Case No. S217763

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, et al.,
Plaintiffs and Respondents,
v.
CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE,
Defendant and Appellant,

THE NEWHALL LAND AND FARMING COMPANY,
Real Party in Interest and Appellant.

From a Decision by the Court of Appeal
Second Appellate District, Division Five
Case No. B245131

Reversing the Ruling by the Honorable Ann I. Jones
Los Angeles Superior Court Case No. BS131347

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; *AMICUS CURIAE* BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, THE CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, AND THE SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS IN SUPPORT OF NO PARTY

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APPLICATION TO FILE *AMICI CURIAE* BRIEF

I. INTRODUCTION

Pursuant to California Rules of Court, rule 8.520(f), *amici curiae* the League of California Cities, the California Association of Counties, the California Special Districts Association, and the Southern California Association of Governments (collectively, "*Amici*") respectfully request leave to file the accompanying neutral brief in support of neither Appellants, Respondent nor Real Party in Interest. This application is timely made within 30 days after the filing of the reply brief on the merits.

II. INTEREST OF THE *AMICI CURIAE*

The League of California Cities ("League") is an association of 473 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee ("League Committee"), which is comprised of 24 city attorneys representing all regions of the State. The League Committee monitors litigation of concern to municipalities and identifies cases that are of statewide or nationwide significance. The League Committee has identified this as one such case. The League has served as *amicus curiae* in dozens of matters before this Court and the Courts of Appeal, as well as in the United States Supreme Court and the Ninth Circuit Court of Appeals.

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county

counsels throughout the state. The Litigation Overview Committee ("CSAC Committee") monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The California Special Districts Association ("CSDA") is a California non-profit corporation consisting of in excess of 1,000 special district members throughout California. These special districts provide a wide variety of public services to both suburban and rural communities, including water supply, treatment and distribution; sewage collection and treatment; fire suppression and emergency medical services; recreation and parks; security and police protection; solid waste collection, transfer, recycling and disposal; library; cemetery; mosquito and vector control; road construction and maintenance; pest control and animal control services; and harbor and port services. California special districts regularly participate in the planning, design and construction of critical public infrastructure necessary to provide these vital public services, which public projects require environmental analysis, documentation and mitigation pursuant to the California Environmental Quality Act ("CEQA"). CSDA monitors litigation of concern to its members and identifies those cases that are of statewide significance. CSDA has identified this case as being of such significance in light of its holdings regarding environmental mitigation, exhaustion of administrative remedies, and analysis of climate change issues under CEQA.

The Southern California Association of Governments ("SCAG") is the regional Metropolitan Planning Organization ("MPO") for the six-county region of Los Angeles, Orange, Ventura, Riverside, San Bernardino and Imperial Counties, which includes 197 member cities and counties in the region. As the MPO, SCAG is responsible for preparing and adopting the long-range regional transportation plan ("RTP") for the region. In accordance with state law, the RTP must include a Sustainable

Communities Strategy which sets forth measures and policies to reduce the greenhouse gas ("GHG") emissions from automobiles and light trucks to achieve, if feasible, a GHG emission reduction target approved for the region by the California Air Resources Board. (Gov. Code § 65080 (b)(2)(B).) SCAG monitors litigation of concern to its members, including litigation related to GHG emissions. SCAG has determined that this case is a case affecting all of its member jurisdictions with respect to the matter of lead agencies undertaking a GHG emissions analysis under CEQA. Thus, SCAG joins the other *Amici* with respect to the third issue in the brief regarding the Global Warming Solutions Act.[1]

This case implicates matters of significance to *Amici*. First, *Amici League, CSAC and CSDA* take great interest in whether the Respondent Department of Fish and Wildlife has discretion to approve mitigation measures for fully protected species, which are designed to ensure their survival, individually and as a species, e.g., by moving them out of harm's way. The preservation of such discretion—in compliance with fully protected species laws, the California Endangered Species Act ("CESA"), and the California Environmental Quality Act ("CEQA")—is particularly important to *Amici* as they consider and implement projects that may require mitigation for protected species, including water-supply and water-quality projects that are of great importance as California public agencies grapple with drought and necessary infrastructure improvements. As a trustee for the State's fish and wildlife, Respondent's comments on and proposed mitigation measures for projects cities, counties and special districts consider for approval will be of critical importance.

Second, *Amici League, CSAC and CSDA* seek to ensure preservation

[1] While the other issues are also of interest and importance to SCAG and its members, it takes no official position for purposes of the instant litigation.

of the rule that, to exhaust administrative remedies before a local agency with respect to CEQA issues, a party must object to the project and raise specific alleged grounds of CEQA noncompliance to local agency decision makers during a public comment period or prior to the close of a public hearing regarding the project. The situation at bar is dissimilar to the scenarios typically faced by cities, counties and special districts in that Respondent did not, between release and certification of the Final Environmental Impact Report, have a public forum at which the decision makers publicly considered comments and concerns. Thus, whatever decision the Supreme Court makes in this case, *Amici* seek to ensure that the analysis does not undermine the requirement that parties raise their concerns about environmental quality issues to city, county and special decision makers through the available public fora.

Third, *Amici* take great interest in the implementation of the Global Warming Solutions Act. *Amici* are partners with the State in the implementation of the Act and endeavor to address climate change issues in compliance with the Act and CEQA, which requires the administrative decisions makers to properly exercise their discretion with respect to both implementation of greenhouse gas reduction goals and mitigation of greenhouse gases emissions.

