CENTRAL COAST FOREST ASSOCIATION and BIG CREEK LUMBER COMPANY, Plaintiffs and Respondents, v. CALIFORNIA FISH AND GAME COMMISSION, Defendant and Appellant.

S208181

SUPREME COURT OF CALIFORNIA

2013 CA S. Ct. Briefs 8181; 2013 CA S. Ct. Briefs LEXIS 471

January 23, 2013

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

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

Petition for Appeal

COUNSEL: [*1] James L. Buchal, SBN 258128, Murphy & Buchal LLP, Portland, OR, Atty. for Plaintiffs and Respondents.

TITLE: Petition for Review

TEXT: INTRODUCTION

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

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

ISSUES PRESENTED FOR REVIEW

1. Are the Commission's decisions On listing petitions under CESA akin to judicial decisions as to which the doctrine of *res judicata* applies, such that a petitioner may not, [*2] through the statutory delisting process, advance new evidence to prove any error in an initial listing?

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

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

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

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

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

NECESSITY FOR REVIEW

This case raises important questions of statutory and regulatory interpretation, and review is also required to secure uniformity in the judicial review of petitions presented [*3] to the Commission.

Until the decision below, it was commonly understood, based on the plain language of CESA and numerous decisions thereunder, that review of the Commission's decisions rejecting petitions under the Act pursuant to *§ 2073.5 of the Fish and Game Code* was governed by the "substantial evidence" test and *§ 1094.5 of the Code of Civil Procedure.* Faced with an extraordinarily-meritorious petition to narrow the scope of a "species" to exclude hatchery-maintained populations of coho salmon south of San Francisco-to the benefit of fragile native steelhead and perhaps the wild coho as well-the Court of Appeal overturned its own prior decision in *Natural Resources Defense Council v. Fish and Game Comm'n (1994) 28 Cal.App.4th 1104,* and declared that the Commission's decisions rejecting petitions constituted quasi-legislative action reviewable only under *§ 1085 of the Code of Civil Procedure.* Such review, of course, utilizes only an "arbitrary and capricious" test. The majority's decision not only unsettles the law, but also makes it flatly contrary to the Legislature's express intent, as set forth in *§ 2076 of the Fish and Game Code,* that review should be [*4] governed by the less deferential standards of § 1094.5.

The majority did acknowledge that "substantial evidence" test and § 1094.5 applied to review of the Commission's final decision on petitions it accepted. However, the majority also held these decisions were somehow afflicted with a powerful form of *res judicata* that prevented any petitioner from ever presenting newly-available scientific evidence (or indeed any evidence) demonstrating that the original listing decision was in error. According to the majority, new evidence is foreclosed on any issue considered in the initial listing decision; the only evidence permitted is evidence showing whether or not species numbers and conditions after the listing are improving or getting worse. This extra-statutory limitation is not only contrary to fundamental principles of due process of law, but also seriously interferes with the Legislature's continuing command to revisit listing decisions based on the best available scientific evidence. The majority's procedural innovation left in place a thicket of profoundly unreasonable interpretations of CESA put forth by the Commission, which also raise important questions of public concern [*5] relating to species definition that this Court has never addressed.

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

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

STATEMENT OF THE CASE

Plaintiffs have long been involved in fishery research and propagation activities, n1 and have even won awards for their environmental stewardship, including the prestigious Wildlife Conservation Achievement Award from the California Department of Fish and Game ("Department") in 1995. (AR1/3:727, n2 756, 782) [*6] Their petition to redefine the geographic scope of the coho salmon "species" is perhaps the only endangered species act petition ever presented to the Commission which was supported by a peer-reviewed article in the *Fisheries* journal of the American Fisheries Society. (AR1/3:899-917.)

n1 *See also Wall Street Journal*, "Even a Logger Praised As Sensitive to Ecology Faces Bitter Opposition", April 1, 1993; *Santa Cruz Weekly*, "Big Creek Lumber Seeks Special Consideration in Salmon Rules," June 19, 2009 (federal fisheries scientist notes that "in Big Creek Lumber's case, self-regulation works").
n2 The certified administrative record for the case consists of four parts. Parts I through III consisted of 12 bound volumes entitled "Administrative Record Concerning Rejection of Petition to Delist Coho South of San Francisco." Part IV of the record, with 13 bound volumes, consists of the certified record concerning the prior listing decision. Parts I through III of the record are cited as "AR1," and Part IV is referred to as "AR2," followed by the volume and page numbers.

