether the law is consistent with the facts.

The respondents have failed to utilize this procedure for review of the final 1995 and 2004 decisions of the Commission and therefore are barred by section 2076 from using a delisting procedure to challenge the facts underlying those decisions. When a statute specifies a procedure for review of a decision that is the procedure that must be used.

The respondents argue that if a petition to delist a species is the only means by which an interested person may contradict the facts underlying a final determination of the Commission, there is no check on a wrongful decision. The respondents misunderstand the administrative procedure. An interested person has ample opportunity to tender scientific information to the department for consideration by the department and

the Commission during the administrative process leading to a final decision.[10] What an interested person may not do is tender new information in a later proceeding that challenges the grounds upon which the final decision has been rendered.

The respondents refer to section 2077, that provides periodic review of the status of an endangered or threatened species by the department, and imply that that it empowers the department to determine whether a prior decision of the Commission was in error. From that premise they reason that a regulation based on incorrect information is in violation of the CESA statutes and may be corrected by a delisting petition. The respondents misread section 2077. It does provide for periodic review whether a species is endangered, but the review is limited to the present condition of the species, whether "the conditions that led to the original listing are *still present.*" (§ 2077, subd. (a), italics added.)[11]

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[10] As noted the respondent Big Creek Lumber Company received notice of the 1995 proceeding and participated in the 2004 proceeding but did not seek review of the final decision in either proceeding.

[11] The respondents ask us to take a procedural detour regarding the standard of judicial review of a Commission decision denying consideration of a petition at the preliminary stage. Although not relevant to this case, we address the issue to clear up a confusion occasioned by an earlier decision of this court and to address the nature of a CESA proceeding.

The confusion stems from our decision in N*atural Resources Defense Council v. Fish & Game Com.* (1994) 28 Cal.App.4th 1104 (*Natural Resources Defense Council*). It concerned the standard of review of a preliminary determination by the Commission whether to consider a petition to list or delist a species pursuant to section 2074.2. The standard for consideration is whether "the petition provides sufficient information to indicate that the petitioned action may be warranted." (§ 2074.2, subd. (a)(2).) We said that "the section 2074.2 [preliminary] determination is a quasi-adjudicatory one that contemplates the Commission weighing the evidence for and against [accepting the petition for review] and deciding essentially a question of fact in the process." (*Natural Resources Defense Council,* at pp. 1116; see also p. 1117, fn. 10.) We further said that judicial review of the decision at the preliminary stage is subject to Code of Civil Procedure section 1094.5. (*Natural Resources Defense Council,* at pp. 1114-1115.) The opinion is incorrect on both points.

Whether the conditions are "still present" is of course directed to the present conditions of the species and does not relate to the conditions upon which a prior decision of the Commission was based. This is consistent with the regulatory grounds of delisting, as we next show.

III
The CESA Authorizes the Delisting of a Species Only Where the Species Is No Longer Endangered

The Commission is empowered to adopted guidelines "by which an interested person may petition the Commission to add a species to, or remove a species from either the list of endangered or the list of threatened species." (§ 2071.) The Commission has done so. (Cal. Code Regs., tit. 14, § 670.1.) Among the regulations the Commission has enacted is the substantive standard by which a petition to delist a species is to be judged.

A petition to delist a species pursuant to the CESA is directed to events that occur after the listing of the species. The requirement is embodied in California Code of Regulations, title 14, section 670.1, which implements the CESA by regulation. It

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Code of Civil Procedure section 1094.5 does not apply to a preliminary determination whether to consider a petition because it does not result in a final decision, as required by subdivision (a). As we said in a subsequent decision: "The Commission is not free to choose between conflicting inferences on subordinate issues and thereafter rely upon those choices in assessing how a reasonable person would view the [delisting] decision." (*Center for Biological Diversity v. Fish & Game Com.* (2008) 166 Cal.App.4th 597, 611.) This bars review by Code of Civil Procedure section 1094.5, which provides for the judicial resolution of conflicting inferences. (Code of Civ. Proc. § 1094.5, subd. (a).)