Amici, including their city, county and special district members throughout California, will be directly impacted by the outcome of this case. Accordingly, *Amici*'s perspective on this matter is worthy of the Court's consideration and will assist the Court in deciding this matter. *Amici* have a substantial interest in this case.

Amici's counsel has examined the briefs on file in this case, are familiar with the issues involved and the scope of their presentation, and do not seek to duplicate that briefing. Proposed *Amici* confirm, pursuant to California Rule of Court 8.520(f)(4), that no one and no party other than

proposed *Amici*, and their counsel of record, made any contribution of any kind to assist in preparation of this brief or made any monetary contribution to fund the preparation of the brief.

III. CONCLUSION

The League, CSAC, CSDA and SCAG respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: December 22, 2014 BURKE, WILLIAMS & SORENSEN, LLP

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[2] The CEQA Guidelines are at Title 14 of the California Code of Regulations.

I. INTRODUCTION

Amici address the following issues identified by the Supreme Court (as published on the Court's webpage identifying issues on review):

1. Whether the California Endangered Species Act ("CESA," Fish & G Code § 2050 et seq.) supersedes other statutes that prohibit the taking of "fully protected" species, and allows such a taking if incidental to a mitigation plan under the California Environmental Quality Act ("CEQA," Pub. Resources Code § 21000 et seq.).

2. Whether CEQA restricts judicial review to the claims presented to an agency before the close of the public comment period on a draft environmental impact report.

3. Whether an agency may deviate from CEQA's existing conditions baseline and instead determine the significance of a project's greenhouse gas emissions by reference to a hypothetical higher "business as usual" baseline.[3]

II. DISCUSSION

A. The Court Should Give Great Weight to Respondent's Interpretations of Its Authority Under the Fish & Game Code and CEQA

1. CESA and the Fully Protected Species Laws Charge Respondent with Conserving and Preventing "Takes" of Stickleback Fish

In 1970, the Legislature adopted Fish and Game Code section 5515, which covers "fully protected" species. It provides in pertinent part:

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[3] SCAG joins this brief with respect to the third issue only. While the first and second issues are also of interest and importance to SCAG and its members, it takes no official position for purposes of the instant litigation.

> Except as provided in Section 2081.7 or 2835, **fully protected fish** or parts thereof **may not be taken or possessed at any time. No provision of this code or any other law shall be construed to authorize the issuance of permits or licenses to take any fully protected fish,** and no permits or licenses heretofore issued shall have any force or effect for that purpose. However, the department may authorize the taking of those species for necessary scientific research, including efforts to recover fully protected, threatened, or endangered species. Prior to authorizing the take of any of those species, the department shall make an effort to notify all affected and interested parties to solicit information and comments on the proposed authorization. The notification shall be published in the California Regulatory Notice Register and be made available to each person who has notified the department, in writing, of his or her interest in fully protected species and who has provided an e-mail address, if available, or postal address to the department. Affected and interested parties shall have 30 days after notification is published in the California Regulatory Notice Register to provide any relevant information and comments on the proposed authorization.

(Fish & G Code § 5515(a)(1), emphasis added.)

The Legislature subsequently adopted CESA to implement the State's policy "to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat ...." (Fish & G Code § 2052.) CESA does not provide an absolute prohibition against "taking" endangered or threatened species. Instead, it provides that "[n]o person shall ... take ... any species ... that the commission determines to be an endangered species or a threatened species" except as authorized by CESA or other state statutes. (Fish & G Code § 2080; see also § 2081(b)(1).) CESA also provides that the State shall implement actions (1) to prevent and mitigate the impacts of the "take" of endangered or threatened species

and (2) to conserve listed species. (See, e.g., Fish & G Code § 2069, subdivs. (b) and (c)(1) (re: mitigation measures); § 2061 (re: conservation measures, which include "trapping" and "transplantation").)

Neither the fully protected species laws nor CESA define "take." However, since well before the adoption of these statutes, the Fish and Game Code has defined the term "take" to mean "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill." (Fish & G Code § 86.)

The subject stickleback fish is both (1) a "fully protected" species (pursuant to Fish & G Code § 5515(b)(9)) and (2) an endangered species under CESA (pursuant to 14 Cal. Code Regs. § 670.5(a)(2)(L)). In an effort to comply with both sets of laws, Respondent adopted the Final EIR and approved mitigation measures, pursuant to CEQA, that authorized the trapping and transplantation of stickleback for conservation purposes, i.e., to avoid a "take" that would be caused by development of the project. Thus, the essential issue is the scope of Respondent's authority to determine whether its mitigation measures constitute permissible conservation measures under CESA (and are not themselves a prohibited take), or whether section 5515 proscribes such measures.

2. *Amici* Urge the Court to Preserve Respondent's Discretion to Reasonably Interpret and Apply CESA and the Fully Protected Species Laws

Amici League, CSAC and CSDA write to emphasize the importance of the Court giving great weight to Respondent's analysis, and deferring to its interpretation.

It is well established that the courts afford great weight to state and local agencies' interpretations of legislation they are charged with implementing, particularly when it is a matter within the agency's expertise. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1,

10-14 (describing the continuum of judicial deference to agency interpretations of statutes, including that the courts are guided by the "experience and informed judgment" of the agencies); *Reddell v. California Coastal Com'n* (2009) 180 Cal.App.4th 956, 968 (deference due to Coastal Commission's interpretation of Coastal Act).) Only if "clearly erroneous or unauthorized" do the courts "reject the contemporaneous construction of a statute by an administrative agency charged with its administration and interpretation." (*City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1087, citations and internal quotation marks omitted.)

