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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

CALIFORNIA CATTLEMEN'S ASSOCIATION, Petitioner, v. CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE; CHARLTON BONHAM, in his official capacity as Director of the California Department of Fish and Wildlife, Respondents.	Case No.: 37-2016-00006135-CU-WM-CTL **PETITIONER'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** [IMAGED FILE] Date: July 6, 2018 Time: 8:30 a.m. Judge: Hon. Joan M. Lewis Dept.: C-65 Action Filed: February 24, 2016

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Department no longer disputes that the California Endangered Species Act's (CESA's) five-year status review requirement imposes a mandatory, rather than discretionary, obligation on the Department. *See* Dep't Opp'n at 11:10-20:16 (resting the Department's opposition on standing). Nor does the Department dispute that it has failed to conduct five-year status reviews "for 231 species listed as threatened or endangered under the California Endangered Species Act since January 1, 2011." *See* Respondents' Separate Statement of Undisputed Material Facts ¶ 2. Rather, the Department rests its entire opposition on its contention that the Association does not have standing to bring this lawsuit on behalf of the public interest. *See* Dep't Opp'n at 11:10-20:16.

The Association plainly has public interest standing to bring this lawsuit.[1] For one, there is a strong public interest in enforcing CESA and furthering "the policy of the state to conserve, protect, restore, and enhance" imperiled species and their habitats. § 2052.[2] The Department attempts to undercut the Association's public interest standing in two ways, but neither is persuasive. The Department argues that other mechanisms for providing species-specific information obviate the need for this Court to consider the Association's petition, but those mechanisms only provide unspecified information about *some* of the listed species. In any event, nowhere in CESA did the Legislature allow the Department to evade its mandatory duty to perform five-year status reviews by giving species-specific presentations instead. The Department also argues that beneficially interested parties may take action resulting in a five-year status review of certain species. Yet the Association requests overdue status reviews of 231 listed species, and the Department has adduced no evidence of any other party that can obtain the same comprehensive relief.

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[1] The Department suggests that the Association made incorrect statements about the Association's claims and the Court's ruling at the demurrer stage. *See* Dep't Opp'n at 8:20-24. On the contrary, the Association's memorandum in support of its Motion for Summary Judgment clearly stated that the Court held that "the Association had *adequately pled* public interest standing." Ass'n MSJ at 2:19-20 (emphasis added). It also clearly stated that the Association moved to proceed solely on public interest standing, four months after the Court's demurrer ruling, in response to the Department's voluminous discovery. *Id.* at 2:22-27.

[2] Unless stated otherwise, all references are to the Fish and Game Code.

The Department also argues that competing considerations outweigh the public's interest in enforcing CESA. Dep't Opp'n at 13:16-18:4. Not so. The Department's competing considerations are concerns about administrative and budgetary resources. Yet the caselaw does not recognize resource concerns as competing considerations because a government entity must expend resources any time that it's required to follow the law. This lawsuit, for example, seeks to compel the Department to follow legislative directives rather than spend its resources on its own whim. In any event, the Department's resources estimates should not be credited, because they are based on a different, more resource-intensive type of status review under a different provision of CESA. *See* Ass'n Opp'n 4:14-6:1 (noting differences between five-year status reviews and more resource intensive 12-month status reviews).

Finally, the Association's initial pleading did not create a material issue of triable fact. Dep't Opp'n at 18:5-20:5. The operative pleading seeks relief solely on public interest standing. Even if the Association's past allegations of a beneficial interest in status reviews for certain species were considered, they would be irrelevant to the issue of whether the Association also has public interest standing. The Department's argument to the contrary is based on its unsupported view that a petitioner must establish a lack of beneficial interest before it is allowed to proceed on public interest standing. Yet, as the California Supreme Court has held, a beneficially interested party is just as capable of bringing a public interest lawsuit as anyone else. *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 52 Cal. 4th 155, 166 (2011). Because the Association has standing to bring its petition in the public interest, this Court should grant its Motion for Summary Judgment.

ARGUMENT

I.

THE ASSOCIATION IS ENTITLED TO SUMMARY JUDGMENT BECAUSE IT HAS ESTABLISHED PUBLIC INTEREST STANDING TO BRING THIS PETITION

A. There Is a Strong Public Interest in Enforcing CESA

In enacting CESA, the Legislature found that the "conservation, protection, and enhancement of [endangered and threatened] species and their habitat is of statewide concern."

