In the Supreme Court of the State of California

California Fish and Game Commission,

Defendant and Appellant,

v.

Central Coast Forest Association and Big Creek Lumber Company,

Plaintiffs and Respondents.

Case No. S208181

Third Appellate District, Case No. 07 CS 00851
Sacramento County Superior Court, Case No. C060569
The Honorable Gail D. Ohanesian, Judge

ANSWERING BRIEF OF DEFENDANT AND APPELLANT CALIFORNIA FISH AND GAME COMMISSION

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ISSUES PRESENTED FOR REVIEW

Pursuant to this Court's order filed February 27, 2013, the issues to be decided in this case are limited to the following:

1) Under the California Endangered Species Act, Fish and Game Code section 2050 et seq., may the Fish and Game Commission consider a petition to delist a species on the ground that the original listing was in error?

2) If so, does the petition at issue here contain sufficient information to warrant the Commission's further consideration?

INTRODUCTION

Plaintiffs, Central California Coast timber interests, seek to delist populations of coho salmon in streams south of San Francisco that the California Endangered Species Act (CESA) now protects. These populations are part of a larger "species," the Central California Coast coho salmon (Central Coast Coho) species, which is listed as "endangered" under CESA, meaning it is at high risk of extinction. The Central Coast Coho species includes all coho salmon populations from Punta Gorda in Mendocino County to the southern extent of their current range in Santa Cruz County. Plaintiffs' delisting petition seeks to "redefine the boundary" of the Central Coast Coho species to exclude the populations south of San Francisco. The petition asserts that these populations should be carved out of the Central Coast Coho species (and thereby consigned to extinction) because, in plaintiffs' view, their initial listing was a mistake and these fish are not "important" enough to protect. Defendant California Fish and Game Commission (Commission) twice denied the petition, finding that it did not contain "sufficient scientific information" to indicate that the

petitioned delisting "may be warranted." (Fish & G. Code, §§ 2072.3, 2074.2.)[1]

SUMMARY OF ARGUMENT

The Commission may consider a petition to delist a species that alleges errors in (e.g. collaterally attacks) a prior listing decision. However, the Commission may not accept such petition for further, in-depth consideration under section 2074.2 unless the alleged errors and other information in the petition are relevant to the statutory grounds for delisting under CESA and the petition contains sufficient scientific information as to those grounds to indicate that the petitioned delisting "may be warranted." CESA only authorizes listing and delisting of entire "species" based on a determination of their biological status. (§§ 2062, 2067.) Thus, a petition to delist a portion of a species must contain sufficient scientific evidence that: (1) the populations to be delisted are a biologically distinct "species" from the larger listed species (here, the Central Coast Coho species); and (2) assuming they constitute a distinct "species," the populations are no longer endangered or threatened within the meaning of CESA. (*Ibid.*; *California Forestry Assn. v. Fish & Game Comn. (California Forestry)* (2007) 156 Cal.App.4th 1535, 1542, 1546-47.)

The instant petition to delist contained no showing on either of the above points, and actually conceded that coho salmon populations south of San Francisco are not a biologically separate "species" and remain highly imperiled. Instead, the petition claims that such populations must be delisted because they allegedly are the progeny of hatchery fish planted in these streams at the turn of the 19th century and/or are strays from the populations farther north, and therefore are outside of their historic, "native

[1] Unless otherwise noted, all statutory references herein are to the California Fish and Game Code.

range" and cannot survive on their own absent continuing hatchery support. But even assuming these assertions are correct, they do not constitute cognizable grounds for delisting all or any portion of a listed species under CESA. Under CESA, the Commission may only delist a species based on scientific evidence that the species is no longer biologically imperiled. Therefore, the Commission properly rejected the petition as failing to satisfy the statutory "may be warranted" standard for further consideration on its face. Finally, even if CESA did recognize the petition's asserted grounds for delisting, the Commission still properly rejected the petition on its merits after fully weighing and evaluating the evidence both for and against the petitioned delisting.

LEGAL BACKGROUND

I. POLICIES AND PURPOSES OF CESA

The California Legislature enacted CESA out of a concern that certain species of fish, wildlife and plants had become extinct in California due to human activities and that other species were in danger of or threatened with extinction. (§ 2051, subds. (a), (b).) Section 2051, subdivision (c) declares the "conservation, protection and enhancement" of endangered and threatened species and their habitat to be a matter of statewide concern due to their "ecological, educational, historical, recreational, esthetic, economic and scientific value to the people of this state." Section 2052 provides that "it is the policy of the state to conserve, protect, restore and enhance" endangered and threatened species and their habitat. Furthermore, all state agencies, boards and commissions "shall seek to conserve endangered . . . and threatened species and shall utilize their authority in furtherance of the purposes of this chapter." (§ 2055.) Section 2061 defines "conserve" broadly as "to use, and the use of, all methods and procedures which are necessary to bring any endangered . . . or threatened species to the point at

which the measures provided pursuant to [CESA] are no longer necessary" (i.e., to the point at which the species is no longer biologically imperiled).

CESA defines an "endangered species" as:

> a 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.

(§ 2062.) A "threatened" species is defined as "a native species or subspecies" that, "although not presently threatened with extinction, 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." (§ 2067.)

II. LISTING OF SPECIES AS ENDANGERED OR THREATENED

The Commission is a constitutionally-created agency charged with exclusive authority to establish a list of endangered and threatened species in California. (Cal. Const., art. IV, § 20; § 2070.) Any interested person may petition the Commission to add a species to, or remove a species from, the endangered or threatened list. (§ 2071.) To be accepted for in-depth consideration, a petition must, "at a minimum, include sufficient scientific information that a petitioned action may be warranted." (§ 2072.3.) A petition shall:

> include information regarding the population trend, range, distribution, abundance, and life history of a species, the factors affecting the ability of a 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.

(*Ibid.*)

A. Initial Evaluation and Acceptance or Rejection of Petition for Further Consideration

Within ten days after receipt of a complete petition, the Commission must publish notice of receipt of the petition and refer it to the Department of Fish and Wildlife (Department) for an evaluation pursuant to section 2073.5. (§§ 2073, 2073.3, subd. (a); Cal. Code Regs., tit. 14, § 670.1, subds. (b), (c).) The Department then must "evaluate the petition on its face and in relation to other relevant information the Department possesses or receives." (§ 2073.5, subd. (a).) Within ninety days of the Department's receipt of the petition, it must submit a report to the Commission with a recommendation as to whether there is or is not "sufficient scientific information" in the petition "to indicate that the petitioned action may be warranted," and accordingly, whether the petition should be accepted or rejected for further consideration. (*Ibid.*; Cal. Code Regs., tit. 14, § 670.1, subd. (d)(1).)

Upon receipt of the Department's ninety-day report, the Commission must schedule the petition and report for consideration at its next available meeting. (§ 2074.) At the meeting, the Commission must "consider the petition, the Department's written report, and comments received," and make a finding as to whether the petition does or does not "provide sufficient information to indicate that the petitioned action may be warranted." (§ 2074.2, subd. (a); Cal. Code Regs., tit. 14, § 670.1, subd. (e).)

The Commission will reject a petition "if it fails to include sufficient scientific information" (as to the categories of information set forth in section 2072.3) "that the petitioned action may be warranted." (Cal. Code Regs., tit. 14, § 670.1, subd. (e)(1).) If the Commission finds that a petition does not contain sufficient information, it must publish a notice rejecting

the petition and explaining the reasons why the petition was not considered sufficient. (§ 2074.2, subd. (a)(1).) Alternatively, if the Commission finds that the petition does contain sufficient information, the Commission must accept the petition for further consideration, designate the species as a candidate for listing or delisting, and publish a notice of its finding. (*Id.*, subd. (a)(2).)

B. In-Depth Evaluation of Petition Accepted for Further Consideration

If the Commission accepts a petition for further consideration, the Department then must undertake a comprehensive review of the biological status of the species and issue a report to the Commission within one year. (§ 2074.6.) The review must be "based upon the best scientific information available to the Department," and evaluate, *inter alia*, "whether the petitioned action is warranted." (*Ibid.*) After receipt of the Department's status review, the Commission must schedule the petition for final consideration at its next available meeting. (§ 2075.) At the meeting, the Commission must determine whether the petitioned action is or is not warranted. (§ 2075.5.)

The Commission *must* find that a petitioned *listing* is warranted if the species' "continued existence is in serious danger or is threatened by any one or any combination of the following" factors: (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." (Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1)(A).) Conversely, the Commission *may* find that a petitioned *delisting* is warranted if the species' continued existence is no longer threatened by any one or a combination of those factors. (*Id.*, subd. (i)(1)(B).)

If the Commission finds that the petitioned action is warranted, it must issue a notice of proposed rulemaking pursuant to the Administrative

Procedure Act (APA), Government Code section 11340 *et seq.*, to add or remove the species to or from the endangered or threatened species list. (§ 2075.5.) After issuance of the notice of proposed rulemaking, further proceedings are conducted in accordance with the APA's formal rulemaking procedures. (*Ibid.*)

FACTUAL AND PROCEDURAL BACKGROUND

I. LISTING OF COHO SALMON SOUTH OF SAN FRANCISCO UNDER CESA

In December 1993, the Commission received a petition to list coho salmon south of San Francisco as a threatened species. (AR1/1:147-189.)[2] At its April 1994 meeting, the Commission unanimously found that the petitioned action "may be warranted," designated coho salmon south of San Francisco as a candidate for listing as threatened, and directed the Department to conduct a biological status review of the species pursuant to section 2074.6. (AR1/1:319.)

