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March 25, 2008

Via Hand Delivery

Administrative Presiding Justice William R. McGuiness
Court of Appeal
First Appellate District, Division Three
350 McAllister Street
San Francisco, California 94102-3600

Re: Center for Biological Diversity, Inc., et al. v.
FPL Group, Inc., et al.
Court of Appeal Case No. A116362

Dear Justice McGuiness:

In response to the Court's January 31, 2008 order, Defendants and Respondents GREP Bay Area Holdings, LLC, AES SeaWest, Inc. (formerly SeaWest WindPower, Inc.), and enXco, Inc. hereby submit responses to the Court's requests and inquiries regarding the doctrines of abstention and primary jurisdiction, as well as the requirements relating to necessary and indispensable parties:

JUDICIAL ABSTENTION IS APPROPRIATE

The doctrine of judicial abstention should be applied in this case which seeks to balance two legitimate but competing environmental goals, each of which is specifically codified by statute, namely, renewable energy production and mitigation of attendant avian impacts. Abstention is appropriate, as set forth below, because this lawsuit asks a court of equity to assume the role of an administrative agency.

I. The Legislature Requires Increased Wind Energy Production.

Wind energy produces none of the toxic emissions of conventional energy sources. As the California Legislature found and declared:

> Wind energy is an abundant, renewable, and nonpolluting energy resource. When converted to electricity, it reduces our dependence on nonrenewable energy resources and reduces air and water pollution that result from conventional sources.

Gov. Code § 65892.13(a)(2) (inoperative July 1, 2005; repealed January 1, 2006).

The continued development of California's wind energy resources has become one of the Legislature's central goals. In 2002, for instance, the Legislature passed the California Renewables Portfolio Standard Program requiring California retail sellers of electricity to purchase a specified minimum percentage of electricity generated by renewable energy resources in any given year. *See* Pub. Util. Code § 399.11, Stats 2002 ch 516 (SB 1078). The Legislature specifically underscored the fact that "[t]he development of renewable energy resources may ameliorate air quality problems throughout the state and improve public health by reducing the burning of fossil fuels and the associated environmental impacts." *Id.* The Legislature declared in Public Resources Code section 399.11(a):

> In order to attain a target of generating 20 percent of total retail sales of electricity in California from eligible renewable energy resources by December 31, 2010, and for the purposes of increasing the diversity, reliability, public health and environmental benefits of the energy mix, it is the intent of the Legislature that the commission and the State Energy Resources Conservation and Development Commission implement the California Renewables Portfolio Standard Program described in this article.

(Emphasis added.)

II. Migratory Birds Collide with Wind Turbines.

Migratory birds at times collide with the wind turbines. In 1989, the CEC issued some of the first documentation that a significant number of raptor fatalities were occurring at California's wind energy resources. Several studies subsequently were initiated to determine effective mitigation measures. Many of those studies were conducted at the Altamont Pass Wind Resource Area ("APWRA") under the participation, initiation, and sponsorship of the wind-turbine owners and operators. This led to a series of mitigation actions issued by the CEC that were implemented by the wind industry.

Yet, the scientific knowledge of effective mitigation measures is uncertain, and there have been shifts in the scientific views of recommended mitigation actions. This, coupled with the policy question of how much wind energy to sacrifice to mitigate avian impacts, makes it impossible for a court, ruling during a "snapshot" in time, to impose effective mitigation measures.

III. Alameda County Has Addressed and Continues to Address this Public Issue.

A. Resolution Number R-2005-463

On September 22, 2005, in response to this public policy quandary, the Alameda County Board of Supervisors issued Resolution Number R-2005-463 (the "County's Resolution"). *See* Consolidated Respondents' Appendix ("RA"), Exh. 6. The County's Resolution resulted from two years effort to "aggressively respond to the greatest extent feasible [to] the ongoing but unintentional death of various species of raptors and other birds in the Altamont Pass area, while also maintaining sustainable levels of wind energy production as a renewable, non-polluting source of energy[.]" (*See id.* at RA123; emphasis added.)

The County's Resolution is 28 pages long with an additional 30 pages of charts and exhibits. It carefully recounts the events leading to the Board of Supervisors

determination as well as the details of the mitigation plan implemented as additional conditions of the conditional use permits ("CUPs").