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Notwithstanding the peculiar technical arguments invented by the majority, and the even more peculiar positions of the Commission, it was at all times obvious that the petition demonstrated at least that species redefinition "may be warranted" for purposes of requiring further review of its claims. Instead of giving the petition full review, the Commission sought to lock California into continuing a century of failure to establish self-sustaining coho populations south of San Francisco by artificial propagation, arguing in effect that once a hatchery was established, no matter how foolish or counterproductive it might be, the fish in it had to be protected as listed species, without regard to any further evidence presented by a petitioner. The Commission's position, and that of the majority, lacks any basis in law or policy.

A. Legal Background

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

> "native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant which is in serious danger of becoming [*8] extinct throughout all, or a significant portion, of its range due to one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, or disease."

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

The Act prohibits the "take" of any endangered or threatened species, *id* § 2080, with "take" defined as to "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill." *Id.* § 86.

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

If the Commission determines that the petition provides sufficient information, [*9] the matter is referred back to the Department, which must then recommend within 12 months whether the petitioned action, in light of the best available scientific information, is warranted. *See id.* § 2074.6. Upon receipt of the Department's recommendation, the Commission must then make the final determination whether to proceed with the petitioned action. *Id.* § 2075.5. If the Commission determines that the petitioned listing or de-listing is warranted, it must then issue a notice of proposed rulemaking in anticipation of the adoption of a regulation listing or de-listing the species. *See id.* § 2075.5(2).

B. Procedural history

As the majority emphasized, the Commission had initially listed coho salmon south of San Francisco in 1995 as a "species" on the basis of a status report by the Department which concluded:

> "These southernmost populations experience and respond to the unfavorable, adverse environmental conditions associated with the fringe of any distribution. In such areas, environmental conditions can become marginal, harsh or extreme for coho survival and, *presumably*, these southernmost populations have adapted to the less-than-optimal environments. [*10] " (*Quoted in* ROA:563; BX10, n3 at 47; emphasis added.)

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

> n3 The Commission designated the Superior Court file as the Record on Appeal. References to that record are designated as "ROA," followed by the page number. Because of potential page numbering problems with the Record on Appeal, we include a parallel cite to the primary factual submission before the Superior Court, exhibits to the Declaration of James L. Buchal ("BX"), where appropriate.

By 2002, the Commission had completed a second status report which also proceeded on the false premise that the native range of coho salmon extended below San Francisco. It appears that the [*11] Commission did not get around to implementing the 2002 status review until August 2004. *See California Forestry Ass'n v. California Fish & Game Comm'n (2007) 156 Cal.App.4th 1535, 1544.*

On June 17, 2004, plaintiffs Central Coast Forest Association and Big Creek Lumber Company submitted their Petition to redefine the southern boundary for CESA protection of coho salmon to the Department. (AR1/3:828-896.) Plaintiffs lodged further materials in support of the Petition with the Commission on January 26, 2005 (ROA:517-71; BX10), and on February 3, 2005 lodged the testimony of an independent, certified, Ph.D. fisheries scientist Dr. Victor Kaczynski (AR1/3:785-798).

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

. The streams south of San Francisco frequently have sandbars blocking salmon migration entirely.

. The drier and "flashier" nature of precipitation south of San Francisco has been widely noticed in the scientific literature and is widely recognized to impair coho survival.