The Department completed its status review in March 1995 (AR1/2:340-477), which concluded that coho salmon populations south of San Francisco "were in serious danger of extinction" because they had declined by an estimated 98% from historical levels, and were imperiled "by numerous deleterious factors." (AR1/2:345.) Accordingly, the Department recommended that coho salmon south of San Francisco be listed as endangered rather than threatened. (*Ibid.*)

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[2] The certified administrative record for this case consists of four parts. Parts I through III, in 12 bound volumes, includes documents concerning the Commission's 1995 listing of coho south of San Francisco and its rejection of plaintiffs' delisting petition. Part IV, in 13 bound volumes, includes documents concerning the Commission's 2004 listing of coho salmon statewide. Parts I through III of the record are referred to herein as "AR1," and Part IV is referred to as "AR2," followed by the volume and page numbers.

At its June 1995 meeting, the Commission unanimously agreed that coho salmon south of San Francisco warranted listing as an endangered species. (AR1/2:496.) The Commission adopted a final listing regulation in October 1995. (AR1/2:500-12, 541.)

II. LISTING OF COHO SALMON STATEWIDE UNDER THE FEDERAL ESA

Also in 1993, the National Marine Fisheries Service (NMFS) received petitions to list all west coast coho salmon populations, including coho salmon south of San Francisco, under the federal Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.* (AR1/10:3105-13.) In October 1993, NMFS conducted a comprehensive status review of coho salmon stocks in Washington, Oregon, and California. (AR1/10:3109.) NMFS solicited data and public comment as to whether any groups of coho salmon populations qualified as "Evolutionarily Significant Units" (ESUs), and whether such groups warranted listing as endangered or threatened "species" under the federal ESA.[3] (AR1/10:3111.)

NMFS issued its west coast-wide status review in July 1995, concluding that there are two separate coho salmon species (ESUs) in California: (1) the Central California Coast coho salmon (Central Coast Coho) group of populations (extending from Punta Gorda—just south of

[3] NMFS developed the ESU concept in 1991 as a means of determining whether distinct populations of anadromous salmonids qualify as separate "species" for listing under the federal ESA. (See 16 U.S.C. § 1532(16) [defining "species" to include subspecies and "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature"].) NMFS will determine that a population of salmon is a "distinct population segment," and therefore a separate "species," if it qualifies as an ESU of the taxonomic species at issue. A population must meet two criteria to qualify as an ESU: "(1) [i]t must be substantially reproductively isolated from other non-specific population units, and (2) it must represent an important component of the evolutionary legacy of the species." (56 Fed. Reg. 58612, 58618 (Nov. 20, 1991).)

Cape Mendocino—to the San Lorenzo River in Santa Cruz); and (2) the Southern Oregon/Northern California Coast coho salmon (Northern Coast Coho) group of populations (extending north of Punta Gorda into southern Oregon). (AR1/10:3126-27.) NMFS further concluded that both the Central Coast Coho and the Northern Coast Coho ESUs warranted listing as threatened species under the federal ESA. (AR1/10:3133-38.) NMFS issued final regulations listing the Central Coast Coho and Northern Coast Coho ESUs as threatened species in October 1996 and May 1997, respectively. (AR1/10:3164-95; 62 Fed. Reg. 24588 (May 6, 1997).)

Then, in February 2002, NMFS undertook a second comprehensive status review of 23 west coast salmonid ESUs, including the Central Coast Coho ESU. (AR1/10:3266-3499.) To conduct the updated status review, NMFS convened a biological review team of 13 experts in coho salmon biology. (AR1/9:2852-2853.) The review team concluded that the Central Coast Coho ESU was now in serious danger of extinction. (AR1/9:2873.) Accordingly, in June 2005, NMFS uplisted the Central Coast Coho ESU from threatened to endangered. (AR1/11:3563, 3577, 3626.)

In November 2003, plaintiffs submitted a petition to NMFS to delist the coho salmon populations south of San Francisco under the federal ESA. (AR1/8:2553.) In March 2006, NMFS denied the petition because it failed "to present substantial scientific or commercial information indicating that the petitioned action may be warranted." (AR1/8:2552-56.) [4]

III. LISTING OF COHO SALMON STATEWIDE UNDER CESA

In July 2000, the Commission received a petition to list all remaining coho salmon populations in California—that is, coho salmon north of San

[4] The procedure and evidentiary standard for further consideration of a petition to list or delist a species under the federal ESA are similar to CESA. (See 16 U.S.C. § 1533(b)(3)(A).)

Francisco to the Oregon border—as endangered under CESA. (AR2/1:17-64.) In April 2001, the Commission unanimously found that the petitioned listing may be warranted, designated the coho salmon north of San Francisco to the Oregon border as a candidate for listing as endangered, and referred the petition to the Department for a comprehensive status review. (AR2:1/259, 268-72.)

In April 2002, the Department completed its status review of coho salmon statewide. (AR1/6:1607-1938.) Similar to NMFS, the Department identified two separate groups of coho salmon populations in California: one group south of Punta Gorda to the San Lorenzo River in Santa Cruz County, including populations south of San Francisco, and the other group north of Punta Gorda to the Oregon border. (AR1/6:1619.) The group of populations south of Punta Gorda is the state equivalent of the federally-listed Central Coast Coho ESU and the group north of Punta Gorda is the California portion of the federally-listed Northern Coast Coho ESU. (*Ibid.*) Like NMFS, the Department determined that these two groups qualified as separate "species" under CESA, based on extensive scientific analysis of reproductive isolation and genetic differences between the two groups. (AR1/6:1632-37.)

The Department's status review concluded that the Central Coast Coho group of populations met the criteria for listing as an endangered species under CESA, and that the Northern Coast Coho group of populations met the criteria for listing as a threatened species. (AR1/6:1619-21, 1803-05.) The Department explained that coho salmon populations have declined by at least 70 percent since the 1960s, and that population abundance in California, including hatchery stocks, may only be six to fifteen percent of historic levels. (AR1/6:1619.) With respect to the Central Coast Coho group of populations, the Department concluded:

> Coho salmon populations in streams in the northern portion of this ESU seem to be relatively stable or are not declining as rapidly as those to the south. However, the southern portion, where widespread extirpation and near-extinctions have occurred, is a major and significant portion of the range of coho salmon in this ESU. Small population size along with large-scale fragmentation and collapse of range . . . indicate that . . . remaining populations may face greatly increased threats of extinction because of this.

(AR1/6:1621; see also *id.*, 1695.)

At its August 2002 meeting, the Commission agreed with the Department and found: (1) the group of coho salmon populations south of Punta Gorda (including populations south of San Francisco) warranted listing as an endangered species under CESA; and (2) the group of populations north of Punta Gorda to the Oregon border warranted listing as a threatened species. (AR2/3:1444-54.) However, pursuant to section 2114, the Commission delayed issuance of a notice of proposed rulemaking to add these species to the lists of endangered and threatened species for one year while the Department prepared a statewide coho salmon recovery strategy. (AR2/3:1454-55.) Petitioner Big Creek and its expert, V.W. Kaczynski,[5] submitted numerous comments to the Department and Commission during this time period, making the same arguments as in their petition to delist. (See AR2/7-8:4203-29, 6:3563-93.)

The Commission adopted the final listing regulations in August 2004. (AR2/7:4063-69; Cal. Code Regs., tit. 14, § 670.5, subds. (a)(2)(N), (b)(2)(E).) The final listing reaffirms the prior listing of coho salmon populations south of San Francisco as endangered, but subsumes these populations into the listing of the larger Central Coast Coho species.

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[5] At that time, Mr. Kaczynski was retained by the California Forestry Association. (AR2/6:3573-75.)

The California Forestry Association, Forest Landowners of California, and other plaintiffs challenged the final listing on the ground that the Commission did not have authority to list groups of populations that are not taxonomically defined "species" or "subspecies." The Third District Court of Appeal rejected this argument and upheld the listing of both salmon groups in *California Forestry, supra*, 156 Cal.App.4th 1535. Plaintiffs did not challenge the final listing.

IV. THE COMMISSION DENIES PLAINTIFFS' PETITION TO DELIST COHO SALMON SOUTH OF SAN FRANCISCO UNDER CESA

A. The Commission's First Rejection of Petition

On June 17, 2004, approximately 1-½ months before the Commission adopted its final statewide listing regulations, plaintiffs submitted to the Commission a petition to "Redefine the Southern Boundary of Central California Coast Coho Salmon. . .Evolutionary [sic] Significant Unit." (AR1/2:556-626.) Plaintiffs requested that the Commission "redefine" the southern boundary of the Central Coast Coho species (ESU) to exclude the streams south of San Francisco from the statewide listing. (AR1/2:561.)

The Commission referred the petition to the Department for a ninety-day evaluation. (AR1/2:630.) In December 2004, the Department completed its evaluation, concluding, for a variety of reasons, that the petition did not contain sufficient information to indicate that delisting may be warranted. (AR1/2:635-49.) At its February 2005 meeting, the Commission agreed with the Department and unanimously denied the petition. (AR1/3:709, 774-79.) The Commission adopted findings in support of that decision at its March 2005 meeting. (AR1/3:800-22.)

In November 2005, plaintiffs challenged the Commission's rejection of their petition. The trial court agreed with plaintiffs and remanded the

matter to the Commission, ruling that the record and findings were insufficient to support the Commission's decision.