A central function of California cities, counties and special districts is the consideration of projects to improve public infrastructure—from water, sewer and other utility projects, to transportation, recreation and various other projects. For cities and counties, this core function also includes the consideration of private development projects, including new housing required to support the State's growing population and meet housing development goals established by regional and state agencies. Cities, counties and special districts undertake extensive efforts to comply with their obligations under CEQA, including to consider the potentially significant environmental effects of the projects and to adopt feasible mitigation measures. California cities, counties and special districts depend upon the expertise of myriad resource agencies, including Respondent, to provide comments and mitigation measures regarding the laws and regulations they are charged with administering and interpreting.

Water supply and quality projects have traditionally been among the most important public projects considered by California cities, counties and special districts. Given the current, historic drought as well as the state electorate's adoption of Proposition 1 in November 2014 (which authorizes $7.12 billion in general obligation bonds for water supply projects, among other things), public agencies' consideration of water-related public

projects is of utmost public importance. Similarly, the consideration of private projects and potential impacts to water supply, water quality, and water flora and fauna is of tremendous importance to California cities and counties.

In this context, Respondent is broadly charged under the Fish and Game Code and CEQA with identifying measures that mitigate significant environmental effects and prevent "takes." (See, e.g., Fish & G Code § 1802;[4] CEQA Guidelines § 15097(f);[5] Pub. Resources Code § 21081.6;[6] see also CEQA Guidelines § 15096(g).[7]) Thus, contrary to the case at bar where Respondent actually certified the EIR, in many instances Respondent will act as a trustee agency under CEQA with responsibility for comments and mitigation measures on projects in which cities, counties and special districts will be the lead agency and adopt/certify CEQA documents.

Accordingly, a ruling in this action that narrowly circumscribes Respondent's authority regarding mitigation measures and "take" determinations would have broad ramifications regarding Respondent's authority with respect to projects under consideration by cities, counties and special districts that concern Respondent's role as a trustee. *Amici's*

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[4] Fish and Game Code section 1802 provides: "The department has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species. The department, as trustee for fish and wildlife resources, shall consult with lead and responsible agencies and shall provide, as available, the requisite biological expertise to review and comment upon environmental documents and impacts arising from project activities, as those terms are used in [CEQA]."

[5] Guidelines section 15097(f) governs the submission by trustee agencies (such as Respondent) of mitigation measures to lead agencies.

[6] Public Resources Code section 21081.6(a)(1) governs the adoption by lead agencies of mitigation plans proposed by trustee agencies.

[7] Guidelines section 15096(g) obligates responsible agencies to adopt feasible mitigation measures.

members will be ill-served if Respondent loses its well-deserved discretion to evaluate potentially significant environmental effects and to identify measures to mitigate significant impacts on and avoid "takes" of fish and wildlife.

Moreover, Respondent reasonably exercised its discretion. Subsequent to defining "take" and adopting the fully protected species laws, the Legislature adopted CESA. In section 2061 of the Fish & Game Code, adopted in 1984, the Legislature defined "'conserve,' 'conserving,' and 'conservation'" as including "live trapping, and transplantation," among other "methods and procedures" that protect species. In section 2061, the Legislature also provided that conservation methods and procedures, "in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated *taking*."[8] Thus, the Legislature described live trapping, transplantation and other conservation methods and procedures as distinct from a "taking" (rather than as subsumed within the meaning of a "taking").

Of course, the Legislature is deemed to have been aware of the

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[8] Section 2061 of the Fish & Game Code provides:

> "Conserve," "conserving," and "conservation" mean to use, and the use of, all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. These **methods and procedures** include, but are not limited to, all activities associated with scientific resources management, such as research, census, law enforcement, habitat acquisition, restoration and maintenance, propagation, **live trapping, and transplantation**, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated **taking**. [Emphasis added.]

existing definition of "take" when it adopted section 2061, defining "conservation." (See *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 283 (legislators, whether they are legislative bodies or the voters, are deemed aware of existing law).) Application of other well-known canons of statutory construction—such as ascribing a practical, common sense understanding to the subject terms, giving significance to each word, and harmonizing the words within section 2061 as well as with the statutory definition of "take" and the fully protected species laws—leads to the reasonable conclusion that the subject conservation measures do not constitute a take. (See *Dyna-Med, Inc. v. Fair Employment and Housing Commission* (1987) 43 Cal.3d 1379, 1386-87.)[9] Given that the courts defer to the reasonable interpretations of administrative agencies charged with implementing statutes, this Court should thus defer to Respondent's reasonable interpretation.

To rule otherwise would not only undermine Respondent's interpretive authority, it would have dramatic and problematic implications for future projects, public and private, that *Amici* may undertake. Whether

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[9] As summarized in *Dyna-Med, Inc. v. Fair Employment and Housing Commission* (1987) 43 Cal.3d 1379, 1386-87:

> [A] court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citations.]

an *Amici's* member was considering a private project (such as a "greenfield," as is at issue here) or a public project (such as a water supply or conservation project or a traffic-relieving/greenhouse gas-reducing public transit project), if a fully protected species were encountered, Respondent and the lead agency would be hamstrung with respect to proposing and adopting appropriate conservation measures. They could not utilize measures such as trapping and transplantation that avoid takes to a fully protected species. Instead, worthy projects would unnecessarily be abandoned, or redesigned or "mitigated" at untold expense, even though effective (and cost-effective) conservation measures would have avoided harm to the species. This would be a particularly troubling result with respect to important public projects. The public would either lose the benefits of such public projects (e.g., a water supply or mass transit project that required measures to conserve a fully protected species) or they would pay unnecessary sums for redesign or mitigation that provided no actual benefit to fully protected species.