§ 2051(c). The Legislature thus enacted a host of statutes to further "the policy of the state to conserve, protect, restore, and enhance" imperiled species and their habitats. § 2052. Unable to take issue with CESA's plain text, the Department points to several factors that purportedly undercut "a weighty public need" in enforcing Section 2077. None is persuasive.

First, the Department suggests that other mechanisms for providing species-specific information to the California Fish and Game Commission should excuse the Department from conducting five-year status reviews. Dep't Opp'n at 11:21-12:18. It should not. The Department's declarants provided only generalities, such as an allegation that the Department provides "species presentations regarding listing species of interest to the Commission, constituents and the public." Decl. of Kari Lewis ¶ 8. The Department does not provide any detail about what sort of information it presents during these "species presentations." And although the Wildlife Branch manages 57 of the 233 species listed in the Association's petition, it has only used this mechanism to provide information to the Commission for "five to ten species." Lewis Dep. 9:5-23.

Even if the Department were to provide "species presentations" on all 231 species for which the Association seeks relief, that would not relieve the Department of its duty to conduct five-year status reviews for those species. The five-year status reviews allow the Department, as the wildlife expert, to synthesize data relevant to a change in a species' listing status for the benefit of all Californians, not just for the Commission. For instance, the Department's five-year status reviews could prompt the Legislature to enact special programs for species that are on the brink of extinction. Moreover, CESA requires that the Commission take action on a five-year status review that shows that a change in listing status is warranted, § 2077(e); the statute contains no such rule for the Department's "species presentations."

Second, the Department argues that there is no weighty need for it to conduct five-year status reviews because there are two other statutory mechanisms that might also lead to a status review. Dep't Opp'n at 12:19-13:3. The Department is wrong. That a listing petition may lead to a 12-month status review is no reason not to conduct a five-year status review absent a petition. The Department's failure to conduct timely status reviews leaves interested persons without information they would use to determine if a petition to alter listing status is warranted in the first

place. Even more critically, the five-year status review informs the Department in its petition evaluation process and is a key component in determining whether a 12-month status review takes place at all. *See* § 2073.5(a) (requiring the Department to review the petition in conjunction with "other relevant information the Department possesses"); § 2072.7 (a Departmental recommendation contained in a five-year status review is treated as a Departmental recommendation in the petition evaluation stage). As noted previously, CESA requires the Commission to treat any Departmental recommendation in a five-year status review as a recommendation that a full 12-month status review would be warranted. §§ 2072.7, 2077; *see* Ass'n Opp'n at 5:12-16. Thus, the Department's failure to conduct five-year status reviews deprives the Commission (and interested persons) of a critical piece of information needed to evaluate petitions that seek to alter a species' listing status.

Nor does the fact that beneficially interested persons could sue to compel five-year status reviews of particular species cancel public interest standing. Dep't Opp'n at 13:4-7. The Department contends the Association once claimed a beneficial interest in the status reviews of 231 species, but even if that were true (and it is not), the authorities that the Department cites only justify denying public interest standing when *other* parties not before the Court are beneficially interested in the same relief. *See Reynolds v. City of Calistoga*, 223 Cal. App. 4th 865, 875 (2014) (discussing the availability of *other* parties that could compel the same relief).

The Association seeks *comprehensive* relief to address the Department's systematic failure to conduct overdue status reviews for 231 species listed under CESA. The Department fails to point to any party other than the Association or its members that would arguably be beneficially interested in the relief that the Association seeks here, nor does the Department show how piecemeal lawsuits by beneficially interested parties could obtain the same comprehensive relief.[3]

[3] As the Association discussed in its opposition memorandum, the initial petition for writ of mandate did not allege that the Association was beneficially interested in compelling the Department to perform status review of all 233 species. Rather, the Association's pleading—properly construed—alleged that, for each of the 233 species, the Association and its members were beneficially interested *or* had public interest standing *or* had both. *See* Ass'n Opp'n at 3:1-6. The Association moved to amend to proceed solely on public interest standing *not* because it was disavowing any beneficial interest but rather to avoid the Department's voluminous discovery, including over 2,500 special interrogatories related to beneficial interest standing. Ass'n MSJ at

In any event, to require up to 231 beneficially interested parties to file 231 lawsuits compelling individual status reviews would hardly serve judicial efficiency. That cumbersome process can be avoided by granting the Association, as a representative of the public interest, the relief that it seeks in this case.