B. The Commission's Reconsideration and Second Rejection of Petition

Pursuant to the trial court's judgment and writ, in January 2007 the Commission published and distributed a notice of its intent to reconsider the petition to delist at its March 2007 meeting. (AR1/4:1077-82.) The Department prepared a supplemental evaluation of the petition, again concluding that the petition did not contain sufficient information to indicate that delisting may be warranted. (AR1/5:1244-1313.) Numerous other parties submitted additional information. (See AR1/4-12:1226-4297.)

At its March 2007 meeting, after hearing presentations and comments from the Department, plaintiffs and the interested public, the Commission once again unanimously denied the petition to delist. (AR1/4:1083-1159.) The Commission adopted findings in support of its decision at its April 2007 meeting. (AR1/4:1161-1202.) In July 2007, plaintiffs again challenged the Commission's decision, seeking a declaration that the Commission has authority to list coho salmon north of San Francisco only and a writ of mandate directing the Commission to accept their petition. (Record on Appeal, 004-015.) The trial court again agreed with plaintiffs (*id.*, 1012-1018) but the Court of Appeal reversed. It held that CESA absolutely bars a person from submitting a delisting petition that alleges errors in a prior listing decision where that person failed to judicially challenge the prior decision. (*Central Coast Forest Assn. v. Fish and Game Comn.* (2012) 211 Cal.App.4th 1433.)

STANDARD OF REVIEW

I. STANDARD OF JUDICIAL REVIEW

Pursuant to section 2076, the Commission's findings and decision rejecting the petition under section 2074.2 are subject to judicial review under Code of Civil Procedure section 1094.5. (*Natural Resources Defense Council v. Fish and Game Comn.* (1994) 28 Cal.App.4th 1104, 1115-16 (*NRDC*).)[6] Under Code of Civil Procedure section 1094.5, subdivisions (b) and (c), a court may overturn the Commission's decision only if it finds that the Commission "proceeded without, or in excess of, jurisdiction" or prejudicially abused its discretion by: (1) failing to proceed in the manner required by law; (2) reaching a decision that is not supported by the findings; or (3) adopting findings that are not supported by substantial evidence in light of the whole record. (*Ocean Harbor House Homeowners' Assn. v. Calif. Coastal Comn.* (2008) 163 Cal.App.4th 215, 226-27.)

The substantial evidence test governs this Court's review of the Commission's findings in support of its decision to reject a petition pursuant to section 2074.2. (*Center for Biological Diversity v. Fish and Game Comn.* (2008) 166 Cal.App.4th 597, 609 (*CBD*).) Under the substantial evidence test, "[t]he trial court presumes that the agency's

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[6] The Commission agrees with plaintiffs that the Court of Appeal's contrary conclusion in this case is incorrect. The court erroneously concluded that only the Commission's ultimate listing or delisting determination pursuant to section 2075.5 is subject to review pursuant to section 2076 and Code of Civil Procedure section 1094.5, because section 2076 only refers to the immediately preceding section 2075.5. (See *Central Coast Forest Assn., supra*, 211 Cal.App.4th at pp. 1445-46, 1447 n. 11.) However, section 2076 can only reasonably be construed to refer to the entire listing article (Article 2: Listing of Endangered Species)-including decisions to accept or reject a petition pursuant to section 2074.2-and not simply the immediately preceding section.

decision is supported by substantial evidence, and the party challenging that decision bears the burden of demonstrating the contrary." (*Ocean Harbor House, supra*, 163 Cal.App.4th at p. 227.) In reviewing the agency's decision:

> [t]he court examines the whole record and considers all relevant evidence, including that evidence which detracts from its decision [citation]. Although this task involves some weighing to fairly estimate the worth of the evidence, that limited weighing does not constitute independent review where the court substitutes its own findings and inferences for that of the Commission. Rather, *it is for the Commission to weigh the preponderance of conflicting evidence*, as the court may reverse [the Commission's] decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion reached by it.

(*Id.* at p. 227, emphasis added; see also *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) Judicial review of an agency's "factual determinations is deferential and all doubts and inferences are resolved in favor of the agency." (*McAllister v. California Coastal Comn.* (2008) 169 Cal.App.4th 912, 921.)

On appeal from a petition for a writ of mandate challenging an agency's decision under Code of Civil Procedure section 1094.5, the appellate court applies the same substantial evidence standard of review that governs the trial court's review of the agency's decision. (*Environmental Protection Information Center v. Calif. Dept. of Forestry* (2008) 44 Cal.4th 459, 479 (*EPIC*); *CBD, supra*, 166 Cal.App.4th at p. 609.) The court reviews the record de novo and is "not bound by the trial court's conclusions." (*EPIC, supra*, 44 Cal.4th at p. 479.)

Finally, the proper interpretation of a statute, and its application to undisputed facts, is a question of law subject to independent judgment review. (*Yamaha Corp. v. State Board of Equalization* (1998) 19 Cal.4th 1, 7, 12.) However, an agency's interpretation of a statute it is charged with

implementing is to be afforded a degree of deference "appropriate to the circumstances of the agency action." (*Id.* at p. 8.) Such deference is particularly appropriate where "the agency has expertise and technical knowledge" and the statute to be interpreted is "technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion." (*Id.* at p. 12; see also *California Forestry, supra*, 156 Cal.App.4th at p. 1546 [deference to the Commission's and Department's interpretation of CESA appropriate "given their central roles in the listing process" and "their scientific expertise"].)

II. STANDARD OF AGENCY REVIEW

In *NRDC, supra*, 28 Cal.App.4th at p. 1116, the Court of Appeal considered the question of what evidentiary standard *the Commission* must use in determining whether to accept a petition for further consideration pursuant to section 2074.2. The court interpreted the statutory standard of "sufficient information to indicate that the petitioned action may be warranted" to mean "that amount of information, when considered in light of the Department's written report and the comments received, that would lead a reasonable person to conclude there is a substantial possibility that the requested listing [or delisting] could occur." (*Id.* at p. 1125.) A "substantial possibility" is more than the "fair argument" or "reasonable possibility" standard for preparing an environmental impact report under the California Environmental Quality Act, but less than the "reasonably probable" or "more likely than not" standard for granting a preliminary injunction. (*Ibid.*) Importantly, the court acknowledged that "the section 2074.2 determination is a quasi-adjudicatory one that contemplates the Commission weighing the evidence for and against candidate listing [or

delisting] and deciding essentially a question of fact in the process." (*Id.* at p. 1116; see also *id.* at pp. 1117 n. 10, 1120, 1125.)[7]

In *CBD, supra*, 166 Cal.App.4th at pp. 609-10, the court reaffirmed the *NRDC* standard for the Commission's initial review of petitions to list or delist species under section 2074.2. The *CBD* court likewise reiterated that "the Commission is the finder of fact in the first instance in evaluating the information in the record." (*Id.* at p. 611, citing *NRDC, supra*, 28 Cal.App.4th at p. 1125.) However, the court explained that, in light of the statutory threshold for acceptance of a petition, "the Commission is not free to choose among conflicting inferences" at this first stage. (*Id.*) Rather, the Commission's decision turns on "*the absence of any substantial possibility* that the species could be listed" after the Department performs its one-year status review. (*Id.*, emphasis added.)

The CBD court then applied the substantial evidence standard of *judicial* review to the Commission's decision to reject a petition to list a species under section 2074.2. (*CBD, supra*, 166 Cal.App.4th at p. 609.) The court explained that, on judicial review, the Commission's decision to reject a petition must be upheld if all of the information both for and against the petitioned action does not "*clearly weigh* in favor of finding" that the action "may be warranted." (*Id.* at pp. 610-11, emphasis added.) "If the balance is unclear," the court *must* defer to the Commission. (Ibid.)

On the other hand, if the information as a whole "clearly would lead a reasonable person to conclude that there is a substantial possibility" that

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[7] Based on its erroneous interpretation of section 2076 as only permitting administrative mandamus challenges to ultimate listing and delisting determinations under section 2075.5, the Court of Appeal in this case improperly disapproved of this language in *NRDC*. (See *Central Coast Forest Assn., supra*, 211 Cal.App.4th at p. 1448 n. 11.) The Commission submits that the quoted language in *NRDC* is correct.

petitioned action "could occur," then rejection of the petition exceeds the scope of the Commission's discretion under section 2074.2. (*CBD, supra*, 166 Cal.App.4th at p. 611.) However, even if the petition itself provides a "prima facie showing" that the petitioned action may be warranted, the court still must uphold the Commission's decision to reject a petition if "countervailing information and logic persuasively, wholly undercut some important component" of that prima facie showing. (*Id.* at p. 612.)

ARGUMENT

I. ALTHOUGH THE COMMISSION MAY CONSIDER A PETITION TO DELIST A SPECIES ON THE GROUND THAT THE ORIGINAL LISTING WAS IN ERROR, IT CANNOT ACCEPT SUCH PETITION FOR IN-DEPTH CONSIDERATION UNLESS THE ALLEGED ERRORS AND OTHER INFORMATION IN THE PETITION ARE RELEVANT TO THE STATUTORY BASES FOR DELISTING

The Commission may accept as complete and begin processing a petition to delist that alleges errors in a prior listing decision, provided the petition meets the minimum criteria set forth in section 2072.3.[8] Section 2073 requires the Commission to determine whether a petition is complete within ten days of receipt. If the Commission finds the petition is complete, it must refer it to the Department for a ninety-day evaluation.

