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May 13, 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:

Pursuant to the Court's January 31, 2008 and April 4, 2008 orders, Defendants and Respondents GREP Bay Area Holdings, LLC, AES SeaWest, Inc. (formerly SeaWest WindPower, Inc.), and enXco, Inc. (collectively, "Respondents") hereby submit their reply to Plaintiffs and Appellants Center for Biological Diversity, Inc. and Peter Galvin's (collectively, "CBD") supplemental brief ("Appellants' Supplemental Brief") responding to the Court's requests and inquiries on the doctrines of abstention and primary jurisdiction, as well as the requirements relating to necessary and indispensable parties:

INTRODUCTION

As an initial matter, the first eight pages of the "Argument" section of Appellants' Supplemental Brief fail to address the Court's questions at all. *See* Appellants'

Supplemental Br. at 4-12. On page 3, Appellants list the questions posed by the Court, but then proceed to jettison the questions and formulate a different, self-serving question:

> The Court's inquiries in one way or another all touch upon the question of whether the Legislature has granted Alameda and Contra Costa Counties or some other public subdivision or agency the power to authorize defendants to destroy wildlife public trust property . . .

Appellants' Supplemental Br. at 4. This is not one of the questions posed by the Court. Appellants rephrase the Court's questions just to provide additional rhetoric about the avian impacts at the Altamont Pass Wind Resource Area ("APWRA").

What is notable about Appellants' response to this purported "question", however, is that it relies upon public statutes that prohibit bird takes *that do* ***not*** *provide a private right of action. Id.* at 4-5 (citing Fish and Game Code §§ 3503.5, 3511, 3800 & 3801.5). In doing so, Appellants ignore the pink elephant in the room – that is, nobody disputes that California law prohibits certain bird takes, but the governmental personnel who actually represent the people of the State of California have made a decision to exercise prosecutorial discretion, and the other stakeholders involved, including the Golden Gate Audubon Society, Californians for Renewable Energy, and Alameda County are pursuing an attempt to reconcile these legitimate but conflicting public policies pursuant to a specifically provided statutory framework. *See, e.g.*, Fish & Game Code §§ 2081 *et seq.* (permitting incidental bird takes where a mitigation and conservation plan is in place). This statutory framework permits the government agencies to reconcile these two conflicting public policies.[1] *See id.*

The governmental agencies and environmental groups participating in this effort are attempting to formulate a scientifically based mitigation plan that would reduce avian

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[1] Noticeably absent from Appellants' Supplemental Brief are any of the California statutes articulating the need in California for green energy. *See* Respondents' Response to Court's Inquiries ("Respondents' Supplemental Br.") at 2 (citing Gov. Code § 65892.13(a)(2) (inoperative July 1, 2005; repealed January 1, 2006); Pub. Util. Code § 399.11, Stats. 2002 ch. 516 (SB 1078); Pub. Res. Code § 399.11(a)).

impacts with wind turbines while combating global warming and other severe environmental problems deriving from conventional energy sources. It is for that reason, among others, that judicial abstention is warranted. Indeed, Public Trust Doctrine actions are not appropriate where the issues raised involve conflicting public policy goals that, by statute or otherwise, are already subject to administrative involvement. The notion that CBD is the only repository of the "public trust" as opposed to the U.S. Fish and Wildlife Service, the California Department of Fish and Game, the California Energy Commission, and the County Board of Supervisors, is absurd. CBD's Public Trust Doctrine lawsuit not only is legally untenable because it has no nexus to tidelands or navigable waters, but also is wrong as a matter of public policy.

Next, Appellants formulate another "question" that the Court did not pose, namely, the propriety of the Court's having taken judicial notice of the papers filed in Alameda County Superior Court actions Nos. RG04183113, RG05239552 and RG05239790, and Alameda County Board of Supervisors Resolution No. R-2005-463, adopted September 22, 2005. *See* Appellants' Supplemental Br. at 6-12. Appellants' criticism that the Court took judicial notice "sua sponte" is misplaced. *See* Appellants' Supplemental Br. at 6; *compare Deschene v. Pinole Point Steel Co.*, 76 Cal. App. 4th 33, 37 n. 2 (1999) (sua sponte judicial notice). The Court is clearly within its power to take judicial notice of documents on its own motion. In addition, the Court's ruling is unambiguous: "On its own motion, the court will take judicial notice of those [documents] . . ." 1-31-08 Order, Questions Nos. 1 & 2. Given that Appellants did not file any proper motion for reconsideration and the Court did not request briefing on this issue, Respondents respectfully refrain from addressing CBD's improper "objection" to the Court's taking judicial notice of relevant public documents. *See* Appellants' Supplemental Br. at 8.