Notwithstanding, the respondents argue that the legislative history of the CESA shows that section 2076 was intended to encompass not only the final determination of section 2075.5 but also the preliminary determination of section 2074.2. We disagree. It is true that in an early version of the CESA the provisions of present sections 2075.5 and 2074.2 were subsections of the provision now contained in section 2076. In that syntactic configuration the singular reference to "this section" encompassed both subsections. However, the early version was superseded by the present provision, in which the Legislature made separate sections out of the subsections (see now §§ 2074.2, 2075.5) yet retained the singular reference "this section" in section 2076. That rules out the inclusion of more than one section and points to the immediately preceding section 2075.5.

provides: "Delisting. A species may be delisted as endangered or threatened, as defined in sections 2062 and 2067 . . . if the Commission determines that its *continued existence is no longer threatened*," as measured by factors specified in subdivision (i)(1)(A). (Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1)(B), italics added.) The factors, all of which relate to the present condition of the species, are: "1. Present or threatened modification or destruction of its habitat; [¶] 2. Overexploitation; [¶] 3. Predation; [¶] 4. Competition; [¶] 5. Disease; or [¶] 6. Other natural occurrences or human-related activities."[12] (Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1)(A).) The CESA also contains a provision for the periodic review of the status of a species by the department. (§ 2077.) But, as noted, it also is limited to the "present" condition of the species, whether "*the conditions that led to the original listing are still present.*"[13] (§ 2077, subd. (a).)

The dissent complains that our opinion would preclude the use of new evidence to show that the original listing was in error. That is correct. It would not, however, preclude any "person [from] submit[ing] information to the department relating to the petitioned species during the [department's] evaluation of the petition pursuant to Section 2073.5." (§ 2073.4, subd. (a).) At least one of the respondents, Big Creek Lumber Company, had the opportunity to do so. As noted, Big Creek Lumber Company

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[12] The CESA contains a single requirement for a "petition [to] the commission to add a species to, or to remove a species from ... the list of endangered . . . species." (§ 2071.) The criteria for addition or removal are the same. (§ 2072.3.) Since a petition to add a species "in serious danger of becoming extinct" is addressed to the present condition of the species so must a petition to remove a species. (§ 2062.)

[13] Section 2077, subdivision (a), in relevant part provides: "The department shall review species listed as an endangered species . . . every five years to determine if *the conditions that led to the original listing are still present.*" (Italics added.) It also provides that the review shall be based on the information required for adding or deleting a species and that the department shall identify the "habitat that may be essential to the *continued existence* of the species . . . ." (Italics added.)

presented testimony at a hearing reviewing the 2000 petition. Moreover, Big Creek Lumber Company received notice of the 1995 proceeding and could have tendered a Code of Civil Procedure section 1094.5 petition in review of the decision. Nor would the regulation bar a delisting petition from showing that the coho salmon are *presently* extinct. (Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1)(B).)[14] That would, of course, require the presentation of scientific evidence meeting the requirements of section 2072.3.

IV

The Species Challenge

The respondents also challenge the 2004 determination. They claim, based on evidence produced by the parties in the delisting proceeding, that the coho salmon south of San Francisco may be genetically distinct from the coho salmon north of San Francisco and are not part of the same ESU. However, the respondents did not seek review of the 2004 determination by administrative mandamus, the species issue arises in the context of the 1995 and 2004 decisions of the Commission and is subject to the broad authority of the Commission to define an ESU.

Whether wild, native, coho salmon ever existed and were historically native to the area south of San Francisco is, of course, a matter of fact and expert judgment, the evidence for which was before the Commission in the administrative rulemaking file supporting the 1995 listing. The rulemaking file contains the written report of the department "based upon the best scientific information available to the department." (§ 2074.6.) The respondents do not examine that data, and their reply brief contains not a single reference to it. Rather, they rely on information tendered pursuant to their 2004

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[14] The language of the regulation can be read to include the extinction of the species in the period following the listing of the species as endangered. That is the position of the Commission. It states: "Species may also be delisted if they are found extinct, but that is not the case here."

delisting petition to demonstrate that the information originally relied upon by the Commission is in error.

In *California Forestry Assn. v. California Fish & Game Commission, supra,* 156 Cal.App.4th 1535, an appeal from the final 2004 determination of the Commission to group coho salmon both south and north of San Francisco as a single ESU, we said that "there are two areas of 'genetic discontinuity/transition' for coho salmon. These areas occur from Punta Gorda south to the San Lorenzo River [Santa Cruz County] - the Central California Coast coho evolutionary significant unit . . . and from Punta Gorda north across the state border to Cape Blanco, Oregon - the Southern Oregon/Northern California Coast evolutionary significant unit . . ." (*Id.* at p. 1542.) " '[T]hese discontinuities represent areas of restrictive gene flow that likely results in some level of reproductive isolation.' " (*Ibid.*) These concern the range of an ESU, about which the "Commission and the Department have a wide degree of discretion in defini[tion] . . . ." (*Id.* at p. 1551.)

The decision is binding on the respondents.

DISPOSITION

The judgment is reversed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

BLEASE, Acting P. J.

I concur:

ROBIE, J.