As a practical matter, the County's Resolution imposed nine new conditions on wind turbine use in the APWRA including:

1. Immediate formation of a scientific review committee - balanced, independent technical experts appointed by Alameda County with expertise in avian issues and windmills. This group should consist of 3-5 people and should be carefully composed to ensure a full range of stakeholder input. The windmill companies will pay for any cost of this committee.
2. Begin intensive monitoring program immediately. To be conducted by consultants hired and managed by the County and funded by the windmill companies. This should add to the data necessary for the EIR process.
3. Begin a repowering program that requires each company to repower 10% of their windmills by year 4, 35% by year 8, 85% by year 10 and 100% by the 13 and final year. All windmills in these permits will then be repowered or simply removed. Any delays will have to be approved by the County and only for reasons beyond the company's control (for example waiting for a State agency permit).
4. Develop an EIR that will include but not be limited to enabling repowering and studying the existing facilities, studying new wind technology, studying siting in the Altamont as a whole, assembling all data from all sources and reviewing offsite mitigation and how it can be used to encourage reductions in avian mortality.
5. Require existing turbines to shut down those identified as the most dangerous 2% of the turbines immediately and winter shutdowns of 2 months for every turbine immediately. This will escalate each year to reach a 3 ½ month winter shutdown and the removal of all tier 2 turbines in the short term by the end of the fifth year.

6. Establish an off site mitigation program established after the EIR is adopted, so it can be studied and best utilized within Alameda County where the impacts occur.
7. Post EIR, consider other and more aggressive methods to be added to the permits for the existing turbines in years 6-13.
8. Have no opt out language for financial hardship.
9. Implement immediately other identified CEC measures such as retrofitting all electrical lines, removing derelict turbines and relocating rock piles away from turbines.

(*Id.* at RA121-122.)

The first of these new conditions, as stated, was the immediate formation of a five person scientific review committee ("SRC") to "serve as a balanced and independent panel of technical experts with knowledge of and experience with avian safety and wind energy issues" with one member from each major stakeholder group: (1) the County of Alameda; (2) the Permittee(s); (3) the environmental community (*e.g.*, Center for Biological Diversity, Californians for Renewable Energy, Inc., Golden Gate Audubon Society, Sierra Club, or other similar group); (4) a California state resource agency such as the California Energy Commission or California Department of Fish and Game; and (5) a federal resource agency such as the U.S. Fish and Wildlife Service. (*Id.* at RA127, 157.)

The SRC is charged with the responsibility of "collectively balanc[ing] the fundamental interests and input of all stakeholders," and shall be responsible for "develop[ing] scientifically-supported strategies to reduce injury and mortality to avian wildlife associated with wind turbine operations in the Alameda County portion of the APWRA," including existing and future repowering projects, through the implementation of those strategies. (*Id.* at RA127, 155; emphasis added.) The County, through its SRC,

has created an ongoing process by which changes can be implemented to maximize wind energy production and reduce avian impacts.

B. The CEQA Actions and Settlement Agreement.

On or about October 31, 2005, Californians for Renewable Energy, Inc. and the Golden Gate Audubon Society filed actions in the Alameda County Superior Court (Case Nos. RG05239552 & RG05239790) against the County of Alameda for approving the conditional use permits and issuing the Resolution without purportedly conducting the required environmental review under the California Environmental Quality Act, Cal. Pub. Res. Code § 21000, *et seq.* (collectively, the "CEQA actions").

In January, 2007, these actions were settled by an agreement to which the Alameda County Board of Supervisors was a signing party. This settlement agreement was filed with the Superior Court adjudicating the CEQA actions. (*See* RJN, Exh. 1.) The settlement agreement, in part, provides the following:

> The Wind Power Companies shall achieve a 50% reduction in raptor mortality within three (3) years . . . [¶] . . . Adaptive management measures will be implemented if a 50% reduction in raptor mortality is not achieved by November 1, 2009.
>
> * * *
>
> It is the intent of the Parties to develop a Natural Communities Conservation Plan ("NCCP") pursuant to section 2801 et seq. of the California Fish and Game Code or similar agreement approved by the California Department of Fish and Game ("CDFG") to address the long-term operation of wind turbines at the APWRA and the conservation of impacted species of concern and their natural communities . . . [¶] . . . The County will be the local sponsor of the NCCP or similar agreement.