. A century of attempts to establish self-sustaining hatchery populations had failed because the coho were repeatedly wiped out by impossible habitat [*12] conditions.

. All available scientific and popular literature prior to the establishment of hatcheries in the early 1900s recognized that coho were not native to the area. n4

. Extensive archeological investigation had failed to identify the presence of coho bones in Native American middens south of San Francisco, though steelhead bones were often found. n5

n4 After the petition was filed, certain dubious specimens of fish, allegedly gathered in 1895, were re-identified as representing coho presence south of San Francisco, an event that does not constitute conclusive, if indeed any, evidence that the fish were native to the area. (*See generally* Plaintiffs and Respondents' Brief at 37-41.)
n5 Scientists would later purport to discover a coho bone in 2006 in the remains of an ancient Native American ocean fishing camp on Ano Nuevo Point, a finding that has no bearing on whether the fish were native. (*See generally* Respondents' Brief at 33-37.)

As a matter of historical accident, [*13] the petition, lodged on June 17, 2004, slightly preceded the Commission's final 2004 decision expanding the coho "species" to a larger unit termed "central coast coho". But the Commission did not address the allegations of the petition in its 2004 final decision; at all relevant times it responded to the petition as representing an entirely separate proceeding.

On March 17, 2005, the Commission issued written findings rejecting the Petition. (AR1/3:810-815.) The Commission declared that "all recent genetic analyses support the genetic distinctiveness of coho salmon from [creeks south of San Francisco]" (AR1/3:814) and did not offer any suggestion that it was without legal power to grant the petition. Nor did the Commission argue that plaintiffs should have presented such evidence as was contained in the initial petition (or indeed any subsequent evidence) exclusively during the 1995 or 2004 rulemaking processes.

In response to the Commission's rejection of the petition, plaintiffs filed their initial suit on December 5, 2005. On September 26, 2006, the Superior Court overturned the Commission's rejection of the Petition. *Central Coast Forest Association and Big Creek Lumber Company* [*14] *v. California Fish & Game Commission*, Case No. 05CS01617 (Sac. Cty. Sept. 22, 2006). On November 22, 2006, the Superior Court issued a writ of mandate to the Commission directing it to reconsider its rejection of the Petition. The Commission did not appeal the decision.

In connection with the Commission's renewed consideration, plaintiffs supplemented the petition with substantial hew expert analyses of "the most up-to-date and reliable survival data". (ROA206: BX34, at 17.) By this time, it had become apparent that the Department's own estimates of coho freshwater and ocean survival proved that no self-sustaining populations could persist in the area. (AR1/3:973-975; *see generally* petitioner's Opening Brief at 15-19 (reviewing evidence).) Plaintiffs' research efforts culminated in an August 2006 article in *Fisheries* magazine, a peer-reviewed publication of the American Fisheries Society, which supported the allegations of the petition, and was also lodged in support of the petition. (ROA633-50. n6)

n6 The Commission's bias against the petition was further demonstrated by its shocking finding that the

peer-reviewed publication failed to provide any "credible information . . . upon which a reasonable person would rely". (AR1/4:1223; *see also* ROA: 1013-14 (Superior Court cites this as evidence of the Commission's failure to apply the appropriate legal standard in reviewing the evidence advanced in the Petition).)

[*15]

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

After an extraordinarily unfair process n7 that even involved the unlawful destruction of documents (as detailed at pp. 7-10 of plaintiffs' opening brief before the Court of Appeals), the Commission held that "the Petition to delist Coho Salmon South of San Francisco does not provide sufficient information to indicate that the petitioned action may be warranted [and] denied the petition". (Supplemental Return to the Writ, March 8, 2007.)

n7 As several federal district courts have explained, "those petitions that are meritorious on their face should not be subject to refutation by information and views provided by selected third parties solicited by FWS [the U.S. Fish and Wildlife Service]". *Center for Biological Diversity v. Morgenweck, 351 F. Supp.2d 1137, 1143 (D. Colo. 2004); see also Colorado River Cutthroat Trout v. Kempthorne, 448 F. Supp.2d 170, 175-77 (D.D.C. 2006)* (setting aside rejection of petition because the Service "solicited information from limited outside sources"); *see also Western Watersheds Project v. Hall, 2007 WL 2790404,* *6 (D. Idaho 2007).