Nicholson, J., Dissenting

This case has been going on for over seven years. Twice a judge ordered the Fish and Game Commission (hereafter Commission) to reconsider its refusal to accept plaintiffs' petition to delist a species. Twice the Commission stubbornly refused. Failing twice to persuade the trial judge it is correct, the Commission is now here. With the filing of their majority opinion, my colleagues compound error by the Commission with error of their own.

The majority opinion mistakenly treats this case as one of judicial review of a final administrative decision. It is not. No complaint or petition was filed in a court challenging the Commission's 1995 and 2004 listing decisions. Rather, this case concerns an attempt to obtain a repeal of a quasi-legislative decision by the means provided by the California Endangered Species Act (CESA) to do so: a petition to the Commission to delist.[1]

The majority opinion explains at length how the listing decision is a quasi-legislative decision, but then it concludes a person cannot ask the administrative agency that enacted the legislative rule to reconsider its decision because the original listing decision is final and immune to judicial review. This mixes apples with oranges, wrongly treating a legislative determination as adjudication. Even though plaintiffs' petition challenges the continued validity of the original listing decision, it does so by legislative process, not judicial action. Nothing in CESA says the Commission cannot reconsider its own legislative decision because the decision is final for purposes of judicial attack.

In fact, CESA says the opposite. It expressly authorizes the Commission to reconsider its prior listing decisions even though they may be final for purposes of

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[1] CESA is codified in the Fish and Game Code section 2050 et seq. Undesignated references to sections are to the Fish and Game Code.

judicial review. Specifically, the statute vests the Commission with authority to delist a species when it finds upon the receipt of sufficient scientific information that the "action is warranted." (§ 2070.)

Indeed, the statute provides three avenues by which the Commission may receive the scientific information and reconsider its prior listing decision. First, an interested person may petition the Commission to delist a species at any time. (§ 2071.) Second, the Department of Fish and Game, in the absence of a petition from an interested person, may recommend to the Commission that it delist a species at any time. (§ 2072.7.) Third, the Department is required to review listed species every five years, and it may as part of that review recommend that the Commission delist a species where the condition that led to the original listing is no longer present. (§ 2077.)

The majority opinion is simply wrong in holding judicial finality bars legislative reconsideration. As can be seen, the statute clearly provides for reconsideration of prior listing decisions even when the listing decision is final for purposes of judicial review. The Commission's prior decisions are not irrelevant to a later reconsideration, but neither are they res judicata; otherwise they would undermine the statutory structure and policy allowing for revising legislative listing decisions based on new or previously undiscovered scientific knowledge.

Thus, the dispositive issue is not whether the 1995 and 2004 listing decisions are final and section 2076 bars further judicial review. That statute does not apply here. Contrary to the holding of the majority opinion, the dispositive issue is whether plaintiffs' petition to the Commission includes sufficient scientific information that the delisting "may be warranted," regardless of when the listing decision was made. (§§ 2072.3, 2074.2, subd. (a).) This was the standard which the trial court on two occasions ordered the Commission to apply and also correctly determined the Commission had failed to apply. I turn now to that standard.

By regulation, the Commission has stated delisting a species is "warranted" only when the species' continued existence is no longer threatened. (Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1)(B).) Both the majority opinion and the Commission rely upon this regulation as conclusive authority that prevents the Commission from delisting a species based on new scientific information that demonstrates the species is not truly an endangered species as CESA defines one. The regulation, however, is not the last word.

Assuming for purposes of argument that the regulation is a quasi-legislative regulation promulgated pursuant to a delegation of lawmaking power, a court nonetheless does not defer to it blindly. "[E]ven quasi-legislative rules are reviewed independently for consistency with controlling law. A court does not, in other words, defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature. The court, not the agency, has 'final responsibility for the interpretation of the law' under which the regulation was issued. [Citations.]" (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11, fn. 4.) " ' "Whatever the force of administrative construction . . . *final responsibility for the interpretation of the law rests with the courts.*" [Citation.] Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations. [Citations.]' " (*Id.* at p. 16 (conc. opn. of Mosk, J., original italics, quoting *Morris v. Williams* (1967) 67 Cal.2d 733, 748.)

The Commission's regulation limiting delisting to when a species is no longer threatened arbitrarily limits the Commission's statutory authorization to delist whenever it is warranted. It is ultimately the court's duty to determine the meaning of the "as warranted" standard, and the Commission's regulation arbitrarily restricts the full scope of the statutory phrase. Delisting may be warranted on additional grounds. Authority under the federal Endangered Species Act (FESA) makes this clear, and California courts may rely on federal authority to help interpret similar provisions of CESA. (*Natural*

Resources Defense Council v. Fish and Game Com. (1994) 28 Cal.App.4th 1104, 1117-1118.)