Accordingly, *Amici* urge this Court to defer to Respondent's discretion reasonably to interpret and apply CESA and the fully protected species laws.

B. This Court Should Hold Steadfast to the Requirement that Parties Exhaust Administrative Remedies By Raising their Concerns to Public Agency Decision Makers During the Available Public Process

1. The Exhaustion Doctrine Requires Parties to Pursue all Available Administrative Remedies and to Raise Each Issue Before Initiating Litigation

This Court has long recognized the critical importance and jurisdictional nature of the exhaustion of administrative remedies doctrine and its preclusion of litigation with respect to issues the plaintiff had not

properly presented to the administrative agency below.

More than 70 years ago, this Court explained that if a plaintiff has not utilized the available administrative procedures, thereby providing the administrative agency an opportunity to reach a final decision on an issue in contention, the plaintiff cannot seek judicial relief on that issue. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 293.)[10]

The exhaustion doctrine advances dual purposes: (1) administrative autonomy (courts should not interfere with agency determinations until the agency has reached a final decision), and (2) judicial efficiency (overworked courts should not intervene until the administrative process is complete, which also provides the courts with the benefits of the analysis and decisions of the agency's final decision makers). (*McAllister v. County of Monterey*, (2007) 147 Cal.App.4th 253, 275.) This ensures that the agency's final decision makers are fully apprised of contentions before litigation is begun, which may render litigation unnecessary or, if litigation ensures, "facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency." (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1137, citations and internal quotation marks omitted.)

The courts have always interpreted CEQA cases to be subject to the exhaustion doctrine; in 1984 the Legislature codified the doctrine in CEQA at section 21177 of the Public Resources Code. (See *California Aviation Council v. County of Amador* (1988) 200 Cal.App.3d 337, 340, 342 (discussing the courts' recognition of the applicability of the doctrine in

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[10] This Court has recognized *Abelleira* as the "seminal California case establishing the exhaustion doctrine." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 84.) *Rojo* also explains that where an administrative remedy is provided by statute, "relief must be sought from the administrative body and such remedy exhausted" before judicial relief respecting that remedy is available. (*Id.* at 83.)

CEQA cases, including by this Court in *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, and the Legislature's codification of the doctrine in 1984, by Stats. 1984, ch. 1514, § 14.)

Section 21177 of the Public Resources Code provides in pertinent part:

> (a) An action or proceeding **shall not be brought** pursuant to Section 21167 **unless the alleged grounds** for noncompliance with this division were presented to the public agency orally or in writing by any person [1] **during the public comment period** provided by this division ***or*** [2] **prior to the close of the public hearing** on the project before the issuance of the notice of determination
>
> * * *
>
> (e) This section **does not apply** to any alleged grounds for noncompliance with this division **for which there was no public hearing or other opportunity for members of the public to raise those objections** orally or in writing **prior to the approval of the project**, or if the public agency failed to give the notice required by law.
>
> * * *
> [Emphasis added]

As this Court has explained, subdivisions (a) and (e) work together to preclude litigation if the contentions sought to be litigated were either not made during (1) a public comment period required by CEQA or (2) a public hearing or other opportunity to raise those objections. (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 291 (challenge to County's reliance on a categorical exemption was barred by challengers' failure to raise this objection prior to the close of a public hearing before the Board of Supervisors on the matter).)

2. *Amici* Urge this Court to Preserve the Requirement that

Parties Raise their Objections to the Agency's Final Decision Makers During the Available Public Process

Amici League, CSAC and SCAG emphasize the continued importance of the latter issue identified in *Tomlinson*, issue no. 2. Whereas Respondent's approval of the Final EIR did not take place at a public meeting, cities, counties and special districts regularly make CEQA decisions after public hearings or at public meetings where interested persons may raise their concerns, including through invocation of an administrative remedy.

A brief review of several key CEQA cases involving cities and counties demonstrates the courts' consistent application of the exhaustion doctrine under such circumstances.

First, it is well established that, if an agency's regulations authorize an administrative appeal to the agency's final decision makers, litigation of the claim is barred if a challenger does not utilize that procedure. For example, in *Sea & Sage Audubon Society, Inc. v. Planning Commission*, challengers to a project appeared at a City Council to assert that the Planning Commission's certification of an EIR was erroneous. The certification of the EIR was on the City Council's consent calendar for approval. But the challengers had not filed an administrative appeal to the City Council. Thus, even though they had appeared before the City Council and raised their concerns, the challengers had not exhausted their administrative remedies by utilizing the available procedures. (*Sea & Sage Audubon Society, Inc. v. Planning Commission* (1983) 34 Cal.3d 412, 417-20; accord *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1445, 1447, 1450 (even though plaintiffs opposed development project before Town Council, the CEQA claims were barred because they did not formally appeal Planning Commission approval).)