B. The Strong Public Interest in Enforcing CESA Outweighs the Department's Unfounded Assertions That Following CESA Would Undermine Its Conservation Efforts

There is a strong public interest in enforcing CESA's statutory mandates, including Section 2077's five-year status review requirement. Contrary to the Department's contention, the five-year status review serves the public interest in ways beyond "the potential delisting of species." Dep't Opp'n at 15:1. The five-year status review process also synthesizes current information on listed species, so that the Department and the Commission can use their resources in a manner that best promotes CESA's goal to restore species to the point at which they no longer need CESA's protection. § 2061.

There are no competing considerations that outweigh the public's strong interest in enforcing CESA. First, as the cases cited by the Department show, Dep't Opp'n at 14:3-27, the competing considerations doctrine is inapposite here. The cases do not hold that a gesture to "administrative and budgetary disruption," *id.* at 14:7, would cancel public interest standing. Indeed, the entire point of a writ of mandamus is to direct the agency to spend time and resources on statutory mandates that it would rather ignore.

Carsten v. Psychology Examining Comm., 27 Cal. 3d 793 (1980), for example, involved a board member who challenged the decision of a board on which she sat. As the Department recites, the California Supreme Court in *Carsten* noted the "inevitable damage such lawsuits will inflict upon the administrative process." *Id.* at 798. Yet the Department neglects to mention the previous two sentences, which clarify that "such lawsuits" refer to the type of "narcissist litigation" in which

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2:22-23. The Court granted the motion, and the case now proceeds solely on public interest standing. *Id.* at 2:25-28. Contrary to the Department's view, Dep't Opp'n at 19:5-16, the fact that the operative pleading is founded solely on public interest standing does not contradict any allegation in the prior pleading. The gist of the operative pleading is that, *regardless of any beneficial interest that the Association or its members may have in the relief sought,* the Association brings the operative pleading exclusively on public interest grounds.

petitioner is "both plaintiff and defendant in the same litigation." *Id.* That concern is not implicated by the Association's lawsuit.

In *Sacramento Cty. Fire Prot. Dist. v. Sacramento Cty. Assessment Appeals Bd. II*, the Court of Appeal emphasized the "narrowness of [its] holding." 75 Cal. App. 4th 327, 336 (1999). "All [that the Court] concluded is that a special district, as merely a property tax recipient with no right to appear before the tax assessment board, has no standing to challenge the assessment board's decision to reduce the assessed valuation of a particular piece of property." *Id.* That decision made sense because granting countless entities standing to file separate lawsuits to challenge the valuation of land whenever the entities did not agree with the valuation could lead to an array of lawsuits and threaten "chaos in the tax system." *Id.* at 336. By contrast, granting the Association the relief it seeks would not open the floodgates of litigation. It would instead definitively and comprehensively resolve the Department's systematic and ongoing violation of CESA's five-year status review mandate.

In *Nowlin v. Dep't of Motor Vehicles*, the Court of Appeal denied petitioners public interest standing based on "competing considerations [ ] embodied" in a different statute. 53 Cal. App. 4th 1529, 1538 (1997). Although petitioners in *Nowlin* sought to enjoin the Department of Motor Vehicles from requiring applicants for a driver's license to provide their social security number, *id.* at 1532, legislative history revealed a strong competing interest in locating the whereabouts of errant parents and facilitating child programs and directives. *Id.* at 1538-39. By contrast, the five-year status reviews work in tandem with other provisions of CESA to promote the protection, conservation, and restoration of imperiled species. § 2052. None of the Department's cases support its argument that competing considerations outweigh public interest standing here.

Even if a general concern about administrative and budgetary resources could serve as a competing consideration in a public interest case, it cannot do so in this case. As the Association explained in its Opposition, the Department's declarants had little to no experience conducting five-year status reviews. *See* Ass'n Opp'n at 5:25 n.5. The Department's inflated resource estimates were instead based on 12-month status reviews under Section 2074.6, a different, more resource-intensive status review. *Id.* at 4:14-6:1 (noting, for instance, that the 12-month status

review, unlike a five-year status review, has a peer-review process and requires a final peer reviewed report); Shaffer Dep. 18:4-19:25 (noting that petition evaluations, which are more akin to five-year status reviews, are "not as in depth" as 12-month status reviews). In any event, legitimate resource concerns can be resolved at the remedy stage; they ought not justify the Department's continued violation of law. *See* Ass'n Opp'n at 6:2-8.

