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9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
10 COUNTY OF SAN DIEGO, CENTRAL DIVISION  
11

12 CALIFORNIA CATTLEMEN'S )  
13 ASSOCIATION, )

14 Petitioner, )

15 v. )

16 CALIFORNIA DEPARTMENT OF FISH )  
17 AND WILDLIFE; CHARLTON BONHAM, )  
18 in his official capacity as Director of the )  
California Department of Fish and Wildlife, )

19 Respondents. )

) Case No.: 37-2016-00006135-CU-WM-CTL

)

) **PETITIONER'S MEMORANDUM OF**  
) **POINTS AND AUTHORITIES IN**  
) **SUPPORT OF MOTION FOR SUMMARY**  
) **JUDGMENT AND WRIT OF MANDAMUS**

)

) [IMAGED FILE]

)

) Date: July 6, 2018  
) Time: 8:30 a.m.  
) Judge: Hon. Joan M. Lewis  
) Dept.: C-65

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) Action Filed: February 24, 2016

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1 **INTRODUCTION**

2 The California Cattlemen’s Association seeks a writ of mandate directing Respondents  
3 California Department of Fish and Wildlife, *et al.* (Department), to conduct mandatory status  
4 reviews of species listed under the California Endangered Species Act (CESA or the Act). After  
5 nearly two years of litigation, the Department continues to insist that it has the discretion not to  
6 perform the status reviews, which the Department concedes have not been done for at least 231  
7 CESA-listed species. Petitioner’s Statement of Undisputed Facts (SUF) ¶ 2. This Court should  
8 issue a writ of mandamus to compel the Department to comply expeditiously with this important  
9 legal obligation.

10 **FACTUAL AND PROCEDURAL  
11 BACKGROUND**

12 **I.**

13 **THE CALIFORNIA ENDANGERED SPECIES ACT**

14 The California Endangered Species Act, Fish & Game Code §§ 2050-2100, promotes the  
15 “ecological, educational, historical, recreational, esthetic, economic, and scientific value” that  
16 wildlife brings to the people of California. *Id.* § 2051(c).<sup>1</sup> Modeled after the federal Endangered  
17 Species Act, 16 U.S.C. §§ 1531-1540, CESA authorizes the Fish and Game Commission to  
18 designate species as endangered or threatened under the Act. §§ 2070, 2071. CESA defines an  
19 “endangered species” as a native species that is currently “in serious danger of becoming extinct.”  
20 § 2062. It defines “threatened species” as a native species that, “although not presently threatened  
21 with extinction, is likely to become an endangered species in the foreseeable future in the absence  
22 of special protection and management efforts . . . .” § 2067.

23 CESA authorizes any interested person to petition the Commission to list, delist, or alter  
24 the listing status of any particular species. § 2071.5. Following submission of such a petition, the  
25 Department conducts an initial assessment of whether the petitioned action may be warranted.  
26 § 2073.5. After receiving the Department’s recommendation, the Commission determines whether  
27 the petitioned action may be warranted. § 2074.2(e). If so, the Department then conducts a full  
28 status review, § 2074.6, after which the Commission makes a final determination as to whether the

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Fish and Game Code.

1 petitioned action is warranted. § 2075.5(e). In making that determination, the Commission  
2 considers a number of factors, including population trend, range, and the impact of existing  
3 management efforts. *See* Cal. Code Regs. tit. 14, § 670.1(i)(1)(B).

4 To determine if the conditions that led to the original listing are still present, the Act  
5 provides that the Department “shall review species listed as an endangered species or as a  
6 threatened species every five years . . . .” § 2077(a). The Department may, in the absence of a  
7 petition from an interested party, recommend to the Commission that it list, delist, or alter the  
8 listing of certain species. § 2072.7. The Commission must treat a Departmental five-year status  
9 review that recommends a change to any species’ status as a Departmental recommendation that a  
10 listing change may be warranted. § 2077(e).

## 11 II.

### 12 PROCEDURAL HISTORY

13 On February 24, 2016, the Association filed a verified petition for a writ of mandamus to  
14 compel the Department to perform overdue status reviews. Petition for Writ of Mandamus, filed  
15 Feb. 24, 2016. At that time, the Department had not completed overdue status reviews for 233 of  
16 those species listed as threatened or endangered for over five years. *Id.* ¶ 3. The original petition was  
17 based on two distinct theories of standing: beneficial interest and public interest. *See id.* ¶¶ 6-10.  
18 In response to the Department’s demurrer, the Association elected to proceed solely on public  
19 interest standing. *See* Pet’r’s Opp. to Demurrer, filed Nov. 23, 2016, at 6-9. In overruling the  
20 demurrer, this Court held that the Association had adequately pled public interest standing. *See*  
21 *Cal. Cattlemen’s Ass’n v. Cal. Dep’t of Fish & Wildlife*, December 9, 2016 Order.