(*See id.* at pp. 2, 3, 5 & 6.)

In short, the County has entered a settlement agreement with the stakeholders that monitors existing avian impacts by requiring a 50 percent reduction by November 1, 2009, and provides a foundation for future wind power projects by seeking to develop an NCCP or similar conservation plan. Pursuant to the County's Resolution and the subsequent Settlement Agreement to which the County is a signing party, numerous agencies and scientists are involved with this continuing process.

LEGAL ARGUMENT SUPPORTING ABSTENTION

I. Abstention Is Appropriate Where the Court of Equity Is Asked to Assume the Functions of an Administrative Agency.

Abstention is appropriate where the court of equity is asked to assume the functions of an administrative agency, as here. In *Alvarado v. Selma Convalescent Hospital*, 153 Cal. App. 4th 1292 (2007), for example, the plaintiffs filed a class action lawsuit under Business and Professions Code sections 17200 *et seq.* seeking restitution and injunctive relief to require owners and operators of skilled nursing and intermediate care facilities to comply with nursing hour requirements set forth in Health and Safety Case section 1276.5, subd. (a).

The trial court sustained a demurrer without leave to amend holding that, even if section 1276.5 permitted a private right of action, the court would exercise its discretion to abstain from adjudicating the case. The Court of Appeal affirmed dismissal under the abstention doctrine:

> Judicial abstention is appropriate when granting the requested relief would require a trial court to **assume the functions of an administrative agency**, or to interfere with the functions of an administrative agency.

Id. at 1298.

On this basis, this district in *Samura v. Kaiser Foundation Health Plan., Inc.*, 17 Cal. App. 4th 1284, 1301-02 (1993), reversed judgment after trial and held that the trial

court erred when it tried to enforce compliance with the "regulatory guidelines and requirements of the Knox-Keene Act." *Id.* at 1301.

> In basing its order on these provisions, the trial court assumed a regulatory power over Health Plan that the Legislature has entrusted exclusively to the Department of Corporations. Samura unquestionably has certain remedies if the Department of Corporations fails to discharge its responsibilities under the Knox-Keene Act but **the courts cannot assume general regulatory powers** over health maintenance organizations through the guise of enforcing Business and Professions Code section 17200. To the extent that the order on appeal is based on portions of the Knox-Keene Act having a purely regulatory import, it improperly invades the powers that the Legislature entrusted to the Department of Corporations.

Id. at 1301-02 (citations omitted).

Likewise, in *California Grocers Ass'n, Inc. v. Bank of America, Nat'l Trust & Savings Ass'n*, 22 Cal. App. 4th 205, 218 (1994), this district reversed the trial court's grant of an injunction requiring a trade group of 3,500 grocers to reduce the fee that it charged on bounced checks. The Court held that, while the authority to grant injunctive relief is subject to the trial court's discretion, the trial court's "overseeing bank service fees" in that case was an abuse of discretion. *Id.* The Court held: "This case implicates a question of economic policy . . . 'It is primarily a legislative and not a judicial function to determine economic policy.'" *Id.* (citing *Max Factor & Co. v. Kunsman*, 5 Cal. 2d 446, 455-56 (1935)).

Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588 (1970), is also instructive. In *Diaz*, migratory farm workers filed a class action lawsuit seeking to enjoin the employment of illegal immigrants in the farming industry. *Id.* at 590-91. The trial court sustained the defendants' demurrer and the Court of Appeal affirmed. While recognizing the farm

workers' need for protection, the *Diaz* court denied injunctive relief holding that the appropriate public agencies, not courts of equity, properly should regulate these issues of immigration policy: "Plaintiffs seek the aid of equity because the national government has breached the commitment implied by national immigration policy. It is more orderly, more effectual, less burdensome to the affected interests, that the national government redeem its commitment. Thus the court of equity withholds its aid." *Id.* at 599; *accord People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co.*, 38 Cal. 3d 509, 523 (1985).