Second, even if a challenger pursued an available administrative

appeal (or an appeal was not authorized or required), if the precise issue was not raised to the agency's final decision makers during the administrative process, the challenger is precluded from litigating the claim. For example, in *Tahoe Vista Concerned Citizens v. County of Placer*, the challengers had filed an administrative appeal of the Planning Commission's approval of a use permit. But they did not assert in the administrative appeal that an EIR was required. Thus, even though they had invoked the available procedures, they failed to exhaust administrative remedies by informing the Board of Supervisors of their specific contention. (*Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 588-89.)

Other cases are in accord. In *Citizens for Responsible Equitable Environmental Development v. City of San Diego*, the challengers alleged that an addendum to an EIR violated CEQA by failing to adequately address water supply issues. But the plaintiff had not raised "the exact issue" it sought to litigate prior to the closure of the noticed public hearing before the City Council. Instead, the plaintiff had only asserted that the city had improperly approved a water supply assessment without public review. The plaintiff had thus not exhausted administrative remedies. (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 521, 528; accord *North Coast Rivers Alliance v. Marin Municipal Water District Board of Directors* (2013) 216 Cal.App.4th 614, 621, 631-32 (issue regarding whether siting a water tank in a specific location was consistent with the County of Marin's Countywide Plan had not specifically been raised to the Water District's Board of Directors before it acted, following public hearings; exhaustion doctrine thus barred claim); compare *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1393-96 (the plaintiffs sufficiently raised the "exact issues" sought to be litigated prior to action by

the City Council at a public meeting, including, for example, through by correspondence complaining about increased shadows caused by higher buildings).)

Accordingly, whatever decision the Court makes in the current proceeding, it should not cast doubt on the continued applicability of the exhaustion doctrine to situations in which the challengers had an opportunity to raise their concerns to the agency's final decision makers during a public comment period or at public hearing or other public forum. This will ensure that the exhaustion doctrine continues to preserve judicial resources and provides administrative agencies and the courts with complete administrative records and the benefits and analysis of the agencies' final decision makers.

C. The Global Warming Solutions Act and CEQA Afford Agencies Discretion to Determine How to Meet Greenhouse Gas Reduction Goals to Evaluate Potentially Significant Impacts

1. The Global Warming Solutions Act and the California Air Resources Board's Scoping Plan Establish Targets for Reducing Greenhouse Gases, but they Do Not Mandate Local Agencies to Take Particular Land Use Actions

The Global Warming Solutions Act of 2006 (Health & Saf. Code § 38500 et seq., the "Global Warming Act" or "AB 32") sets forth the State Legislature's plan for addressing climate change. The legislation directed the California Air Resources Board ("CARB") (a) to "determine what the statewide greenhouse gas emissions level was in 1990" and (b) to adopt "a statewide greenhouse gas emissions limit that is equivalent to that level, to be achieved by 2020." (Health & Saf. Code § 38550.) The Global Warming Act further mandates that CARB adopt "a scoping plan ... for achieving the maximum technologically feasible and cost-effective reduction in greenhouse gas emissions from sources or categories of

sources of greenhouse gases by 2020 ...." (Health & Saf. Code § 38561(a).)

In December 2007, CARB determined that the 1990 emissions level, and thus the 2020 limit, was 427 million metric tons of greenhouse gases. (*Association of Irritated Residents v. California Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1490 fn. 2; see also Scoping Plan, p. 5 [http://www.arb.ca.gov/cc/scopingplan/document/adopted_scoping_plan.pdf, accessed November 15, 2014].)[11]

In December 2008, CARB adopted a Climate Change Scoping Plan ("Scoping Plan"), which proposed a comprehensive set of measures to facilitate the reduction of greenhouse gas emissions, by 2020, to the 1990 level of 427 million metric tons of greenhouse gases. (*Association of Irritated Residents*, 206 Cal.App.4th at 1490, 1496-97; see also Slip. Opinion, pp. 93-94.) CARB estimated that without implementation of the Scoping Plan—the "business-as-usual" scenario—the emissions level in 2020 would be 596 million metric tons of greenhouse gases. (*Association of Irritated Residents*, 206 Cal.App.4th at 1496-97; see also Scoping Plan, pp. 12, 20, 21.) CARB calculated the delta between (1) greenhouse gas emissions projected in 2020 under the "business-as-usual" scenario, and (2) greenhouse gas emissions that will be achieved if the Scoping Plan measures are implemented by 2020. (*Association of Irritated Residents*, 206 Cal.App.4th at 1496-97.) CARB projected that under a business-as-usual scenario the emissions level in 2020 would be 596 million metric tons of greenhouse gas emissions, but that with implementation of the Scoping Plan Measures, the emissions would be 422 million metric tons (which is below the 427 million metric tons level of 1990), a reduction of 174 million metric tons. (*Association of Irritated Residents*, 206 Cal.App.4th at 1496-

[11] Greenhouse gases are measured and described as million metric tons of carbon dioxide equivalent, or "$MMTCO_2E$." (*Ibid.*; see also Scoping Plan, p. 5.)

97; see also Scoping Plan, p. 21.)

CARB also described this reduction to 1990 levels, from the business-as-usual scenario, in terms of a percentage reduction. As summarized in the 2008 Scoping Plan, "[r]educing greenhouse gas emissions to 1990 levels means cutting approximately 30 percent from business-as-usual emission levels projected for 2020, or about 15 percent from today's levels." (Scoping Plan, p. ES-1; see also p. 12.)