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[8] The Commission argued below that such a petition must contain significant *new information* that either was not in existence, or could not reasonably have been discovered, at the time the Commission made its original listing decision, and that the instant petition did not contain such new information. (Comn. Supp. Brf. at 7-14, 18-19; Comn. Supp. Reply Brf. at 1, 6; see also Pltfs' Opening Brief (POB) at 11.) Here, the Commission assumes *arguendo* that the petition did contain such new information. For purposes of the Court's questions, the important point is not whether the information in the petition is "new," but whether the Commission properly found that this information was insufficient to satisfy the "may be warranted" test under section 2074.2.

(§§ 2073, 2073.5; Cal. Code Regs., tit. 14, § 670.1, subd. (b).) Here, the Commission deemed the petition complete and referred it to the Department. (AR1/3:627-28.)

However, the Commission cannot accept the petition for further, *in-depth* consideration under section 2074.2 unless the alleged errors and other information in the petition are: (1) relevant to the statutory bases for delisting under CESA and (2) sufficient to meet the "may be warranted" evidentiary threshold. In considering whether to accept a delisting petition for further review, the sole determination the Commission is authorized to make under CESA is whether the petition provides "sufficient scientific information" to "indicate that the petitioned action may be warranted." (§§ 2070, 2072.3, 2074.2, subd. (a); Cal. Code Regs., tit. 14, § 670.1, subd. (e), emphasis added.) As noted above, the Third District Court of Appeal has twice interpreted this standard to mean sufficient information to indicate to a reasonable person that there is a "substantial possibility" the petitioned action "could occur." (*NRDC, supra*, 28 Cal.App.4th at p. 1125; *CBD, supra*, 166 Cal.App.4th at pp. 609-10.)

In this case, the "petitioned action" was a request to "redefine the southern boundary" of the Central Coast Coho species "to exclude coastal streams south of San Francisco, effectively delisting coho salmon south of San Francisco." (AR1/2:556, 561.) Thus, the petition requests that the Commission redefine the listed Central Coast Coho species to delist a portion of that species – the populations south of San Francisco. (POB at 19-20.) The petition does not merely seek to split two species "into separate units for analysis," as plaintiffs claim. (*Id.* at 17.) Rather, the petition seeks to carve out a portion of a listed species and remove CESA protection for that portion. (AR1/2:561-62, 580, 614.)

As explained below, CESA only authorizes listing or delisting of entire "species," based on a scientific determination of the biological status

of such species. Thus, in order for the Commission to find that there is a "substantial possibility" that delisting of *a portion* of a previously listed species ultimately "could occur," the petition must contain sufficient evidence tending to show that: (1) the group of populations proposed to be delisted are a biologically distinct "species" from the listed species; and (2) this separate species is not a biologically "endangered" or "threatened" species, as defined in CESA. (§§ 2062, 2067, 2070.)

A. The Commission May Only Delist a Portion of a Listed Species if that Portion Is a Biologically Distinct Group of Populations

CESA does not separately define the term "species," but defines an "endangered species" and a "threatened species" in part as a "native *species or subspecies* of . . . fish." (§§ 2062, 2067, emphasis added.) In *California Forestry, supra*, 156 Cal.App.4th at p. 1540, the Court of Appeal considered whether the terms "species" and "subspecies" authorize listing of distinct groups of coho salmon populations (ESUs).[9] *California*

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[9] This Court should decline plaintiffs' request (POB at 29 n. 9) to reconsider the Court of Appeal's holding in *California Forestry*, for several reasons. First, because plaintiffs raise this argument for the first time in their opening brief in this Court, the argument is waived, and the Court should decline to exercise its discretion to consider it. (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 45-6; *Souza v. Westlands Water Dist.* (2006) 135 Cal.App.4th 879, 898-99.) Second, reconsideration of *California Forestry* is not fairly encompassed within this Court's order granting review, and does not satisfy the criteria of California Rule of Court, Rule 8.516, subd. (b)(2).

Third and most importantly, the *California Forestry* decision is *res judicata* for purposes of this case. (See *Fedn. of Hillside and Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202-04.) Plaintiffs and their expert participated in the 2004 listing decision challenged in *California Forestry*. (See AR2/7-8:4203-4229, 2/6:3561-3593.) Plaintiffs are in privity with the plaintiffs in *California Forestry*, as the California Forestry Association "serve[s] as a central voice for California's forest-resource companies and communities."

(continued...)

Forestry holds that the Commission may define a distinct group of salmon populations (ESU) as a separate "species" or "subspecies" under CESA, provided there is scientific evidence that the population group is genetically or reproductively distinct from other population groups within the same taxonomic species or subspecies. (*Id.* at pp. 1546-47.) Contrary to plaintiffs' contention, the Commission does not have unfettered discretion under CESA to list or delist "any particular" geographic "subgroup" of a taxonomic species. (POB at 12, 27, 29.)

Plaintiffs in *California Forestry* challenged the Commission's statewide listing of both the Central Coast Coho ESU and the Northern Coast Coho ESU. Plaintiffs argued that the Commission did not have authority under CESA to separately evaluate and list groups of populations that were not *taxonomically* defined "species" or "subspecies." (*California Forestry, supra*, 156 Cal.App.4th at p. 1545.) Because CESA does not separately define the terms "species" and "subspecies," the Commission and Department interpret these terms, based on principles of biology, to include subsets of taxonomic species or subspecies that function as independent biological units and that are genetically and/or reproductively distinct from other such groups within the same taxonomic species. (*Id.* at pp. 1542, 1546; AR1/6:1619, 1635, 1637 [defining an ESU under CESA as "a group of interbreeding organisms that is reproductively isolated from other such groups"].) Plaintiffs in *California Forestry* argued that this interpretation exceeded the agencies' statutory authority. (*Id.* at p. 1545.)

(...continued)
(http://www.calforests.org/about-cfa/.) *California Forestry* adjudicated and upheld the Commission's basic authority to define the Central Coast Coho "species" under CESA. That case is now final, this Court having denied review on February 13, 2008.

The Court of Appeal rejected this argument and upheld the agencies' interpretation of CESA. The court reasoned that deference to the agencies' interpretation "is consistent with the liberal construction we accord laws such as the CESA and furthers the policy of that statute to 'conserve, protect, restore and enhance any endangered species or any threatened species' (§ 2052)" by "maintaining the diversity of the species." (*California Forestry, supra*, 156 Cal.App.4th at pp. 1547, 1549.) Thus, the court held that the Commission has authority under CESA to list *biologically distinct* groups of populations of coho salmon as separate "species" because such an approach protects the genetic structure and biological diversity of coho salmon in California as a whole. (*Id.* at pp. 1540, 1546-47.) The court also upheld the Commission's listing of the Central Coast Coho species/ESU as "endangered" and the Northern Coast Coho species/ESU as "threatened" under CESA. (*Id.* at pp. 1546, 1549.)

Specifically, the court upheld the Commission's decision to list the Central Coast Coho and Northern Coast Coho ESUs as separate "species," based on the latest scientific research showing "two areas of 'genetic discontinuity/transition' for coho salmon," one north of Punta Gorda to the California border, and the other south of Punta Gorda to the San Lorenzo River. (*California Forestry, supra*, 156 Cal.App.4th at p. 1542; AR1/6:1619, 1635-1637.) The Department and NMFS both concluded that "[t]hese discontinuities represent areas of restricted gene flow that likely results in some level of reproductive isolation" and which over time has resulted in some genetic differences between the two population groups. (*Ibid.*; AR1/6:1635.) These two units "reflect the best current understanding of the likely boundaries of reproductively isolated salmon populations over a broad geographic area." (*Id.* at p. 1546; AR1/6:1637.) The court agreed that this approach was based on the best available science and furthered the goals and purposes of CESA. (*Id.* at pp. 1547, 1549.)

Thus, under *California Forestry*, the Commission similarly may not *redefine* the Central Coast Coho species to carve away the salmon populations south of San Francisco, absent some evidence tending to show that these populations are genetically and/or reproductively distinct from other populations in the same ESU.[10]

B. The Commission May Only Delist a Biologically Distinct Population if That Population Is Not Endangered or Threatened

Once the relevant "species" is defined, the next step for listing or delisting under CESA is to determine the biological status of that species. Therefore, in addition to containing some evidence that the populations south of San Francisco are biologically distinct from other populations within the Central Coast Coho species/ESU, the petition to delist also must contain some evidence tending to show that the southern group is not "endangered" or "threatened" within the meaning of CESA. (§§ 2062, 2067; cf. AR1/10:3285 and *Trout Unlimited v. Lohn* (9th Cir. 2009) 559 F.3d 946, 955 [identifying similar two-step process for identifying and listing species under federal ESA].) By its terms, CESA only protects those species that qualify or potentially qualify as "endangered" or "threatened" species. (§§ 2051, 2052, 2080, 2084, 2085.) CESA defines such species as those which either are "in serious danger of becoming extinct" or are likely to be threatened with extinction in the foreseeable future, "due to one or

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[10] A petition may also seek to change the definition of a species/ESU by submitting information that a species has been completely extirpated from a certain area. (See § 2072.3.) However, the petition herein is not based on that theory. Rather, it argues that the Central Coast Coho species should be defined to exclude streams south of San Francisco even though coho salmon *concededly still reside there*. (See AR1/2:561, 565; section II.C.3 *infra*.)

more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, or disease." (§§ 2062, 2067.)