22 The Department subsequently propounded voluminous discovery, including over 2,500  
23 special interrogatories related to beneficial interest standing. *See* Declaration of Damien M. Schiff  
24 in Support of Motion for Leave to Amend Petition For Writ of Mandamus, filed Apr. 26, 2017,  
25 ¶ 3. The Association therefore moved to amend its pleading to remove all allegations pertaining to  
26 beneficial interest standing, and thus to proceed solely on public interest standing. *Id.* ¶ 6. Over  
27 the Department’s opposition, the Court granted the motion, *see Cal. Cattlemen’s Ass’n v. Cal.*  
28 *Dep’t of Fish & Wildlife*, August 10, 2017 Order, and the Association filed an amended petition.

1 Further discovery revealed that the Department has still not conducted status reviews for at least  
2 231 species listed under CESA. *See* SUF ¶ 2. The Association now moves for summary judgment  
3 and for a writ of mandamus directing the Department to conduct those reviews.

## 4 ARGUMENT

### 5 I.

#### 6 STANDARD OF REVIEW

7 Summary judgment is proper if there is no triable issue of material fact and a party is  
8 entitled to judgment as a matter of law. Code Civ. Proc. § 437c, subd. (c). A plaintiff moving for  
9 summary judgment “bears the burden of persuasion that each element of the cause of action in  
10 question has been proved, and hence that there is no defense thereto.” *Aguilar v. Atlantic Richfield*  
11 *Co.*, 25 Cal. 4th 826, 850 (2001). “Once the plaintiff . . . has met that burden, the burden shifts to  
12 the defendant . . . to show that a triable issue of one or more material facts exists as to the cause of  
13 action or a defense thereto.” Cal. Civ. Proc. § 437c, subd. (p)(1). The defendant may not rely upon  
14 allegations or denials of its pleading to show that a triable issue of material facts exists, but instead  
15 must set forth specific facts showing that a triable issue of material fact exists as to the cause of  
16 action or a defense thereto. *Id.*

### 17 II.

#### 18 THE ASSOCIATION HAS STANDING TO SEEK A 19 WRIT OF MANDAMUS COMPELLING THE DEPARTMENT TO 20 CONDUCT MANDATORY FIVE-YEAR STATUS REVIEWS FOR 231 SPECIES LISTED UNDER THE CALIFORNIA ENDANGERED SPECIES ACT

21 The Association has public interest standing to compel the Department to conduct  
22 mandatory five-year status reviews. A California citizen has standing to seek a writ of mandamus  
23 “where the question is one of public right and the object of the mandamus is to procure the  
24 enforcement of a public duty.” *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 52 Cal. 4th  
25 155, 166 (2011). This type of standing, known as public interest standing, “promotes the policy of  
26 guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the  
27 purpose of legislation establishing a public right.” *Green v. Obledo*, 29 Cal. 3d 126, 144 (1981).  
28 This policy “may [only] be outweighed in a proper case by competing considerations of a more

1 urgent nature . . .” *Id.* at 145. The Association qualifies as a citizen for purposes of public interest  
2 standing because its petition is “undertaken to further the public interest and is not limited to the  
3 [Association’s] private concerns.” *Save the Plastic Bag Coal.*, 52 Cal. 4th at 168; *see* SUF ¶¶ 3-6.  
4 In particular, the Association seeks to compel the Department to follow California law and conduct  
5 five-year status reviews of species listed as threatened or endangered. *Id.* ¶ 6.

6 **A. The Association’s Petition Furthers a Significant Public Interest in**  
7 **Compelling the Department to Conduct Five-Year Status Reviews**

8 The Association has public interest standing because the petition seeks to compel the  
9 Department to fulfil a mandatory duty under CESA.

10 “Where the question is one of a public right and the object of the mandamus is to  
11 procure the enforcement of a public duty, the [petitioner] need not show that he has  
12 any legal or special interest in the result since it is sufficient that he is interested as  
a citizen . . . .”