[*16]

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

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

This time, the Commission appealed. Following the completion [*17] of briefing, the Court of Appeals invented *sua sponte* a new and even more far-reaching defense: that once any listing was made, doctrines of *res judicata* meant that the only lawful basis on which it ever might be changed was a change in the status of the species once defined. The majority even overruled the Third Appellate Districts's own prior case invoking *§ 1094.5 of the Code of Civil Procedure* to applying a "substantial evidence" test to the rejection of CESA petitions at the threshold stage of review.

REASONS FOR GRANTING REVIEW

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

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

Until the decision below, it was well-established that review of both the initial decision concerning the sufficiency of a petition, and the ultimate listing decision based on the petition, both proceeded under *§ 1094.5 of the Code of Civil Procedure*. Reviewing courts have properly applied the "substantial evidence" test utilized in § 1094.5 cases. *See, e.g., Natural Resources Defense Council v. Fish and Game Comm'n (1994) 28 Cal.App.4th 1104, 1114-17;* [*18] *accord Center for Biological Diversity v. Fish & Game Comm'n (2008) 166 Cal.App.4th 597* (reviewing petition rejection); *see also Center for Biological Diversity v. California Fish and Game Comm'n (2011), 195 Cal.App.4th 128, 132* (reviewing fee award). Specifically, "the standard, at this threshold in the listing process, requires only that a substantial possibility of listing could be found by an objective, reasonable observer." *Center for Biological Diversity, 166 Cal.App.4th at 611*.

The Court of Appeals, however, reasoned that the Commission's threshold factual review of a petition was a "quasi-legislative action of the Commission" (slip op. at 12), apparently because the final listing decisions are set forth in a rule, and appeared to suggest that review of the Commission's decision was by ordinary mandamus pursuant to *§ 1085 of the Code of Civil Procedure* (*id.* at 13). But no California court reviewing a CESA decision has ever employed the highly-deferential "arbitrary and capricious" test which is utilized in § 1085 cases. *See generally American Coatings Ass'n v. South Coast Air Quality Management (2012) 54 Cal.4th 446, 461* [*19] (distinguishing "substantial evidence" and "arbitrary and capricious" tests).

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

The majority opinion has it backwards: in rejecting a petition, the Commission makes a specific quasi-judicial decision reviewable under § 1094.5; its final listing decision enacted by quasi-legislative rulemaking would be reviewable under § 1085 but for the Legislature's specific grant of more probing review under § 1094.5. n8

n8 The majority found the Legislature's intent for less deferential review to apply only to the final listing decision because § 2076 refers to § 1094.5 review of findings "pursuant to this section;" the majority interpreted "this section" to mean "the preceding section," which governed final listing decisions. In the Court of Appeal, plaintiffs filed an extensive collection of the legislative history to show that the Legislature had intended to have the heightened standard of review apply to all listing decisions under the Act, and by accident had left § 2076 as self-referential and formally meaningless if read literally, because it was at the last minute chopped out of a larger section that contained both the initial and final listing decisions. *See generally* Respondents' Motion for Judicial Notice, Feb. 24. 2012; Respondents' Supplemental Brief, Feb. 26, 2012, at 8-11.