Pursuant to its delegated rulemaking authority (see sections 2071, 2071.5), the Commission has adopted regulations governing listing and delisting of species that reflect the definitions of "endangered" and "threatened" species in sections 2062 and 2067. (See Cal. Code Regs., tit. 14, § 670.1.) The regulations provide that "[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 by any one or any combination of factors provided in subsection (i)(1)(A) above." (*Id.*, § 670.1, subd. (i)(1)(B).) Subsection (i)(1)(A) reiterates the statutory factors defining endangered and threatened species in sections 2062 and 2067, providing that a species:

> shall be listed as endangered or threatened, as defined in sections 2062 and 2067. . ., if the Commission determines that its continued existence is in serious danger or is threatened by any one or any combination of the following factors: 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.

(*Id.*, § 670.1, subd. (i)(1)(A).)[11]

Relying on the dissenting opinion in the court below, plaintiffs argue for the first time in this Court that this regulation is invalid as ultra vires. (POB at 14, 20-21.) But where, as here, the Legislature has delegated substantive rulemaking power to an agency, the scope of judicial review "is narrow." (*Yamaha Corp., supra*, 19 Cal.4th at p. 10; *American Coating Assn., Inc. v. South Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 460.) If the court is "satisfied that the rule in question [lies] within the lawmaking

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[11] Species may also be delisted if they are found extinct, but that is not the case here.

authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end." (*Ibid.*)

Here, there can be no question that the Commission's delisting regulations meet these criteria. First, they are clearly within the scope of the Commission's broad authority to adopt regulations governing listing and delisting species, as well as the statutory definitions of endangered and threatened species. (§§ 2062, 2067, 2071, 2071.5.) Second, the regulations are reasonably necessary to effectuate the purpose of CESA, which is solely aimed at the conservation – i.e., biological recovery – of such species. (See §§ 2051, 2052, 2055, 2061.)

Contrary to plaintiffs' assertion, the "may be warranted" test for acceptance of a petition to delist (section 2074.2) and "is warranted" test for ultimate delisting (section 2075.5) must be construed in light of CESA's overarching species conservation purpose. (*People v. Pieters* (1991) 52 Cal.3d 894, 901 [a statute must be interpreted "so as to effectuate the purposes of the law"]; accord *People v. Mendoza* (2000) 23 Cal.4th 896, 907-08.) The "may be warranted" and "is warranted" tests cannot reasonably be construed as an open-ended license to delist a species for any reason whatsoever, untethered to the statutory definitions of what constitutes an endangered or threatened species in the first instance. Such a construction would do violence to the purpose of the statute. "Where the language of a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted." (*Western Oil & Gas Assn. v. Monterey Bay Unif. Air Poll. Control Dist.* (1989) 49 Cal.3d 408, 425; see also *In Re Michelle D.* (2002) 29 Cal.4th 600, 606.)

Finally, judicial deference to agency regulations is particularly appropriate where, as here, the agency's interpretation is consistent,

longstanding and "congruent with the statute's language and obvious purpose." (*Western Oil & Gas Assn., supra*, 49 Cal.3d at p. 425; *Yamaha, supra*, 19 Cal.4th at p. 13.) "Consistent administrative construction of a statute over many years . . . is entitled to great weight and will not be overturned unless clearly erroneous." (*Robinson v. Fair Employment & Housing Comn.* (1992) 2 Cal.4th 226, 234.) The Commission's regulations have been in effect since 1986. Deference also is appropriate in light of the Commission's central role in the listing process and its scientific expertise. (*California Forestry, supra*, 156 Cal.App.4th at p. 1546.)

In sum, the Commission cannot accept the petition to delist the coho salmon populations south of San Francisco for further consideration under section 2074.2 unless it contains some scientific evidence that these populations: (1) constitute a biologically distinct "species" from the Central Coast Coho species (e.g., are genetically and/or reproductively isolated from the larger group); and (2) are not actually "endangered" or "threatened" (e.g., not biologically imperiled), within the meaning of CESA. As discussed below, the petition contained no showing on either point and in fact *conceded* both points. Accordingly, the Commission properly found that the petition on its face did not contain sufficient information to indicate that the petitioned delisting may be warranted. (AR1/4:1202; § 2074.2.)

II. THE COMMISSION PROPERLY REJECTED THE PETITION BECAUSE IT CONTAINED NO INFORMATION RELEVANT TO THE STATUTORY BASES FOR DELISTING

Rather than asserting that the coho salmon populations south of San Francisco are a biologically separate species or that these populations are not actually endangered or threatened, the petition challenges the Commission's decision to list these fish on a variety of policy, factual and legal grounds. All of plaintiffs' theories and evidence are unrelated to

CESA's basic criteria for defining and listing species and are predicated on fundamental misunderstandings of the scope of the Commission's authority under CESA.

The petition to delist does not dispute – and in fact supports – the conclusions that coho salmon south of San Francisco are part of the larger listed Central Coast Coho species and that they remain highly endangered. But the petition nevertheless asks the Commission to consign these populations to extinction simply because, in plaintiffs' view, these coho salmon are not "important enough to protect" and are not "significant" because they allegedly: (1) are descendants of hatchery fish and thus are not historically "native" to this area and are outside their "natural range"; (2) have only an "ephemeral presence" in the area or are "strays" from populations north of San Francisco; (3) are not "naturally self-sustaining" absent continuing hatchery support; and (4) threaten "genuinely native, listed steelhead." (AR1/2:561-62, 577-580, 583, 602-06; POB at 6-7, 12, 22-24, 28.)

The Commission does not have discretion under CESA to decline to protect individual members or populations of a listed species for any of these reasons, *even assuming they are true*.[12] In asking the Commission to progressively write off individuals or populations of imperiled animals and plants at the edges of their ranges, plaintiffs' approach is directly contrary to CESA and is a recipe for extinction of species in California. Because this approach is inimical to CESA, there was *no* possibility-let alone a "substantial possibility"-that the requested delisting "could occur," and therefore the Commission properly rejected the petition for failing to meet

[12] As discussed in section III *infra*, each of these assertions is either unsupported by any credible evidence in the record or is "wholly undercut" by other evidence in the record. (*CBD, supra*, 166 Cal.App.4th at p. 612.)

the minimum standard of proof on its face. (*CBD, supra*, 166 Cal.App.4th at pp. 609-10, 612; *NRDC, supra*, 28 Cal.App.4th at p. 1125.)

A. The Petition Contains No Evidence that Coho Salmon South of San Francisco Are a Biologically Distinct Group of Populations

Based on extensive scientific studies, both the federal and state wildlife agencies have concluded that coho salmon south of San Francisco are genetically and reproductively related to coho salmon north of San Francisco and therefore are biologically part of the larger Central Coast Coho species. (See AR1/2:352-53, 640-42; 3:814; 4:1130, 1197-1201; 5:1250, 1254-1256, 1258; 6:1621, 1695, 1805; 8:2554-56; see also 77 Fed.Reg. 19552, 19554, 19558 (Apr. 2, 2012).) The petition contains no scientific evidence challenging this conclusion, and in fact concedes that coho salmon populations south of San Francisco are genetically related to, and are not reproductively separate from, the larger Central Coast Coho species. (AR1/2:561-62, 577-580, 614; see also POB at 59 ["there is little genetic variation among all coho salmon . . . across the entire Pacific Northwest"].) Plaintiffs' expert likewise concludes that coho salmon south of San Francisco are not isolated populations. (AR1/3:788, 792 ["there is no distinctiveness, genetic, life history or otherwise, for the residual (hatchery derived) populations in Santa Cruz County streams"].)

On appeal, plaintiffs argued for the first time that a NMFS study of coho salmon genetics "refute[s] the Commission's claim that the south of San Francisco fish must be lumped in with the more northerly fish." (POB at 61; see also 9, 19.) Even if plaintiffs had not waived the argument by failing to raise it in their delisting petition, the argument would fail because it is directly contradicted by the evidence in the record, including the very NMFS study upon which plaintiffs rely. This study concludes that, based on available genetic and geographic data, all but three of the streams south

of San Francisco historically had coho salmon populations which were "dependent"—that is, influenced by immigration of salmon from *other streams* within the Central Coast Coho species/ESU. (AR1/9:2909, 2970, 2976.)

Plaintiffs also argue that genetics are of "little use" in defining salmon species. (POB at 59.) This argument is incorrect, as genetic distinctiveness is a critical factor for determining what population groups constitute separate "species," both under CESA and the ESA. (See *California Forestry, supra,* 156 Cal.App.4th at pp. 1542, 1546; AR1/6:1635-37; 56 Fed.Reg. 58612, 58618.)[13]

In conclusion, the petition and supporting information contain no evidence that coho salmon populations south of San Francisco are genetically or reproductively distinct from the Central Coast Coho species/ESU and even concede that the contrary is true. Therefore, the Commission properly denied the petition on its face.

B. The Petition Contains No Evidence That Coho Salmon South of San Francisco Are Not Endangered or Threatened

Even assuming that the coho salmon south of San Francisco could be considered a separate "species," the petition remains fatally flawed because it contains *no evidence* that these populations may not be in serious danger of, or threatened with, "becoming extinct throughout all, or a significant portion, of [their] range due to one or more causes." (§§ 2062, 2067; Cal.

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[13] Plaintiffs conclude that ultimately, "[o]ne must look beyond genetics to questions of policy to determine what group of fish meets the test for an [ESU]." (POB at 61.) However, such determinations under CESA are not "questions of policy," but rather must be based on the best scientific evidence available. (See §§ 2070, 2072.3, 2074.2, 2074.6, 2075.5; Cal. Code Regs., tit. 14, § 670.1, subds. (d)(1), (e)(1), (f); *California Forestry, supra*, 156 Cal.App.4th at pp. 1546-47.)