13 *Reynolds v. City of Calistoga*, 223 Cal. App. 4th 865, 873 (2014) (quoting *Bd. of Social Welfare*  
14 *v. Cty. of L.A.*, 27 Cal. 2d 98, 100-01 (1945)).<sup>2</sup> Public interest standing “has often been invoked  
15 by California courts” to compel the government to follow the law on issues of statewide concern.  
16 *Green*, 29 Cal. 3d at 144.

17 The enforcement of the Department’s mandatory duty serves the public interest because  
18 the public has a significant interest in ensuring that the listing of species comports with current  
19 conditions—an integral part in facilitating CESA’s purpose. That purpose, as stated in the Act, is  
20 to “conserve, protect, restore, and enhance any endangered species or any threatened species and  
21 its habitat.” § 2052; *cf. Hector F. v. El Centro Elementary Sch. Dist.*, 227 Cal. App. 4th 331, 341  
22 (2014) (finding public interest standing by reference to the interests articulated in the statutory  
23 text). The Act aims to restore listed species to the point at which such mechanisms “are no longer  
24 necessary,” § 2061, a goal which presumes knowledge about the *current* conditions of each of  
25 those listed species. The status reviews thus play a crucial role in “[t]he protection and preservation  
26 of California’s wildlife,” which objective the Department elsewhere has represented to be “of

27 \_\_\_\_\_  
28 <sup>2</sup> *See also Green*, 29 Cal. 3d at 143-45 (allowing public interest standing to challenge a regulation  
that denied welfare benefits); *Bd. of Social Welfare*, 27 Cal. 2d at 100-01 (allowing public interest  
standing to challenge a county’s failure to reissue expired welfare checks).



1 unquestionably great public interest.” Department’s Brief, *Pac. Shores Prop. Owners Ass’n v.*  
2 *Dep’t of Fish and Game*, No. C070201, 2013 WL 7087194, at 37 (Cal. Ct. App. Nov. 1, 2013)  
3 (citing § 2052). As the California Court of Appeal confirmed just this year, “laws providing for  
4 the conservation of natural resources, such as the CESA, are of great remedial and public  
5 importance . . . .” *Central Coast Forest Ass’n v. Fish and Game Comm’n*, No. C060569, 2018 WL  
6 300188, at \*22 (Cal. Ct. App. Jan. 5, 2018). Thus, consistent with this Court’s prior ruling, the  
7 Association has public interest standing. *See* SUF ¶¶ 1-6.

8 **B. No Competing Considerations Outweigh the Substantial**  
9 **Public Interest in Compelling the Department to Conduct**  
10 **Mandatory Five-Year Status Reviews**

11 There are no competing considerations that outweigh the Association’s standing. The  
12 Department’s contrary contention did not persuade this Court at the demurrer stage. Order Denying  
13 Respondents’ Motion for Demurrer at 1. Nothing dictates a different result here. At the demurrer  
14 stage, the Department rested much of its argument about competing considerations on two cases.  
15 Neither precludes public interest standing in this case.

16 In *Carsten v. Psychology Examining Comm.*, 27 Cal. 3d 793 (1980), a board member on  
17 the agency responsible for licensing psychologists sued the agency because she disagreed with the  
18 board’s decisions regarding approval of applicants who scored below the state-required grade. *Id.*  
19 at 795-96. Concerned about perpetuation of litigation, the California Supreme Court held that  
20 competing considerations outweighed standing to sue in the public interest in light of the  
21 petitioner’s participation (as a board member) in the decision that she was challenging in court. *Id.*  
22 at 801. But unlike the petitioner in *Carsten*, the Association’s members do not work for the  
23 Department, and they were not complicit in the Department’s failure to conduct status reviews.  
24 Thus, the “conflicts of interest and perpetuation of litigation which were of concern in *Carsten*,”  
25 *Hector F.*, 227 Cal. App. 4th at 342, have no bearing on the Association’s public interest standing  
26 here.

27 Similarly unhelpful to the Department is its reliance on *Sacramento Cty. Fire Protection*  
28 *Dist. v. Sacramento Cty. Assessment Appeals Bd.*, 75 Cal. App. 4th 327 (1999). That case involved  
a challenge to a stipulation between a county assessor and a landowner that substantially reduced

1 the value of a tract of land. *Id.* at 330. The Sacramento County Fire Protection District, a property  
2 tax recipient that had to refund \$1.5 million in tax dollars in light of the decreased value in land,  
3 sought a writ of mandate to invalidate the stipulation. *Id.* The court of appeal rejected the district’s  
4 standing, concluding that the county already ably represented the district’s interests during the  
5 assessment process. *See id.* at 334. Thus, granting the district—and the countless other entities that  
6 benefit from tax revenue—standing to file separate lawsuits to challenge the valuation of land  
7 would, in the court’s estimation, threaten “chaos in the tax system.” *Id.* at 336. No such havoc will  
8 ensue from the Association’s petition, which seeks merely to compel the Department to conduct  
9 mandatory status reviews. Fulfilling that obligation will promote—not frustrate—the Act’s  
10 administration. Moreover, granting the Association the relief it seeks would not open the  
11 floodgates of litigation, because this lawsuit can address *all* of the Department’s failures to conduct  
12 status reviews.