Under regulations implementing the FESA, delisting is warranted when the species (1) has become extinct; (2) the species has recovered, or (3) of relevance here, when the species "is neither endangered nor threatened" because "[o]riginal data for classification [was] in error. Subsequent investigations may show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error." (50 C.F.R. § 424.11, subd. (d)(3).)

The federal interpretation of the "as warranted" standard as including delisting on account of prior erroneous data exposes the arbitrary nature of the Commission's regulation. The regulation impairs the Commission's statutory authority under CESA to delist. If the data supporting a listing is later found to be erroneous and the species truly does not qualify as an endangered species, the Commission is not authorized, or warranted, to continue regulating the listed species and its habitat. Otherwise, in the worst case scenario, the Commission would continue to impose restrictions on otherwise lawful activities and land uses when the species does not in fact justify or require them. The regulation's exclusion of this ground for delisting, in light of its potential consequence of unwarranted regulation of lawful activities, is arbitrary indeed. Consideration of delisting by the Commission under CESA is "warranted" on this basis.

Plaintiffs' arguments and evidence in support of their petition fall into this category. The petition provides evidence indicating delisting may be warranted because new scientific information demonstrates the original listing may be in error. The issue before us, then, is whether the Commission abused its discretion in rejecting the petition by determining the petition did not demonstrate delisting may be "warranted," giving that statutory term its full meaning. (§ 2074.2, subd. (a)(1).)

We review the Commission's decision under a substantial evidence test. Specifically, we are to determine whether the evidence in the record, including the

Commission's evidence, clearly would lead a reasonable person to conclude there is a substantial possibility delisting could occur. If we conclude it does, then the Commission abused its discretion in rejecting the petition. (*Center for Biological Diversity v. Fish and Game Com.* (2008) 166 Cal.App.4th 597, 610-612.) I conclude the evidence in the record meets this standard, and the Commission erred.

The Legislature defined an endangered species of fish as a species or subspecies of wild fish native to California which is in danger of becoming extinct throughout all or a significant portion of its range. (§§ 45, 2062.) Based upon the evidence in the record derived from investigations conducted after the Commission listed coho salmon as endangered in 1995, a reasonable person clearly could conclude a substantial possibility of delisting exists in this instance because coho salmon south of San Francisco may not qualify as endangered under CESA's definition. Contrary to what was believed at the time of listing, substantial evidence now indicates these coho salmon may constitute a separate species or subspecies of fish that may not be wild or native to California. If that is so, delisting would be warranted.

The majority opinion highlights the importance of the judgment and expertise of the Commission and its staff. Yet, the opinion forecloses the public from receiving the benefit of that judgment and expertise by means of a technicality, and a faulty technicality at that. Res judicata does not bar new legislative action. Plaintiffs seek nothing more from the Commission than a full and fair consideration of the new scientific evidence they presented in their petition and whether the legislative listing no longer satisfies its statutory prerequisites. CESA is written to allow that consideration to take place at any time. The trial court twice ordered it to take place. I conclude the trial court was correct, and I would affirm its judgment and order the Commission finally to accept plaintiffs' petition for full consideration. (§ 2074.2, subd. (a)(2).)

NICHOLSON, J.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing PETITION FOR REVIEW is proportionately spaced, has a typeface of 13 points or more, and contains 6,806 words.

DATED: January 22, 2013.

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DECLARATION OF SERVICE BY MAIL

I, Carole Caldwell, declare as follows:

I am a resident of the State of Oregon, residing and employed in Portland, Oregon. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 3425 SE Yamhill Street, Suite 100, Portland, Oregon 97214.

On January 22, 2013, true copies of PETITION FOR REVIEW were placed in envelopes addressed to:

Cecilia L. Dennis
Deputy Attorney General
California Department of Justice
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San Francisco, CA 94102-7004

Deborah A. Sivas
Environmental Law Clinic
559 Nathan Abbot Way
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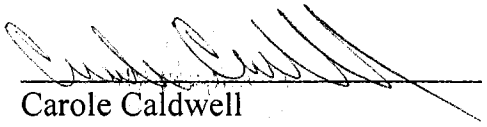
Third Appellate District
914 Capitol Mall
Sacramento, CA 95814

Sacramento County Superior Court
720 Ninth Street, Room 611
Sacramento, CA 95814

which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Portland, Oregon.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 22nd day of January, 2013, at Portland, Oregon.



Carole Caldwell