Code Regs., tit. 14, § 670.1, subd. (i)(1).) As the Commission stated in its findings:

> 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 a combination of the [listing] factors[.]" In the petition and supplemental materials submitted by plaintiffs, little credible evidence is provided regarding the continuing status of coho salmon south of San Francisco and no credible evidence is provided that [these] populations are "no longer threatened."

(AR1/4:1186.) The record is replete with evidence that the Central Coast Coho species, and particularly the populations south of San Francisco, are in imminent danger of extinction. (AR1/1:163, 204, 273; 2:345-46, 375-84, 391-92; 3:812; 4:1130-31; 6:1619-21, 1695, 1674, 1805; 8:2556; 9:2854-57; 2873; 10:3133-34, 3164, 3168; 11:3563, 3577.)

Indeed, in asserting that coho salmon south of San Francisco are not "naturally self-sustaining" and "cannot survive on their own" absent continuing hatchery support, the petition *itself* makes the case that coho salmon populations south of San Francisco remain critically endangered, due to habitat degradation and loss and "other natural occurrences" such as floods, droughts and deteriorating ocean conditions. (Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1)(A); see AR1/2:567-68; 588-98, 607-09 [explaining the adverse effect of floods, droughts, sedimentation, stream temperatures and ocean conditions on coho salmon survival south of San Francisco]; see also POB at 6-7, 12, 25, 40-45, 47-49 [essentially arguing that coho salmon south of San Francisco are at high risk of extinction for same reasons]; AR1/3:789.) These are the *very same grounds* on which the Commission based its 1995 and 2004 decisions to list these fish. (See AR1/2:345-46, 375-84, 391-92; 6:1621, 1695, 1805; see also AR1/10:3179-82 [NMFS grounds for listing Central Coast Coho ESU].) Particularly striking is the petition's acknowledgment that "coho salmon south of San Francisco,

without hatchery support, will almost certainly become extirpated in the near future." (AR1/2:568, 597, 588; see also POB at 25-26.)

Plaintiffs argue that coho salmon populations south of San Francisco, while concededly imperiled, can be consigned to extinction because coho salmon allegedly are healthy in other portions of their range. (POB at 12, 25.) This claim is both irrelevant and incorrect. Even if true, the Central Coast Coho ESU still must continue to be listed, given that coho salmon south of San Francisco remain imperiled and are a "major and significant" portion of this ESU. (AR1/6:1621.) But in fact coho salmon are not healthy in any portion of their existing range. As the court noted in *California Forestry, supra*, 156 Cal.App.4th at p. 1543:

> Studies have shown that the population of coho salmon in California, including hatchery stocks, has declined at least 70 percent since the 1960s. According to the "presence survey" in the Department's status report, the population of the Central Coast unit has severely declined in Central California to the point of "widespread extirpation or near extinction" in some larger stream systems.

Indeed, the record shows that coho salmon populations are at risk not just on the central coast of California, but throughout California and along the entire west coast of the United States, rendering every remaining population critical to the species' survival. (See AR1/6:1619-21, 1684-84, 1697-1701, 1803; 10:3111, 3132-33; 11:3505; see also 77 Fed.Reg. 19554, 19558-59.)

In sum, the petition's claim that coho salmon south of San Francisco should not be protected because they are too imperiled to survive is precisely why CESA mandates their continued protection. *The very purpose* of the statute is to protect animals and plants that are not self-sustaining. (§§ 2051, 2052, 2062, 2067.) Consequently, there was no possibility that the petitioned delisting "could occur" and the Commission properly denied the petition on its face for this reason as well. (*NRDC,*

supra, 28 Cal.App.4th at p. 1125; *CBD, supra*, 166 Cal.App.4th at pp. 609-610, 612.)

C. The Petition's Alleged Errors in the Commission's Prior Listing Decision Are Not Cognizable Under CESA

1. The Commission may not re-define a listed species based on a determination that certain populations are "unimportant"

While conceding that coho salmon south of San Francisco are genetically related to the rest of the Central Coast Coho species and remain imperiled, the petition nevertheless asserts that these populations should not be included within the Central Coast Coho species—or even listed as a separate species—under any circumstances. The petition claims that coho populations south of San Francisco must be delisted because they do not "represent a morphologically discrete, genetically distinct, phenotypically unique, behaviorally different, or otherwise important component" of the taxonomic coho species. (AR1/2:562, 577-80, 614.)

a. Delisting populations based on their "lack of importance" is fundamentally inconsistent with CESA

However, CESA does not authorize the Commission to consider the alleged lack of "importance" of individuals or populations in defining, or determining the biological status of, a "species." The petition turns CESA and *California Forestry* on their head by asserting that the Commission's authority to separately list distinct populations of a taxonomic species can also be used to *delist* populations of a taxonomic species if they are *not* sufficiently distinct from other populations. (See AR1/2:568, 577-80.) Thus, the petition asserts that, because coho salmon populations south of San Francisco *are* genetically related to, and are not isolated from, other coho salmon populations in the Central Coast Coho species/ESU, they

consequently are not "unique" enough to warrant protection under CESA. (*Ibid.*; see also POB at 59-61.)

But CESA is designed to prevent, not facilitate, extinction. (§§ 2051, 2052, 2055.) Thus, the statute cannot reasonably be construed to give the Commission discretion to engage in gerrymandering in defining a "species." (See *California Forestry, supra*, 156 Cal.App.4th at pp. 1546-47 [explaining the importance under CESA of protecting all populations of a taxonomic species]; see also AR1/8:2556 ["every population of coho salmon needs to be included in some coho salmon ESU"]; 2:383-84, 642; 4:1201; 5:1255-56, 1258; 6:1653-54 and 12:3743 [stressing need to protect all populations of coho salmon in California].) Rather, the determination of what groups of populations may constitute a separate "species" is based strictly on scientific evidence of the biological relationships among groups of populations within the same taxonomically defined species. (*California Forestry, supra*, 156 Cal.App.4th at pp. 1542, 1546-47.)

b. The federal ESU policy does not allow delisting of populations based on "lack of importance"

NMFS' 1991 ESU policy likewise does not support plaintiffs' argument that coho salmon populations south of San Francisco can be carved out of the Central Coast Coho species and delisted. (AR1/2:577-80; POB at 27-29, citing 56 Fed.Reg. 58618.)[14]

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[14] Plaintiffs rely on the second prong of the NMFS ESU definition, which explains that "[t]o be considered an ESU, the population must . . . represent an *important component* in the evolutionary legacy of the species." (56 Fed.Reg. 58618, emphasis added.) This criterion is "met if the population contributed substantially to the ecological/genetic diversity of the species as a whole. In other words, if the population became extinct, would this event represent a significant loss to the ecological/genetic diversity of the species?" (*Ibid.*)

For one thing, NMFS' policy applies only to *its* determination whether a group of interbreeding Pacific coast salmonids constitutes a "species" under the *federal ESA*. (56 Fed. Reg. 58612, 58618.) While the Commission and Department apply a somewhat similar approach in defining salmonid species under CESA, the state and federal approaches are not identical. Rather, the state focuses on "areas of 'genetic discontinuity/transition' for delineation of ESU boundaries," and on whether a group of salmonid populations constitutes "a group of interbreeding organisms that is reproductively isolated from other such groups." (AR1/6:1619, 1635, 1637.)

More importantly, even assuming that the federal ESU policy does apply here, plaintiffs misapply that policy. In defining the Central Coast Coho ESU as a separate "species" under the federal ESA, NMFS determined that this ESU, including the populations south of San Francisco, constitutes "an important component in the evolutionary legacy" of the taxonomic coho salmon species as a whole. (AR1/8:2556.) Plaintiffs now would require a further finding that each coho salmon population *within* the Central Coast Coho ESU also constitutes an "important component in the evolutionary legacy" of *that ESU.*

But the "important component" analysis applies only to the initial determination of whether a group of populations within the taxonomic species as a whole constitutes an ESU (species) for listing purposes. (56 Fed.Reg. 58618.) The "important component" analysis was never intended to be further applied to each separate population within a listed ESU to determine whether certain populations should subsequently be excluded from the ESU. (77 Fed.Reg. 19557 ["[u]nder NMFS' ESU policy, the evolutionary legacy criterion is applied to the group of populations being considered as an ESU, rather than to individual populations"].) Like CESA, the ESA "does not authorize the listing or delisting of a subset or

portion of a listed species." (AR1/8:2553; see also AR1/11:3506 [NMFS cannot list (or delist) only a subset of an ESU]; *Trout Unltd, supra*, 559 F.3d at pp. 960-61.) As NMFS stated in denying respondents' petition to delist coho salmon south of San Francisco under the federal ESA:

> Much of the discussion in Waples (1991), the paper that NMFS' Salmonid ESU Policy was based on, is concerned with whether to designate a population or group of populations as an ESU and not, as advocated by petitioner's representatives, whether or not to include or exclude a population that is part of an ESU. Waples (1991) argued that ephemeral populations should not be considered ESUs by themselves but should be included within the context of larger populations that will persist over evolutionary time frames. Using this rationale, every population of coho salmon needs to be included in some coho salmon ESU.

(AR1/8:2556.)