The balance of Appellants' Supplemental Brief discusses abstention, primary jurisdiction, and indispensable parties. As stated in Respondents' Supplemental Brief, the primary jurisdiction doctrine does not appear to be applicable in this instance. *See*

Respondents' Supplemental Br. at 12 n.1. CBD erroneously states, however, that the doctrines of abstention and indispensable parties are also inapplicable. Abstention is appropriate here because this lawsuit asks a court of equity to assume the role of an administrative agency. In addition, Alameda County is an indispensable party because, as stated below, CBD bases its Public Trust Doctrine claim on the erroneous contention that Alameda County has abrogated its public trust responsibilities.

ABSTENTION IS PROPER IN THIS CASE

This district has held that it is an abuse of discretion for a trial court to assume the functions of a public agency and has *reversed* trial courts on that ground. *See, e.g.*, *California Grocers Ass'n, Inc. v. Bank of America, Nat'l Trust & Savings Ass'n*, 22 Cal. App. 4th 205, 218 (1994) (holding that the trial court's "overseeing bank service fees" in that case was an abuse of discretion); *Samura v. Kaiser Foundation Health Plan., Inc.*, 17 Cal. App. 4th 1284, 1301-02 (1993) (reversing judgment after trial and holding that "the trial court assumed a regulatory power over Health Plan that the Legislature has entrusted exclusively to the Department of Corporations."). That is precisely what CBD seeks here. CBD is asking the trial court to step into the shoes of the applicable administrative agencies and balance two legitimate yet competing public policies, namely, producing renewable energy and minimizing avian impacts.

The trial court's judgment dismissing this action should be affirmed. As *Alvarado v. Selma Convalescent Hospital*, 153 Cal. App. 4th 1292, 1298 (2007), recently held: "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." *See also Shamsian v. Dept. of Conservation*, 136 Cal. App. 4th 621, 642 (2006) (refusing 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.").

Here, as discussed more fully in Respondents' Supplemental Brief (*see* Respondents' Supplemental Br. at 3-7), after years of meetings and deliberations that

included all stakeholders (including CBD), the County issued Resolution Number R-2005-463 (the "County's Resolution"). *See* Consolidated Respondents' Appendix ("RA"), Exh. 6. The County's Resolution imposed nine new conditions on wind turbine operators' conditional use permits aimed at avian impact mitigation. While two stakeholders, Golden Gate Audubon Society and Californians for Renewable Energy, Inc., responded to the County's Resolution by filing CEQA petitions in Alameda County Superior Court, CBD did not. Instead, CBD has proceeded with this Public Trust Doctrine lawsuit in contravention to California legal authority that prohibits a Public Trust Doctrine claim unrelated to tidelands or navigable waters.

The CEQA lawsuits are significant and highlight why abstention is particularly appropriate here. For instance, the Settlement Agreement to which the County is a party underscores the competing public policies at issue and why these issues should not be tried in court. The agreement mandates a "50% reduction in raptor mortality" by November 2009 or adaptive management measures will be implemented. *See* Respondents' 3-28-08 Request for Judicial Notice ("RJN"), Exh. 1 at 30.[2] The Scientific Review Committee ("SRC"), an advisory body to the County of Alameda, will be charged with the task of analyzing and developing appropriate adaptive management measures. In addition, the settling parties have agreed to develop, in conjunction with the California Department of Fish and Game, a Natural Communities Conservation Plan pursuant to Fish and Game Code sections 2801, *et seq.* ("NCCP"). *Id.* at 32. There is no proper role for the trial court to serve other than – improperly – to step into the shoes of the governing administrative bodies and usurp their authority and expertise in these areas.