[*20]

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

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

The majority's decision is contrary to a large body of law holding that issue preclusion can only apply when the

proceedings are "of a sufficiently judicial character." *Murray v. Alaska Airlines, Inc. (2010) 50 Cal.4th 860, 867; see also Y.K.A. Industries, Inc. v. Redevelopment Agency of the City of San Jose (2009) 174 Cal.App.4th 339, 357.* [*21] This Court has explained that:

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

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

The premise of this line of cases is that those bound by quasi-judicial proceedings participate in them, directly or by representation. Serious questions of due process of law arise in holding, as did the majority, that citizens might be legally bound by proceedings of which they may not even have been aware. n9 And even if they did participate, the requisite procedural indicia for *res judicata* discussed above are not present here, in either the procedures for 90-day review of petitions (§ 2074.2), or for final review of accepted petitions (§ 2075.5). [*22] Even the statute concerning final action merely directs the Commission to make findings "[a]t the meeting scheduled pursuant to Section 2075." (§ 2075.5.) There is no testimony given under oath, and no ability to subpoena, call, examine, and cross-examine witnesses-none of the traditional indicia of an evidentiary hearing.

n9 One plaintiff, Big Creek Lumber Company, did participate in coho listing rulemaking.

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

The whole rulemaking design of the statute is based upon the premise that the status of species is not like a set of rights that may be fixed [*23] under existing law; it is a policy decision based on an ever-expanding pool of knowledge concerning species status. Like any rule, a listing decision can and should always be subject to legislative revision in the light of new evidence. This is clear from the design of the statute, to which we now turn.

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

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

> "§ 2070. The commission shall establish a list of endangered species and a list of threatened species. The commission shall add or remove species from either list if it finds, upon the receipt of sufficient scientific information pursuant to this article, that the [*24] action is warranted.
>
> "§ 2071. The commission shall adopt guidelines by which an interested person may petition the

> commission to add a species to, or to remove a species from either the list of endangered or the list of threatened species."

The Legislature's concern is that sufficient scientific information support whichever determination the Commission makes, to list, or delist, and to that end the Legislature gave specific guidance containing the contents of a petition-with the same information relevant to both listing and delisting petitions:

> "§ 2072.3. To be accepted, a petition shall, at a minimum, include sufficient scientific information that a petitioned action may be warranted. Petitions shall include information regarding the population trend, range, distribution, abundance, and life history of a species, the factors affecting the ability of the population to survive and reproduce, the degree and immediacy of the threat, the impact of existing management efforts, suggestions for future management, and the availability and sources of information. The petition shall also include information regarding the kind of habitat necessary for species survival, [*25] a detailed distribution map, and any other factors that the petitioner deems relevant."

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

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

> "An interested person has ample opportunity to tender scientific information to the department for consideration by the department and the Commission during the administrative process leading to a final [listing] decision. *What an interested person may not do is tender new information in a later proceeding that challenges the grounds upon which the initial decision has been* [*26] *rendered.*"

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

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

The Legislature provided no such anti-scientific procedure [*27] for the management of California's wildlife. Rather, citizens can compel the Commission to consider new information by the express remedy in the statute: the petition process. The dissent properly recognized that exclusion of new evidence was not consistent with the language, structure, goals of CESA:

> "The majority opinion is simply wrong in holding judicial finality bars legislative reconsideration. As can be seen, the statute clearly provides for reconsideration of prior listing decisions even when the listing decision is final for purposes of judicial review. The Commission's prior decisions are not irrelevant to a later reconsideration, but neither are they res judicata; otherwise they would undermine the

> statutory structure and policy allowing for revising legislative listing decisions based on new or previously undiscovered scientific knowledge."

(Dissent at 2.)

The majority cited a regulation enacted by the Commission in which the Commission had declared that a species might be delisted only "if the Commission determines that its continued existence is no longer threatened". (Cal. Code. Regs. tit. 14, § 670.1.) The Court of Appeals interpreted this regulation [*28] to embody an overarching command that a petition to delist a species be limited to "events that occur after the listing of the species." (Slip op. at 15.) The Court of Appeals did not explain why new scientific information that became available after the listing of the species was not such an "event". For example, subsequent to the 2004 listing, an extraordinarily extensive study of the genetics of California coho salmon became available which undermined entirely the premise that the coho south of San Francisco were properly considered part of some larger coho ESU. n10 The "continued existence" of.coho south of San Francisco is "no longer threatened" within the meaning of the regulation if the new information shows they had no "continued existence" in the first place.