Desert Healthcare Dist. v. Pacificare, FHP, Inc., 94 Cal. App. 4th 781, 795 (2001), also underscores the propriety of judicial abstention when private plaintiffs seek equitable relief on matters of complex public policy. In *Desert Healthcare*, a hospital owner sued a health care service plan it had hired to provide medical services. The hospital brought an unfair competition claim based on the service plan's practice of requiring providers to waive rights against it and transferring its risk to intermediaries. *Id.* at 785. The trial court sustained a demurrer without leave to amend. The Court of Appeal affirmed the trial court's dismissal of the case, holding that "it is primarily a legislative and not a judicial function to determine the best economic policy," and, thus, "there is no proper role for the court of equity to play in the instant dispute." *Id.* at 796.

> The instant case is a perfect example of when a court of equity should abstain. Desert Healthcare essentially argues that PacifiCare abused the capitation system by transferring too much risk to its intermediary without adequate oversight. In order to fashion an appropriate remedy for such a claim, be it injunctive or restitutionary, **the trial court would have to determine the appropriate levels of capitation and oversight.** Such an inquiry would pull the court deep into the thicket of the health care finance industry, **an economic arena that courts are ill-equipped to meddle in.**

> As such, there is no proper role for the court of equity to play in the instant dispute.

94 Cal. App. 4th at 795 (emphasis added).

Shamsian v. Dept. of Conservation, 136 Cal. App. 4th 621 (2006), addressed a situation comparable to the one here, and likewise held that the abstention doctrine mandated dismissal. In *Shamsian*, the plaintiff filed a putitive class action and mandate petition against the Department of Conservation, state officials and two beer companies for failure to discharge statutory obligations to provide convenient, economical and efficient beverage container redemption opportunities for California consumers. *Id.* at 626. Affirming dismissal of the portion of the action seeking restitution and other equitable relief, the Court of Appeal refused to "interfere with the department's administration of the act and regulation of beverage container recycling and potentially risk throwing the entire complex economic arrangement out of balance." *Id.* at 642.

In this case, an injunctive order would involve the court to perform the function of an administrative agency. Balancing competing environmental benefits and harms is a matter of public policy and regulation. The only sure-fire way to stop avian collisions with wind turbines is to remove wind energy turbines from California. This, however, would thwart other public goals codified by statute. Indeed, adjudication of this action would force the court to issue an injunction in a "snapshot" in time, and, subsequently, to become a public agency regulating the effectiveness of the actions it has ordered. This is not the purpose of a court of equity. *Compare McKell v. Washington Mutual, Inc.*, 142 Cal. App. 4th 1457, 1474 (2006) (Declining to apply the abstention doctrine because "by addressing plaintiffs' UCL claims, we are doing no more than enforcing already-established economic policies.") (emphasis added). Moreover, even if it were proper for a court of equity to decide among competing public goals as well as to choose between conflicting scientific recommendations on how to mitigate avian impacts, it would place

an untenable and ongoing burden upon the courts to do so, as discussed in the next section.

II. Granting the Relief Sought by the First Amended Complaint Would Place an Unnecessary Burden on the Court.

Even if the trial court could craft an injunction, such an injunction would need to be enforceable, workable, and capable of court supervision. *See Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) ("Equitable remedies are a special blend of what is necessary, what is fair, and what is workable."); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 161-66 (1948) (vacating injunction that implicated the "judiciary heavily in the details of business management" in order for supervision "to be effective"); *Rutland Marble Co. v. Ripley*, 77 U.S. 339, 358-59 (1870) (same); Restatement (Second) of Torts § 943 cmt. a ("In determining the appropriateness of injunctive relief, the court must give consideration to the practicality of drafting and enforcing the order or judgment. If drafting and enforcing are found to be impracticable, the injunction should not be granted.").

Any injunction in this action will be constantly monitored and revised as additional scientific information is learned during the next several years. This Court will be made to conduct ongoing, intensive fact finding to resolve disputes among scientists as to how to measure raptor mortality and what mitigation efforts work during a period of years, or else shut down wind-energy production in California. Here, as the Court of Appeal held in *Diaz v. Kay-Dix Ranch, supra*:

> Multiple injunctions covering a wide segment of California agriculture would have the cumulative effect of a statutory regulation, administered by the superior courts through the medium of contempt hearings. The injunctive relief sought by plaintiffs would subject farm operators to

burdensome, if bearable, regulation, and the courts to burdensome, if bearable, enforcement responsibilities.