Importantly, as the court held in *California Forestry, supra*, 156 Cal.App.4th at pp. 1546-47, the ESU concept is designed to protect and maintain the diversity of the taxonomic species as a whole by allowing similar populations to be "grouped for efficient protection of bio- and genetic diversity." (See also 56 Fed.Reg. 58612 [primary purpose of federal ESU policy is "to preserve a genetic variability, both between and within species" as required by the federal ESA].) Plaintiffs' approach-that each population or run of salmon must be found to be independently "evolutionarily significant"-would achieve precisely the opposite result and is a recipe for piecemeal extinction of imperiled species in California. (*California Forestry, supra*, 156 Cal.App.4th at p. 1547; § 2052.)

2. The agencies determined that coho salmon south of San Francisco are important to the survival of the Central Coast Coho species as a whole

Even more critically, the Commission, the Department and NMFS *did* determine that coho salmon populations south of San Francisco are biologically important to the survival of the Central Coast Coho

species/ESU, and the petition presented no relevant scientific information to contradict these findings. First, in both its 1995 and 2002 status reviews, the Department found that the populations south of San Francisco are "a major and significant portion of the range of coho salmon" in California and are critical to the survival of the Central Coast Coho species as a whole. (AR1/2:344, 351-52, 383-84, 392; 6:1621, 1695, 1805; see also 5:1258, 12:3743.)

In denying the petition to delist, the Commission likewise concluded, based on "credible scientific evidence," that:

> there is substantial gene flow between south of San Francisco coho and coho populations to the north, and [these] metapopulation processes may be very important to long term viability of coho salmon across their ranges. The fact of metapopulation exchange between southern and more northerly populations suggests that these southern populations are a functioning part of a larger metapopulation process that includes more northerly coho salmon groups. That, along with the potential importance of metapopulation structure to long-term persistence, leads us to conclude that southern coho populations are important to the overall California coho salmon viability.

(AR1/4:1198.) Thus, the Commission concluded, "what seem to be ephemeral populations today may be essential to long-term viability of the species as a whole at some time in the future." (AR1/4:1198-99.) Removal of CESA protections for ephemeral populations "would remove an invaluable mechanism for recovery." (*Ibid.*)

In evaluating the petition, the Department also concluded, and the Commission concurred, that:

> in non-viable populations, such as the endangered [Central Coast Coho] ESU, these subpopulations [south of San Francisco] take on a much greater importance for persistence of the metapopulation and the ESU in that they 1) add to the genetic diversity of the ESU, 2) provide a means of recolonization of habitat where they had previously become extirpated, 3) provide a "safety net" in case other subpopulations are extirpated, and 4)

> lead to range expansion and ultimately recovery of the species. . . . [T]here is substantial gene flow between south of San Francisco coho and coho populations to the north, and [such] metapopulation processes may be very important to long term viability of coho salmon across their range.

(AR1/5:1255; see also 1:173, 4:1130-31, 1198; 5:1250, 1256, 1258; 6:1717.)

NMFS reached the same conclusion in denying the petition to delist coho salmon south of San Francisco under the federal ESA. NMFS stated that the south of San Francisco populations "contribute to the ESU as a whole" and that "protection and restoration" of these populations is:

> essential to the conservation of this ESU as a whole because this geographic area is at the southernmost edge of the species' distribution in North America and is likely to be a source of evolutionary innovation for the species.

(AR1/8:2556.) NMFS also concluded that, even if the south of San Francisco populations are "ephemeral," they "are part of the [Central Coast Coho] ESU, which functions as a metapopulation." (AR1/8:2554; see also 77 Fed.Reg. 19557 [coho salmon populations south of San Francisco Bay "contribute to the overall functioning of" the Central Coast Coho ESU].)

3. CESA applies to all members of a species within its current range

Plaintiffs next claim that the Commission erred in protecting coho salmon outside of their "native range." They argue that the term "range" in CESA's definition of "endangered species":

> [C]an only be understood by reference to some historical geographic area from which the species has been eliminated, or is in "serious" danger of elimination, by a relevant "cause." *Listing fish outside their native range is thus a threshold error in striking contradiction to the very definition of "endangered species."*

(POB at 22, emphasis in original.) There is no dispute that coho salmon are currently present in streams south of San Francisco. (AR1/2:565 [petition states that "[t]he current geographic range of coho salmon spawning populations" extends to Monterey Bay].) However, plaintiffs argue that, because these fish allegedly were first planted in streams south of San Francisco at the turn of the 19th century, and/or are "strays" from the streams further to the north, they are not historically "native" or indigenous to streams south of San Francisco. (AR1/2:561-598.)

Even assuming these assertions are true,[15] they are based on a fundamentally flawed view of CESA. CESA defines an "endangered species" as "a *native* species or subspecies of a . . . fish . . . which is in serious danger of becoming extinct throughout all, or a significant portion, of *its range* due to one or more causes." (§ 2062, emphasis added.) "Threatened species" is defined similarly. (§ 2067.) As with the terms "species" and "subspecies," CESA does not separately define the terms "native" and "range." The Commission and Department interpret these terms to require protection of all individual members and populations of an endangered or threatened species that is otherwise indigenous to California (here, the Central Coast Coho species) throughout its present range, regardless of how or why they came to exist in their current location. (AR 1/2:638-39, 642; 3:814; 4:1200-01; 5:1255-56, 1258.)

As the Commission noted in its findings denying the petition:

> Both a plain language reading of the Act and an examination of species already protected under the Act reveals that the "native species" governed by the Act are all species indigenous to California. CESA's protections extend to indigenous species wherever they occur in California. . . . Nor does CESA

[15] The Commission explains in section III *infra* and in its opening and reply briefs in the Court of Appeal why these assertions are factually wrong.

> discriminate between hatchery and naturally spawning populations. . . . Additionally, if a coho population is the result of "stray spawnings" of fish from north of San Francisco populations, as plaintiffs hypothesize, CESA does not exclude fish that are the result of straying. . . . Even if the plaintiffs' assertions are correct, populations south of San Francisco would then represent a range expansion of the species in California and would be subject to CESA, regardless of how they got there.

(AR1/4:1200-1201; see also AR1/2:639, 642; 3:814; 4:1118-19, 1130-31; 5:1255-56, 1258.) The Commission also found that "ephemeral" populations are entitled to protection under CESA. (AR1/4:1198-99.)

The Commission's interpretation of CESA as requiring it to protect all individuals and populations of a listed animal or plant wherever they are now found, and regardless of how they got there, is a reasonable construction of the statute. This interpretation is entitled to substantial deference. (*California Forestry*, 156 Cal.App.4th at pp. 1546-47.) As the *California Forestry* court explained: "CESA is of great remedial importance and must be construed liberally" to achieve its objectives of preventing the extinction and ensuring the recovery of imperiled animals and plants in California, for the benefit of all people in the state. (156 Cal.App.4th at pp. 1545-46, 1550-51; §§ 2051, 2052, 2055, 2061.) Like its interpretations of the terms "species" and "subspecies" upheld in *California Forestry*, the Commission's interpretations of the terms "native" and "range" further both the statute's overall purpose to "conserve, protect, restore and enhance" imperiled species and the Commission's statutory duty to conserve such species. (*Ibid.*; *cf. California Forestry, supra*, 156 Cal.App.4th at p. 1551 [term "range" refers to a species' California range].)

The Commission's construction protects animals and plants at the edges of their existing ranges, such as coho salmon south of San Francisco, where, as the petition itself repeatedly concedes, they are often most vulnerable to extirpation. (See AR1/2:567, 581, 588, 597; see also POB at

25-6.) In addition, the edge of the range is often the most important to protect because it assists in the survival and contributes to the biological and genetic diversity of the listed species as a whole. (See *California Forestry, supra*, 156 Cal.App.4th at pp. 1546-47; AR1/1:173; 2:383-84, 392; 4:1131; 5:1255; 6:1717.) Here, as discussed in section II.C.2 *supra*, the evidence shows that the southern end of the coho salmon's range is "a major and significant portion of the range" and is critical to the survival of the entire Central Coast Coho species. (AR1/6:1621, 1695, 1805.)

By contrast, plaintiffs' construction of CESA leads to an illogical and absurd result that is fundamentally inconsistent with the statute's language, structure and purpose. (*Western Oil & Gas Assn., supra*, 49 Cal.3d at p. 425.) Plaintiffs would interpret the term "native" to mean "indigenous to that precise location" from unspecified "historic" times, and "range" to mean "historic, but not necessarily current" range. Plaintiffs' construction adds significant limitations to these terms that the Legislature chose not to add, violating the cardinal rule that "a court may not rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed." (*Cornette v. Calif. Dept. of Transp.* (2001) 26 Cal.4th 63, 73-74.)

Furthermore, by allowing the Commission to progressively eliminate individuals or populations of animals and plants at the edges of their current ranges, plaintiffs' construction directly contravenes CESA's fundamental purposes. (§§ 2051, 2052.) It is entirely implausible that CESA, the very purpose of which is to protect California's most vulnerable species, would not, at a minimum, protect such species throughout their entire existing range in California. By definition, an imperiled animal or plant already has been extirpated from much of its historic range, thereby rendering all of its current range critical to the species' survival. Under plaintiffs' view, CESA would not apply even if, as here, the scientific evidence

unquestionably demonstrates that the species is on the verge of extinction and that particular populations are important to the survival of that species as a whole. Thus, as in *California Forestry*, plaintiffs' interpretation "frustrates the intent of CESA because it fails to protect subgroups of a species that are integral to the species' survival." (*California Forestry, supra*, 156 Cal.App.4th at p. 1547.)