> n10 In adopting their "ESU" listing policy, federal listing authorities have properly emphasized that genetic information, though the only evidence cited by the majority is of very limited utility in species definition. A full exposition of the significance of the available genetic information concerning coho is beyond the scope of this petition for review.

[*29]

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

It is particularly arbitrary for the Commission now to insist that its authority is artificially limited, when it repeatedly and successfully defended a broad vision of its authority to list groups of animals extending far below the taxonomic or common understanding of the statutory term "native species." It is odd indeed to grant the Commission virtually unlimited power to define any particular group of animals as a "native species," and at the same [*30] time declare that the power once exercised is beyond all challenge or correction no matter what advances in scientific knowledge may arise thereafter. The history of determinations shows the plastic and evolving nature of species definition'. Here, the Commission first identified the coho south of San Francisco in 1995 as a "species," then later determined in 2004 that they were part of a larger "evolutionarily significant unit" that could also be a "species;" and there is every indication that scientific knowledge concerning species definition will continue to evolve.

The majority also repeatedly cites language in the five-year reconsideration provision asking the Commission "to determine if the conditions that led to the original listing are still present". (Slip op. at 10, 14, 16; emphasis deleted.) The Court of Appeals interpreted this language to mean that after a listing, all further consideration was "limited to the 'present' condition of the species" (slip op: at 16), fundamental questions such as whether or not the group of animals even constituted a species could never again be considered. No such limitation appears in the statute. If the Commission were in fact forbidden [*31] from any further consideration of species definition, the coho south of San Francisco would still be their own species. Put another way, if the Commission can lump two species together later on, why can't it split them apart?

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

The majority did not discuss or review the new evidence presented by plaintiffs, brushing off their evidentiary showing with a reference to its subsequent decision affirming the 2004 coho listing in *California Forestry Ass'n v. California Fish & Game Commission (2007) 156 Cal.App.4th 1535* (*CFA*). The Court referred to the "wide discretion" the Commission enjoys in listing determinations, and simply declared the 2004 decision "binding on respondents" n11

> n11 There is a suggestion by the majority that plaintiffs "also challenge the 2004 determination" (slip. op at 17) in these proceedings, but no such relief was ever sought; at all relevant times, plaintiffs have merely sought full and fair consideration of their petition, and judicial review of the Commission's rejection of that petition. *See also* Dissent at 1 (dissent notes that "no complaint or petition was filed in a court challenging the Commission's 1995 and 2004 decisions").

[*32]

As the dissent explained,

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

(Dissent at 2.)

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

First and foremost in importance are the [*33] issues related to species definition. Notwithstanding CESA's limitation to "species," the Commission has previously persuaded the Court of Appeals that it had discretion to list (or not list) any particular subgroup of animals as a "species" within the meaning of the Fish and Game Code by reference to what the Court of Appeals called the Commission's "longstanding adherence to the policy that the CESA allows listings of evolutionarily significant units." *CFA, 156 Cal.App.4th at 1546* (emphasis added). The Court of Appeals held, in substance, that the Commission could follow a federal policy developed to focus administrative discretion in exercising express statutory authority under the federal Endangered Species Act for listing "distinct population segments" of larger species.