The Scoping Plan explains that the majority of the reduction in greenhouse gas emissions (146.7 million metric tons) requires direct regulation and price controls, e.g., with respect to sectors of the California economy for which the State will impose emissions limits and will establish a cap-and-trade program. (Scoping Plan, pp. 15-16; see also Figure 3 at p. 21.) The balance of the reduction (27.3 million metric tons) will be achieved through measures imposed on uncapped segments of the California economy. (Scoping Plan, pp. 15-16; see also Figure 3 at p. 21.)

The Scoping Plan describes the measures to achieve this reduction by 2020 of 30% from the business-as-usual projection, including adopting cap-and-trade programs for electrical generating and industrial facilities (pp. 30-38), imposing fuel efficiency standards for vehicles (pp. 38-41), maximizing efficiency standards for buildings and appliances (pp. 41-46), expanding the use of green building practices, including for both new construction and modifying operations and renovating existing structures (pp. 57- 59).

The Scoping Plan identifies local governments as "essential partners in achieving California's goals to reduce greenhouse gas emissions." (Scoping Plan, p. 26.) But the Scoping Plan does not mandate any particular measure, e.g., with respect to land use decisions, that local governments must implement to support the State's plan to reduce greenhouse gas emissions by 30 percent from the business-as-usual target.

Rather, the Scoping Plan recognizes that local governments retain "primary authority to plan, zone, approve, and permit how and where land is developed to accommodate population growth and the changing needs of their jurisdictions." (Scoping Plan, p. 27.) In addition, the Scoping Plan describes protocols and processes, e.g., for tracking the greenhouse gas emission reduction efforts and for transportation planning, that will assist in evaluating and meeting the Global Warming Act goals. (Scoping Plan, p. 27; see also p. ES-1, -2 (encouraging local governments to adopt "21st century land use planning and development practices").)[12]

2. CEQA Allows Lead Agencies Discretion when Assessing the Significance of Environmental Effects Related to Greenhouse Gas

In March 2010, the California Natural Resources Agency adopted section 15604.4 of the CEQA Guidelines to address greenhouse gas emissions. (See *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 335 ("*CREED v. City of Chula Vista*").)

CEQA Guidelines section 15064.4 directs lead agencies to consider several factors relative to greenhouse gas emissions, but it does not mandate any particular method of analysis, including with respect to the adoption of any particular threshold of significance. Section 15064.4, subdivision (b), provides:

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[12] The Scoping Plan also recommends local government reduce greenhouse gas emissions by 15 percent from 2008 levels to match the State's reduction target. (Scoping Plan, p. ES-5.) Similarly, subsequent to the adoption of the Scoping Plan, SB 375 (Steinberg) became law in January 2009 and called for an integrated regional land use and transportation planning approach to reduce greenhouse gas emissions from automobiles and light trucks, principally by reducing vehicle miles traveled. (See, e.g., Gov. Code § 65080(b)(2).)

(b) A lead agency should consider the following factors, among others, when assessing the significance of impacts from greenhouse gas emissions on the environment:

(1) **The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting;**

(2) Whether the **project emissions exceed a threshold of significance that the lead agency determines applies to the project.**

(3) **The extent to which the project complies with regulations or requirements adopted to implement a statewide**, regional, or local plan for the reduction or mitigation of greenhouse gas emissions. Such requirements must be adopted by the relevant public agency through a public review process and must reduce or mitigate the project's incremental contribution of greenhouse gas emissions. If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding compliance with the adopted regulations or requirements, an EIR must be prepared for the project."

In addition, in subdivision (a), CEQA Guidelines section 15064.4 reserves local agency discretion to determine whether to "[u]se a model or methodology to quantify greenhouse gas emissions resulting from a project, and which model or methodology to use," and whether to "[r]ely on a qualitative analysis or performance based standards." (CEQA Guidelines § 15064.4(a).)

Thus, subdivisions (a) and (b) of section 15064.4 unequivocally reserve to lead agencies the discretion to select a threshold of significance and to determine how to measure the potentially significant environmental impacts of greenhouse gas emissions related to a project. In addition, subdivision (b) of section 15064.4 provides that determining whether the

project has a potentially significant effect is not as simple as answering whether that threshold is exceeded. Rather, in addition to the threshold exceedance analysis (per subdivision (b)(2)), the lead agency *should* consider the extent to which greenhouse gas emissions increase or decrease compared to the existing setting and the extent to which the project complies with statewide, regional or local regulations or requirements for reducing greenhouse gases (subdivisions (b)(1) and (b)(2).)

To be sure, a component of the lead agency's analysis "should consider" the magnitude of the increase in greenhouse gas emissions caused by a project "as compared to the existing environmental setting." (CEQA Guidelines § 15064.4(b)(1).) This analysis typically involves the evaluation of the "baseline" conditions at the time the lead agency considers the project. As explained in in the CEQA Guidelines:

> An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.

(CEQA Guidelines § 15125(a).)

The purpose of this requirement is to provide "the public and decision makers the most accurate picture practically possible of the project's likely impacts" when they compare the pre- and post-project conditions. (*Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, 449.) Often, where environmental effects are quantifiable, the analysis of environmental effects will involve a measurement of the baseline conditions to the project conditions, with a numerical threshold. (See, e.g., *Communities for a Better Environment v.*

South Coast Air Quality Management Dist. (2010) 48 Cal.4th 310, 317 fn. 2 (numerical threshold of significance for nitrogen oxides).)