13 Finally, the Department’s assertion that requiring it to perform status reviews would be  
14 unwarranted because it would redirect the Department’s limited resources, proves too much. The  
15 Legislature has determined that status reviews are essential to promoting CESA’s purpose. *See*  
16 §§ 2052, 2077. Requiring the Department to conduct status reviews in accordance with the Act  
17 does not redirect resources any differently than requiring an elementary school to follow California  
18 antidiscrimination law, *see Hector F.*, 227 Cal. App. 4th at 342, or forcing a city to prepare an  
19 environmental impact report, *see Save the Plastic Bag Coal.*, 52 Cal. 4th at 160. The Department’s  
20 assertion misses the whole point of a status review: to direct resources away from projects that are  
21 optional—and into projects that are mandatory. § 2077.

22 After all, the Legislature was aware of the State’s limited resources at the time it enacted  
23 the Act. *See* Governor’s Budget for 1983–84 at 6 (estimating a budget deficit of \$446 million).<sup>3</sup>  
24 Nevertheless, the Legislature determined that the public interest is best served by regular status  
25 reviews of listed species. Other entities with smaller coffers may not insulate themselves from  
26 judicial review by claiming limited resources; neither may the Department. The Department should  
27

28 \_\_\_\_\_  
<sup>3</sup> *See* Declaration of Wencong Fa, Exhibit 3.

1 “take up [financial] constraints with [the Legislature] rather than” ignore mandatory deadlines and  
2 tasks. *Florida Home Builders Ass’n v. Norton*, 496 F. Supp. 2d 1330, 1336 (M.D. Fla. 2007).

3 **III.**

4 **THIS COURT SHOULD ENTER JUDGMENT**  
5 **AGAINST DEFENDANT BECAUSE IT FAILED TO**  
6 **PERFORM ITS MANDATORY DUTY TO CONDUCT**  
7 **FIVE-YEAR STATUS REVIEWS UNDER CESA**

8 The Department acknowledges that it has failed to conduct status reviews for 231 of the  
9 species listed under CESA. SUF § 2. This Court should grant summary judgment to Petitioner,  
10 because the Department’s duty is mandatory rather than discretionary. In cases involving statutory  
11 interpretation, courts begin with “the plain language of the statute, affording the words of the  
12 provision their ordinary and usual meaning . . . .” *People v. Cornett*, 53 Cal. 4th 1261, 1265 (2012).  
13 The plain text of CESA mandates the five-year status reviews. While other parts of the statute  
14 allow the Department to use its discretion, the Legislature used the term “shall” to describe the  
15 Department’s mandatory obligation to conduct status reviews. *cf.* § 2077(d) (“Notwithstanding  
16 any other part of this section, the commission or the department *may* review a species at any time  
17 based upon a petition or upon other data available to the department and the commission.”  
18 (emphasis added)). *See Walt Rankin & Assocs., Inc. v. City of Murrieta*, 84 Cal. App. 4th 605, 614  
19 (2000) (the “usual rule with California codes” is that “shall” is mandatory and “may” is  
20 permissive). The federal Endangered Species Act imposes an analogous “duty to conduct status  
21 reviews every five years,” an obligation that is both “mandatory and nondiscretionary.” *Florida*  
22 *Home Builders Ass’n*, 496 F. Supp. 2d at 1333. CESA should be construed similar to its federal  
23 counterpart. *NRDC v. Fish and Game Comm’n*, 28 Cal. App. 4th 1104, 1117-18 (1994) (federal  
24 ESA should be used to interpret similar provisions under the Act). Hence, the federal courts’  
25 construction of the federal Act’s five-year status review provision further supports a mandatory  
26 construction of CESA’s parallel provision.

27 Contrary to the Department’s demurrer briefing, *Woods v. Dep’t of Motor Vehicles*, 211  
28 Cal. App. 3d 1263 (1987), supports the Association’s position. In that case, the court of appeal  
considered a writ petition from a driver whose license had been suspended for failing to provide