Finally, plaintiffs' approach also is contrary to CESA because it would erect unreasonable hurdles to species listing. In many cases, a species' historic range is not well documented or known. Plaintiffs' position also fails to account for the fact that populations of animals and plants are dynamic and change over time, as the petition itself concedes. (See AR1/2:588; 4:1198-99; 6:1653-54.) Thus, as the Commission stated, even if plaintiffs are correct that the populations south of San Francisco are "ephemeral" or consist solely of "strays," this would still represent an expansion of the coho salmon's historical range that warrants protection under CESA. (AR1/4:1201; see also AR1/2:638; 4:1130-31; 5:1255-56, 1258 [protection of strays and ephemeral populations is necessary and appropriate under CESA].)

4. CESA authorizes listing of hatchery fish

Plaintiffs further argue that the Commission may not list hatchery-spawned or hatchery-influenced fish under CESA, citing *California Forestry, supra*, 156 Cal.App.4th at p. 1552. (POB at 24.) *California Forestry* does not so hold.

In determining the biological status of the Central Coast Coho species, both the Commission and NMFS considered the effect of hatcheries on this species and included some hatchery-influenced runs within the listing. (AR1/2:639, 642; 3:814; 4:1201; 6:1706-16; 10:3364-65, 3477-78; 11:3535, 3539, 3563-64, 3626-27; AR 2/5:2512.) The agencies concluded that continued operation of conservation-based hatcheries, including Big

Creek hatchery, can assist in the recovery of the Central Coast Coho species. (See AR1/6:1637, 1706, 1711; 11:3563-64; 12:4172-73, 4184-85; see also 70 Fed.Reg. 37204, 37215 (June 28, 2005) [NMFS hatchery listing policy].)

While emphasizing that the Commission cannot use hatchery stocks as a reason *not* to list natural or wild stocks, *California Forestry* actually *upheld* the Commission's inclusion of hatchery-influenced coho salmon stocks in the Central Coast Coho species. (*California Forestry, supra*, 156 Cal.App.4th at p. 1552.) The court concluded that "the Commission and the Department did not err in analyzing *both* wild coho salmon and hatchery coho salmon when determining whether the two coho units were entitled to protection under CESA." (*Ibid.*, emphasis added.) NMFS' listing authority under the federal ESA is similarly broad. (*Trout Unlimited, supra*, 559 F.3d at pp. 955-58, 961.) Regardless of whether coho salmon are naturally-spawned or hatchery-spawned, all California coho salmon are still considered "native" species that may be listed under CESA. (See AR1/2:639, 642; 3:814; 4:1130-31, 1201; 5:1258.)

The use or influence of hatcheries cannot reasonably be a determinative factor in not listing or delisting coho salmon populations under either CESA or the ESA, as this would severely undermine the ability to protect these fish under those statutes. (*California Forestry, supra*, 156 Cal.App.4th at p. 1552; *Trout Unlimited, supra*, 559 F.3d at pp. 955-58, 961.) "Hatchery-produced coho salmon have been collected and planted in most, if not all, of the larger coho salmon-bearing waters of the state" and throughout the west coast, dating back to the 1890s. (AR1/6:1715, 1758; see also AR1/1:198; 5:1255, 1258; 9:2857, 2951; 10:3123, 3182.) This includes "large transfers of distant origin (i.e., out-of-

basin or out-of-state) stocks," which "were common aspects of historical coho salmon hatchery operations." (AR1/6:1762.)[16]

Moreover, hatchery stocks "share the same evolutionary genetic and ecological legacy" as natural stocks and can, under certain circumstances, benefit natural stocks within the ESU. (*Trout Unltd., supra*, 559 F.3d at pp. 956, 958.) As the Department concluded in its 2004 status review: "[e]ven if hatchery- and natural-origin coho salmon are different in some ways, hatchery-origin fish represent an important component of the total species' gene pool. Hatchery-origin and natural coho salmon are often indistinguishable genetically." (AR1/6:1706.) Additionally, while hatchery operations can have negative effects on naturally-spawning coho, hatchery supplementation also can support and contribute to natural runs. (AR1/6:1711; see also 12:4172-73.) "Hatchery-raised coho salmon in California constitute a significant portion of the population in some streams," and "have been used to bolster or re-establish naturally spawning coho populations throughout their range in California." (AR1/1:198; see also 6:1715, 1758.)

5. CESA does not allow the Commission to delist a species based on its impact on another species

Finally, plaintiffs argue that the Commission was required to consider the alleged adverse effects of coho salmon on "genuinely native wild steelhead." (AR1/2:583; POB at 7, 12, 62.) This argument also has no basis in CESA, and is unsupported by any evidence in the record. First, the determination whether to list or delist a species is based solely on the best available scientific information concerning the biological status of *that species*—i.e. whether that species is imperiled by specified factors,

[16] The Department ceased all interbasin and out-of-basin transfers of coho stocks in the 1980s. (AR1/6:1707, 1762.)

including predation and competition from other species. (§§ 2062, 2067, 2074.6, 2075.5; Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1).) Nothing in CESA authorizes the Commission to refuse to list or delist a species based on that species' predation on or competition with another species, even if that other species also is endangered or threatened. Rather, this presents an issue of proper management of both listed species.

Second, contrary to plaintiffs' contention, steelhead far outnumber coho salmon in streams south of San Francisco, and are known to prey upon and compete with coho salmon fry-not the other way around. (AR1/1:151, 171; 2:370-71, 468-77; 6:1703; 12:3760.) Nor are steelhead entirely "native" or "wild," as plaintiffs claim. Like coho salmon, hatchery-bred steelhead have been planted throughout their range in California, including areas south of San Francisco. (62 Fed.Reg. 43937, 43943 (Aug. 18, 1997); AR1/1:171; 2:468-477; 9:3024-26.)

In conclusion, each of plaintiffs' arguments as to why their petition is not legally deficient is unavailing. Therefore, the Commission properly exercised its discretion to reject the petition as failing to meet the minimum standard of proof for acceptance on its face. (§ 2074.2, *CBD, supra*, 166 Cal.App.4th at p. 612.)

III. EVEN ASSUMING THE EVIDENCE IN THE PETITION IS RELEVANTTO DELISTING, THE COMMISSION PROPERLY REJECTED THE PETITION ON ITS MERITS

Even assuming the theories and evidence in support of the petition were cognizable under CESA, the Commission still properly exercised its discretion to reject the petition on the merits. Although the Commission properly found the petition to be deficient on its face, it also took care to consider the petition's novel theories and to thoroughly weigh and evaluate the evidence for and against them. (AR1/4:1187, 1200-01.) The

Commission properly concluded that strong evidence undercut each of plaintiffs' theories. (AR1/4:1187-1202.)

In *CBD, supra*, the court held that "the Commission's decision *must be* upheld, if all the information . . . does not *clearly weigh* in favor of finding that the statutory [section 2074.2] standard is met." (*CBD, supra*, 166 Cal.App.4th at pp. 610-11, emphasis added.) And even if a petition provides a "prima facie" case for delisting, the Commission's decision still must be upheld if "the countervailing information and logic persuasively, wholly undercut some important component of that prima facie showing." (*Id.* at p. 612.)

Here, the evidence in support of the petition does not "clearly weigh" in favor of a conclusion that the petition satisfied the "may be warranted" test. (*CBD, supra*, 166 Cal.App.4th at p. 612; § 2074.2.) And even if the petition did present a *prima facie* case for delisting based on plaintiffs' theories, "countervailing information and logic persuasively, wholly undercut" the petition's central claims that wild coho salmon were not historically present in streams south of San Francisco and that they would not exist there now but for hatchery support. (*Ibid.*)[17]

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[17] See e.g., AR1/1:155-57; 2:351-52, 361-65, 375-84, 391-92, 460-77, 636-42; 3:812-14, 906-07; 4:1024, 1119-37, 1187-1200; 5:1245-58; 6:1716, 1719-30, 1736-51; 8:2548-56; 9:2867-68, 2951-54, 2980-82, 2986-87, 3024-26; 10:3172-74, 3183; 11:3539, 3640-41, 3644-77, 3680-81; 12:3762, 3765-79, 3868-69, 4173-75; see also 77 Fed.Reg. 19552-59 [all supporting the conclusion that wild coho salmon were historically indigenous to streams south of San Francisco and still survive there despite historic hatchery plantings]. This evidence is discussed in detail in the Commission's opening brief (pp. 39-47) and reply brief (pp. 24-28) on appeal.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court affirm the Court of Appeal's decision for the reasons stated herein and uphold the Commission's finding that the petition did not contain sufficient scientific information to indicate that delisting "may be warranted."

Dated: June 24, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWERING BRIEF OF DEFENDANT AND APPELLANT CALIFORNIA FISH AND GAME COMMISSION uses a 13 point Times New Roman font and contains 13,307 words.

Dated: June 24, 2013

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: ***California Fish and Game Commission v. Central Coast Forest Association and Big Creek Lumber Company***

California Supreme Court No.: **S208181**

Third Appellate District No.: **C060569**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1515 Clay Street, 20th Floor, Oakland, CA 94612-0550.

On June 24, 2013, I served the attached **ANSWERING BRIEF OF DEFENDANT AND APPELLANT CALIFORNIA FISH AND GAME COMMISSION** by placing a true copy thereof enclosed in a sealed envelope with the **FEDERAL EXPRESS**, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on Junel 24, 2013, at Oakland, California.

Cheryl Branin
Declarant

Signature

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