But CEQA does not create a hard and fast rule. Agencies have discretion regarding the adoption of thresholds of significance. (See *ibid.*, discussing CEQA Guidelines § 15064.7(a); *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 896 (section 15064.7 "does not *require* a public agency to adopt such significance thresholds, ... and it does not forbid an agency to rely on standards developed for a particular project"; italics in original).) In addition, as explained by the Supreme Court, a lead agency may even consider an anticipated, future setting as the baseline conditions if comparing the impacts of the project, when it goes on line, to such future baseline setting will give the public and decision makers a better picture of the impacts of the project. (*Neighbors for Smart Rail,* 57 Cal.4th at 452.)

Turning back to section 15064.4, it provides that lead agencies "should" compare the level of greenhouse gas emissions under the "existing environmental setting" and under the project conditions. (Guidelines § 15064.4(b)(1).) But it does not provide that this analysis should be the basis for a threshold of significance analysis. Indeed, the section reserves lead agency discretion to establish an applicable threshold of significance. (Guidelines § 15064.4(b)(2).) In any event, Appellants' claim is not that Respondent failed to consider the existing conditions (i.e., baseline) and the project conditions. Rather, Appellants claim that with respect to the "business-as-usual" analysis, Respondent was obligated to utilize the existing conditions for purposes of determining whether the project was consistent with the goals of the Global Warming Act, as discussed next.

3. The Court Should Affirm that Agencies Approving Land Use Projects Have Discretion with Respect to Greenhouse Gas Analysis

Here, Respondent adopted the following threshold of significance: "'Will the proposed [project's] [greenhouse gas] emissions impede compliance with the [greenhouse gas] emission reductions mandated in [the global warming act]?'" (Slip Opinion, p. 105.)[13]

The parties dispute whether Respondent properly utilized a "business-as-usual" approach to this analysis. Under Respondent's methodology, Respondent considered the "business-as-usual" scenario assuming an approval that did not include environmental safeguards or measures designed to reduce greenhouse gas emissions. Under this scenario, the project would generate approximately 390,046 tons of greenhouse gases annually. But the project as approved would result in the generation of approximately 269,000 metric tons of greenhouse gases annually—a reduction of 31%. Thus, Respondent concluded, the project did not trigger Respondent's threshold of significance because it furthers and does not impede the goals of the Global Warming Act. (Slip Op., p. 102.)

Appellants contend this methodology is unlawful. They assert that Respondent was required to consider business as usual to be the roughly 10,272 tons of greenhouse gas emissions generated at the site currently. Appellants equate this approach to the traditional "baseline" approach utilized for comparing project impacts to existing conditions, as discussed in *Neighbors for Smart Rail*, *Communities for a Better Environment* and other cases.

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[13] Respondent also considered the "emissions deferential" between the existing conditions and the project conditions. (Slip. Opinion, p. 105.) However, that analysis was distinct from the threshold of significance analysis.

However, whether Respondent's greenhouse gas analysis complied with CEQA is not simply resolved by application of traditional baseline principles, as articulated in precedents such as *Neighbors for Smart Rail* and *Communities for a Better Environment.* In those cases, this Court analyzed whether the lead agency had discretion to consider expected future conditions as the baseline environmental setting (e.g., anticipated conditions when the subject project went on line) and whether the current, existing baseline setting constituted *actual* conditions or *possible* conditions (e.g., if an oil refinery were operating at its permitted full capacity).

Here, by contrast, the Global Warming Act and CARB's Scoping Plan generally describe measures to be taken by state and local agencies that are expected collectively to lead to a reduction of greenhouse gas emissions to 1990 levels. The measures do not mandate that agencies reject development projects or take other measures that would prevent new uses and activities from generating greenhouse gases. Rather, they anticipate that by imposing new regulatory and project approval requirements, for example, the conditions in 2020 will resemble 1990, at least with respect to greenhouse gas emission levels.[14] Indeed, CARB's business-as-usual projection of 596 million metric tons by 2020 is premised on the assertion that development would occur without the Scoping Plan measures, not that no new development would occur.

If Appellants were correct that CEQA mandates lead agencies to compare the existing setting to the project conditions in order to measure global warming impacts, it could undermine the reasons and rationales for

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[14] As an analogy, consider that the Global Warming Solutions Act does not require fewer automobiles or fewer driving hours. Rather, it prescribes the development of more fuel-efficient vehicle standards, among other measures, that will lead to a reduction in greenhouse gases emitted by automobiles.

adopting the measures described in the Scoping Plan.[15] A chief objective of the Global Warming Act and the Scoping Plan is to change behavior in a manner that leads to reduced greenhouse gases. Under the methodology adopted by Respondent, lead agencies appropriately retain the discretion to adopt generally-applicable regulations and to impose project-specific requirements that lead to a reduction in emissions generated by alternative versions of a project, thereby encouraging a more environmentally sound approval.

On the other hand, Appellants' position would profoundly disincentivize so-called "greenfield" projects from achieving more environmentally sound project features because, rather than consider alternative projects, the agency always would consider the existing conditions and the proposed project. Where the comparison is undeveloped land to developed land, it would surely be impossible to approve any version of the project that would meet Global Warming Act objectives. Thus, agencies may be compelled to choose between rejection of the project and the approval with a statement of overriding considerations, rather than explore environmentally superior versions of the project which would reduce the project's greenhouse gas emissions.

In short, Appellants' position requiring agencies to compare project emissions to existing conditions in every case would impede CEQA's (and the Global Warming Act's) goals to provide information that will assist the public and the agency decision makers with respect to greenhouse gas emissions and whether to deny or approve a project (or an alternative), and if to approve, under what conditions and with what mitigation measures.