The Department also fails to produce any evidence that its employees are working exclusively on mandatory CESA tasks in lieu of the five-year status reviews. The point of a writ of mandate is to ensure that the Department is spending its resources on mandatory tasks rather than discretionary ones. Even to the extent that the Department believes that it is subject to conflicting mandatory duties, it must seek relief from the Legislature. *Steven S. v. Deborah D.*, 127 Cal. App. 4th 319, 326 (2005) ("It is for the Legislature, not the courts, to choose between conflicting public policies."). The Department must follow CESA, regardless of what it thinks of particular provisions. *Marquez v. Medical Bd. of Cal.*, 182 Cal. App. 4th 548, 551 (2010) ("If a statute requires an agency to dot its 'i's' and cross its 't's,' the Legislature's will must be done."). As the Department itself recognizes, it is not free to ignore legislative earmarks even if it believed doing so would further CESA's broader conservation mandate. *See* Dep't Opp'n at 17:9 n.5. The Department should afford Section 2077 the same respect.

II.

THE ASSOCIATION'S INITIAL PETITION DOES NOT CREATE TRIABLE ISSUES OF MATERIAL FACT AND THE ASSOCIATION PLAINLY HAS PUBLIC INTEREST STANDING TO BRING ITS AMENDED PETITION

The Association's initial petition, which alleged that the Association had a beneficial interest in five-year status reviews for some species, does not create a material fact concerning whether the Association has public interest standing now. As the Department acknowledges, the Association's *operative* pleading proceeds only on public interest standing. The Department contends that the Association did not adequately allege its intent to file its petition for the benefit of the public. *See* Dep't Opp'n at 18:10-19:14. Yet intent is irrelevant in determining whether a party has public interest standing. Rather, the proper test is whether a petition "promotes the policy

of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." *Save the Plastic Bag Coal.*, 52 Cal. 4th at 166 (citation omitted). The Association's petition plainly does that by requesting that the Department follow CESA and fulfill its conservation purpose.[4]

The Department also finds it significant that the Association alleged both beneficial interest standing and public interest standing in its initial petition. Dep't Opp'n at 19:7-11.[5] But as *Save the Plastic Bag Coalition* shows, even a petitioner that has a clear beneficial interest in the outcome of the litigation is just as entitled to bring a lawsuit to enforce a public right as anyone else. *Save the Plastic Bag Coal.*, 52 Cal. 4th at 167 (agreeing "with the Court of Appeal that plaintiff's commercial interests were not an impediment to its [public interest] standing here"). The Department is mistaken when it urges this Court to determine whether "this lawsuit was brought for personal rather than public benefit." Dep't Opp'n at 19:9-11. A petitioner can bring its lawsuit for both. The Department is similarly mistaken that "courts should only consider extending public interest standing when a petitioner lacks a beneficial interest in the relief sought." *Id.* at 19:18-19. That contention finds no basis in decades of precedent on public interest standing. *See* Ass'n Opp'n at 9:5-10:13.

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[4] It is proper for Kirk Wilbur to submit a declaration on behalf of the Association even though he did not sign the verified petition. Wilbur declared that he has personal knowledge of the facts based on his declaration. Wilbur Decl. ¶ 1. He is Director of Government Affairs with the Association, has chief responsibility for monitoring the implementation of a number of environmental laws, and regularly interacts with the Association's members as well as government officials, including officials within the Department. *Id.* ¶ 2. This Court should credit Mr. Wilbur's testimony. *See Sheley v. Harrop*, 9 Cal. App. 5th 1147, 1172 (2017) (considering declaration from shareholder and officer of a corporation).

[5] Under the correct construction of the Association's initial petition, the Association alleged that it had beneficial interest standing or public interest standing or both in status reviews for each species. Contrary to the Department's view, the original pleading did *not* allege, and it was never the Association's intention to allege, that the Association or its members were beneficially interested in each and every species for which no timely status review has been completed.

CONCLUSION

The Association's Motion for Summary Judgment should be granted.

DATED: June 22, 2018.

Respectfully submitted,

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By:_____
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DECLARATION OF SERVICE BY MAIL

I, Patricia R. Castillo, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On June 22, 2018, a true copy of the **PETITIONER'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was placed in an envelope addressed to:

Office of the Attorney General
Attn: Phillip M. Hoos
Deputy Attorney General
600 West Broadway, Suite 1800
San Diego, CA 92101-3702

which envelope, with postage thereon fully prepaid, was then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 22nd day of June, 2018, at Sacramento, California.

_____
PATRICIA R. CASTILLO