CBD's reliance on *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 431 n.11 (1983), is misplaced. Indeed, *National Audubon* did not even discuss

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[2] The Settlement Agreement was entered and filed in the CEQA lawsuits after this case was dismissed, and, hence, is not part of the record considered by the trial court. It is part of the record in the CEQA actions, however, and, among other reasons, is judicially noticeable to rebut CBD's contention that the issue raised by this Public Trust Doctrine action has not been extensively considered or addressed.

abstention; it is an exhaustion of administrative remedies and primary jurisdiction case. *Id.* at 448-452. "It is axiomatic that cases are not authority for propositions not considered." *People v. Ault*, 33 Cal. 4th 1250, 1268 n.10 (2004). Therefore, CBD's argument that "there is even less basis for abstaining tha[n] there was in *National Audubon*" (Appellants' Supplemental Br. at 20) is misleading and false. The Supreme Court in *National Audubon* neither considered nor discussed the abstention doctrine.

ALAMEDA COUNTY IS A NECESSARY AND INDISPENSABLE PARTY

Appellants' Supplemental Brief also is disingenuous regarding whether Alameda County is an indispensable party. CBD asserts that "plaintiffs seek no relief directed at Alameda or Contra Costa Counties and do not seek to compel or prohibit any action by those counties." Appellants' Supplemental Br. at 22. In the same brief, however, CBD states:

> Plaintiffs are eager to prove . . . Alameda County's utter and continuing failure over the past 20 years to take any effective measures to reduce avian mortality and its refusal for 20 years to take any enforcement actions against wind turbine violators . . .

Id. at 11. That certainly sounds like CBD seeks to compel action by the County.

Moreover, Alameda County's importance to this lawsuit cannot be understated. Alameda County is the governing body to which the SRC reports. The SRC is charged with the duty of analyzing the avian impact monitoring data and advising the County on a going-forward basis regarding mitigation strategies. So Alameda County obviously would need to be a party to this lawsuit. Further, as previously discussed, Alameda County is a party to the CEQA cases Settlement Agreement, and, as such, is obligated to work toward developing an NCCP with the Audubon Society, the wind power operators, and the Department of Fish and Game. Again, any judicial decrees in this case would require the County to be a party since the County is obligated to try to develop an NCCP. The County is also the permitting body. Any judicial ruling would impact the terms of the County's permits to operate the APWRA wind turbines.

CBD erroneously contends that "the State of California and Alameda County each expressly disclaimed on the record any interest in participating in this litigation." *Id.* at 22. This is a gross misrepresentation. The State of California and Alameda County declined to act ***as plaintiffs*** in this action in a manner that would permit a Business and Professions Code sections 17200 *et seq.* action to proceed after Proposition 64 prohibited private claims on public issues without satisfying class action requirements. *See* Supplemental Appellants' Appendix, Exhs. 1 & 2. These entities did ***not*** state that they had no "interest" in the APWRA. To the contrary, State agencies and County representatives have spent countless hours studying and analyzing the issue of avian impacts at the APWRA. Alameda County specifically is a party to the CEQA Settlement Agreement that mandates a future course of conduct. The governmental agencies have made recommendations and resolutions. These, of course, are subject to judicial review under the applicable statutes, where the procedural requirements are met. To say that the State of California and the Counties of Alameda and Contra Costa have no "interest" in this wind resource area, however, simply misstates the truth.

CONCLUSION

The trial court's judgment in this case should be affirmed for numerous reasons. As stated in the Respondents' Brief, the Public Trust Doctrine does not apply to alleged harm to wildlife with no nexus to tidelands or navigable waters. Also, because this case involves the balancing of two legitimate yet competing public policies, the trial court's judgment dismissing this action should be affirmed on abstention grounds. In addition, CBD's failure to include the County of Alameda as a party is fatal to its claim because the County is a necessary and indispensable party to this Public Trust Doctrine litigation.

Respectfully submitted,

Kristopher S. Davis

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cc: Richard Wiebe, Esq.
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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 Epstein Becker & Green, P.C., 1925 Century Park East, Suite 500, Los Angeles, California 90067.

On **May 13, 2008**, I served the foregoing document described as: **RESPONDENTS' REPLY TO APPELLANTS' RESPONSE TO COURT'S 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

_X_ by **ELECTRONIC MAIL**

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

_X_ (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 **May 13, 2008**, at Los Angeles, California.

SHANTA TEEKAH
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