Specifically, the federal government has through formal notice and comment procedures, outside any particular listing decision, promulgated what it calls the "evolutionarily significant unit" ("ESU") approach to determining whether any particular group of animals qualifies for protection. The cornerstone of this federal policy is that to list a group of animals as an ESU two findings are required: [*34] "(1) It must be substantially reproductively isolated from other conspecific population units; and (2) It must represent an important component of the evolutionary legacy of the species." *56 Fed. Reg. 58,612, at 58,618.*

Salmon tend to return to their native streams or rivers, but significant straying rates cast doubt upon the first criterion. The primary dispute in this case involves the second criterion. An ephemeral local population that can only persist south of San Francisco with constant hatchery supplementation, because natural habitat conditions inevitably wipe them out, cannot possibly be "an important component of the evolutionary legacy of the species." *See id.* ("if the population became extinct, would this event represent a significant loss to the ecological/genetic diversity of the [entire coho salmon] species?"); *see also id.* at 58, 616 ("loss of isolates . . . would generally not represent an irreversible loss of genetic diversity because most of the genetic diversity . .. would still reside in the parent population"). n12

n12 When Congress was considering whether to give federal regulators ESU listing authority, the General Accounting Office warned that the squirrels in a single park might be listed (*see* S. Rep. No. 96-151, 96th Cong., 1st Sess. 7 (1979)); the federal ESU policy's insistence upon the listed group represent an important component in the evolutionary legacy of the species was intended, in part, to respond to that criticism. NOAA Technical Memorandum, "Definition of "Species" under the Endangered Species Act:

Application to Pacific Salmon" (Mar. 1991)

(http://www.nwfsc.noaa.gov/publications/techmemos/tm194/waples.htm).

There is no indication that the California Legislature ever considered granting the Commission the power to list groups of animals that did not constitute an "entire" species.

[*35]

Before the Court of Appeals in this case, the Commission's brief on one hand asserted that its coho listing decisions were "[p]aralleling the federal approach" (Appellant's Br. at 14). But the Commission also denied entirely that it follows the federal definition of an ESU. (Appellant's Br. at 26 n. 7.) As best plaintiffs can tell, the Commission now articulates the view that an "evolutionarily significant unit" need not be *significant* at all. (*Id.*) This position undermines entirely the Court of Appeal's earlier rationale in the *CFA* case for granting the Commission the power to list groups of animals that may be far less extensive than a "species." n13

n13 Here there are thousands of populations of coho salmon stretching from northern California around the Pacific rim to Siberia, and abundant exemplars of the species can be purchased for a few dollars a pound at any supermarket.

The majority decision is also utterly contrary to the proclamation in the *CFA* case that "the Legislature intended [*36] that 'wild fish,' as opposed to hatchery fish, be protected under the CESA." *CFA, 156 Cal.App.4th at 1552.* A cornerstone of the petition was the demonstration that coho south of San Francisco were only maintained by hatcheries, since it was not their native habitat, and that operation of these hatcheries not only threatened native steelhead (the coho eat them), but also drained recovery resources from self-sustaining coho populations to the north.

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

The Commission's ever-changing views of its listing powers and responsibilities confirm the desperate need for this Court's guidance on the fundamental questions presented. The Commission has never conducted any [*37] formal rulemaking process concerning any of these questions, instead stumbling from listing to listing and articulating arbitrary litigation positions. If the Commission's *ad hoc* decisions once made can never be reconsidered in light of advances in scientific knowledge, the purposes of CESA will be utterly subverted.

CONCLUSION

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

DATED: January 22, 2013.

Respectfully submitted,

/s/ [Signature]
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CERTIFICATE OF COMPLIANCE

Pursuant to *California Rule of Court 8.204(c)(1)*, I hereby certify that the foregoing PETITION FOR REVIEW is proportionately [*38] spaced, has a typeface of 13 points or more, and contains 6,806 words.

DATED: January 22, 2013.

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DECLARATION OF SERVICE BY MAIL

I, Carole Caldwell, declare as follows:

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

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

Cecilia L. Dennis
Deputy Attorney General
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San Francisco, CA 94102-7004

Deborah A. Sivas
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Third Appellate District
914 Capitol Mall
Sacramento, CA 95814

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

which envelopes, with postage thereon [*39] fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Portland, Oregon.

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

/s/ [Signature]
Carole Caldwell

[SEE ATTACHMENTS IN ORIGINAL]