9 Cal App. 3d at 599.

Larez v. Oberti, 23 Cal. App. 3d 217 (1972), also demonstrates the propriety of abstention in this case. In *Larez*, a class of farm workers filed an action for damages and injunctive relief to prohibit the defendants from employing undocumented workers, and to require employers to verify employment eligibility by proof. The Court of Appeal held: "[I]n our opinion, the impracticability of drafting, supervising and enforcing an injunctive order in this case *and the plethora of cases it would undoubtedly spawn* is a factor to consider in determining the appropriateness of injunctive relief (Rest., Torts, § 943). The courts are ill-equipped to deal with that task." 23 Cal. App. 3d at 222-23 (emphasis added). Indeed, *Larez* recognized "that injunctive intervention is an extraordinary remedy, available only in appropriate cases, and . . . relief herein should be denied." *Id.* at 221.[1]

ALAMEDA COUNTY IS A NECESSARY AND INDISPENSABLE PARTY

The Court also has posed the question: "If this court should conclude that plaintiffs are entitled to maintain an action to enforce a public trust with respect to raptors and other birds found in the Altamont Pass Wind Resources Area, are the counties of Alameda and Contra Costa or any other public subdivisions or agencies necessary and indispensable

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[1] With respect to the Primary Jurisdiction Doctrine, this is not a situation in which the doctrine typically would be applied. The issue is not simply that there is a separate administrative proceeding, it is that the entire subject matter is one which belongs in an administrative context. This lawsuit asks the trial court to determine and implement public policy for the next decade, or to completely shut down areas of wind energy production in Northern California, which raises serious questions beyond judicial efficiency that would be governed by the primary jurisdiction doctrine. The Court should abstain from deciding open ended public policy questions.

parties to such an action? If so, may the judgment be affirmed based on the failure to join such parties?"

The answer is affirmative because of the nature of the Public Trust Doctrine. The Supreme Court held in *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 425 (1983): "[T]he core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters." The Court further held: "Accordingly, we believe that before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests." *Id.* at 426. The Court, in ruling that the Public Trust Doctrine applies to tributaries of Mono Lake, ordered that "some responsible body ought to reconsider the allocation of the waters of the Mono Basin." *Id.* at 447.

Here, the "responsible body" is clearly the County of Alameda given that it issues the CUPs for the APWRA wind power generation. Indeed, the failure to include the County underscores this point because:

- If the Court orders mitigation measures less stringent than the County, or the same as the County, then this lawsuit is a waste of time and resources both for the Court and for the parties because the wind power companies would still be required to satisfy the County permit conditions;
- If the Court orders more stringent measures, on the other hand, this Court would be required to supervise and enforce mitigation efforts for all of the wind turbine operators in the APWRA during the thirteen (13) year life of the permits, which circumvents the County's authority entirely.

This lawsuit essentially is meant to challenge how the County and other agencies are working to balance the competing but legitimate public goals of increasing wind

power in California while attempting to reduce avian collisions with wind turbines. Any decision in that regard, however, will necessarily have to have flexibility and fluidity built into it to deal with the SRC and the constantly developing scientific studies. The County is much better situated to address that fluidity than the courts.

In sum, this appeal fails on many fronts. First and foremost, the Public Trust Doctrine does not apply in this context as explained in Respondents' Brief. Second, it is the quintessential case to which the courts should apply the abstention doctrine. It is not the proper province of the judiciary to legislate public policy. Third, the County is an indispensable party if the Public Trust Doctrine actually did apply (which it does not). The County is the "responsible party" that would be charged with effectuating any court order, and the County is the proper party to deal with the fluidity and flexibility of any such order. By all relevant measures, this Court should affirm the judgment of the trial court dismissing this lawsuit.

Respectfully submitted,

George T. Caplan

cc: Richard Wiebe, Esq.
William Berland, Esq.
John Zarian, Esq.
Daniel Lazar, Esq.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Kaye Scholer LLP, 1999 Avenue of the Stars, Suite 1700, Los Angeles, California 90067.

On **March 26, 2008**, I served the foregoing document described as: **RESPONSES TO THE COURT'S REQUESTS AND INQUIRIES** on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

See Attached Service List

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

____ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **March 26, 2008**, at Los Angeles, California.

SHANTA TEEKAH
Name

S Teekah
Signature

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