Indeed, two courts of appeal have approved greenhouse gas

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[15] *Amici* do not mean to suggest that lead agencies may not employ the methodology proposed by Appellants, only that they are not mandated to do so.

emissions analyses that are consistent with Respondent's analysis. In *CREED v. City of Chula Vista*, the Fourth District evaluated the analysis in a Mitigated Negative Declaration for a replacement Target store. The Mitigated Negative Declaration described the "business-as-usual" emissions for both the existing Target store the proposed store. Emissions would increase if the new store were constructed under a "business-as-usual" scenario. "However, through the implementation of energy saving measures, the operational greenhouse gas emissions for the proposed store" would be reduced by 2,956 tons compared to 10,337 tons emitted by a version of the proposed store without such measures. "This amounts to a 29 percent reduction from business as usual" and thus furthered the goals of Global Warming Act. (*CREED v. City of Chula Vista*, 197 Cal.App.4th at 335.)

In *North Coast Rivers Alliance,* the First District considered a challenge to the approval of a desalination plant. The respondent water district adopted a threshold of significance that is comparable to a business-as-usual approach, to wit: "whether the Project would interfere with the County's goal of reducing GHG emissions to 15 percent below the 1990 levels by 2020." (*North Coast Rivers Alliance,* 216 Cal.App.4th at 651.) The EIR analyzed existing conditions, project conditions, and cumulative conditions, and it explained the analytical route to the conclusion that "the Project would not interfere with achieving a 15 percent reduction in countywide GHG emissions, compared to 1990 levels, by 2020." (*Id.* at 652.) The First District held that this good faith analysis satisfied CEQA. (*Ibid.*) Moreover, the Court noted that the adoption of operations systems (e.g., high efficiency pumps and advanced energy recovery systems) supported the goal of reducing emissions. (*Ibid.*) The Court did not fault the respondent water district for not expressly determining whether the project's emissions were greater than the existing, or baseline, emissions—

the analysis that Appellants assert is required. (See *ibid.*)

Thus, the First District and Fourth Districts have deferred to administrative agencies' reasoned analysis regarding how a project (which includes features designed to minimize greenhouse gas emissions) advances the goal to reduce greenhouse gases.

Moreover, administrative agencies are best situated to make discretionary decisions regarding the adoption of appropriate methodologies and thresholds of significance. (See, e.g., *National Parks and Conservation Ass'n v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1353 (administrative agencies are best situated to determine "the appropriate methodology for studying an impact," and the courts' review is thus "limited to whether the agency's reasons for proceeding as it did are supported by substantial evidence;" citations and internal quotation marks omitted); *Oakland Heritage Alliance,* 195 Cal.App.4th at 896 (CEQA does not mandate particular thresholds of significance).) As this Court has recognized, the judiciary has "neither the resources nor the scientific expertise" to determine whether a public agency's or a challenger's analyses or conclusions are sounder. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393.) Rather, the purpose of CEQA is to "to compel government at all levels to make decisions with environmental consequences in mind" (*ibid.*), not to compel results or to "substitute [the courts'] judgment for that of the people and their local representatives." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.)

Accordingly, irrespective of whether this Court finds Respondent properly analyzed greenhouse gas emissions with respect to the subject project, *Amici* urge this Court to recognize that lead agencies must have discretion to adopt and apply appropriate thresholds of significance. For some local agencies, that may mean the adoption of thresholds of

significance and methodologies that are consistent with those employed by Respondent. For other local agencies, it may mean the adoption of a threshold of significance and methodology that comports with Appellants' views. But the bottom line is that the Global Warming Act and CEQA do not mandate that all lead agencies adopt a single solution, but that they instead utilize a variety of measures to combat global warming and retain local discretion in assessing the environmental air quality impacts associated with a project.

III. CONCLUSION

Amici League of California Cities, California State Association of Counties, the California Special Districts Association, and the Southern California Association of Governments respectfully request that this Court consider their perspectives as it considers the issues presented in this case.

Dated: December 22, 2014 BURKE, WILLIAMS & SORENSEN, LLP

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CERTIFICATE OF COMPLIANCE

California Rules of Court 8.204(c)

Pursuant to California Rules of Court 8.204(c), I certify that the foregoing **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, THE CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, AND THE SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS IN SUPPORT OF NO PARTY** was produced on a computer and contains 6,928 words, including footnotes, according to the word count of the computer program used to prepare the Answer.

Executed on December 22, 2014, at Oakland, California

Kevin D Siegel

KEVIN D. SIEGEL

PROOF OF SERVICE

I, CELESTINE SEALS, declare that I am over the age of eighteen years and not a party to the within-entitled action. I am a citizen of the United States and am employed by Burke, Williams & Sorensen, LLP, whose business address is 1901 Harrison Street, Suite 900, Oakland, California 94612-3501.

On December 23, 2014, I served the foregoing document entitled:

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; *AMICUS CURIAE* BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, THE CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, AND THE SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS IN SUPPORT OF NO PARTY

on the parties on the attached Service List.

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it is deposited with the U.S. Postal Service on the same day it is collected with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I served the above-listed document by placing a true and correct copy of same in a sealed envelope for collection and mailing with postage thereon fully prepaid, in the United States mail at Oakland, California. addressed as set forth on the attached Service List.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 23, 2014, at Oakland, California.

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