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Via Hand Delivery

Presiding Justice William K. McGuiness
California Court of Appeal
First Appellate District
Division Three
350 McAllister Street
San Francisco, CA 94102

RE: *Center for Biological Diversity, Inc., et al. v. FPL Group, et al.*
Appellate Case No. A116362

Dear Judge McGuiness:

Responses to the Court's Request and Inquiries Dated February 1, 2008, filed by Respondents FPL Group, Inc., FPL Energy, LLC, ESI Bay Area GP, Inc., ESI Bay Area, Inc., Altamont Power, LLC, and Green Ridge Power, LLC are submitted herein.

I. INTRODUCTION

This Court has invited the parties [1] to brief the question whether "the doctrines of abstention and/or primary jurisdiction provide grounds on

[1] As referenced in this brief, defendants and respondents are referred to collectively as **"Respondents"** and includes FPL Group, Inc., FPL Energy, LLC, ESI Bay Area GP, Inc., ESI Bay Area, Inc., Grep Bay Area Holdings, LLC, Green Ridge Power LLC, Altamont Power LLC, Enxco, Inc., Seawest Windpower, Inc., Pacific Winds, Inc., Windworks, Inc., and Altamont Winds, Inc. As referenced in this brief, references to **"the FPL Group"** collectively includes FPL Group, Inc., FPL Energy, LLC, ESI Bay Area GP, Inc., ESI Bay Area, Inc., Altamont Power, LLC, and Green Ridge

which the judgment may be affirmed." [2] The answer is "yes," both doctrines provide bases for affirming the trial court's order granting Respondents' motion for judgment on the pleadings.

California courts recognize that there are inherent limitations as to their ability to effectively intervene in matters involving complex regulatory or policy issues. (See, e.g., *Desert Health Care Dist. v. PacifiCare FHP, Inc.* (2001) 94 Cal.App.4th 781, 795; see also *People ex rel. Department of Transportation v. Naegele Outdoor Advertising Co. of California, Inc.* (1985) 38 Cal.3d 509, 523; see also *Diaz v. Kay-Dix Ranch* (1979) 9 Cal.App.3d 588, 599.) As a result of these limitations, California courts abstain from exercising their equitable powers if doing so would drag the court into an area of complex policy, especially where there are more effective means of redress. (See *Desert Health Care Dist.*, *supra*, 94 Cal.App.4th at p. 795; see also *Alvarado v. Selma Convalescent Hosp.* (2007) 153 Cal.App.4th 1292, 1298.)

In the instant case, the relationship between the strong governmental interest in promoting wind power as a source of clean, renewable energy and the policy of protecting avian wildlife involves complex regulatory and policy issues.

The public's strong support for wind power as a source of renewable energy is undisputed. To reduce our dependence on foreign oil and

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Power, LLC. Plaintiffs and appellants Peter Galvin and the Center for Biological Diversity, Inc., are referenced herein collectively as **"CBD."**

[2] The Court's question regarding indispensable parties is analyzed in § (II)(C), *infra*. Respondents do not believe that is a basis for affirming the judgment.

mitigate the harmful environmental effects of burning fossil fuels, Congress has stated that increasing the use of wind power and other sources of renewable energy are integral to the nation's energy and environmental policy. (See, e.g., 42 U.S.C. § 9201.) The State of California has carried this federal policy forward. In 1980, the California Energy Commission ("CEC") identified the Altamont Pass as one of the few areas in California suitable for the development of wind power. In 2002, the California Legislature required that California's investor-owned utilities and competitive retail suppliers derive 20% of their retail sales from renewable energy by 2017. According to the CEC, wind power is critical to achieving this goal.

In the pursuit of bringing these public policies to fruition, some avian wildlife is being harmed by wind turbines at the Altamont Pass Wind Resource Area ("APWRA"). This intersection between the production of wind power and the protection of birds within the APWRA has been the subject of long and intensive collaborative efforts between various industry, environmental, and governmental groups. The collective goal has been to carry out the strong public policies favoring wind power as a critical source of renewable energy, while reducing harm to birds.

How to achieve this collective goal has been the subject of numerous lengthy and detailed scientific studies over the years, resulting in a number of recommendations, some of which have been successful, but many of which have failed to produce the desired results. To further complicate matters, often times after implementing a recommended scientific approach, it was subsequently rescinded by the same scientific community

because either the program was not working or it was producing an undesired side-effect.

What has become clear from the succession of studies, recommendations, and changes in thought among the experts is that a solution to the issues at the APWRA is a developing, complex, work in progress that is not yet completed. The competing environmental policies and the ongoing efforts of those seeking answers make this an appropriate case for the application of the abstention and primary jurisdiction doctrines for three reasons.

First, Respondents have been working with a number of environmental groups and governmental agencies for many years in a collaborative effort trying to fashion a solution to the issues at the APWRA. During the long process of renewing conditional use permits ("CUPs"), environmental groups, governmental agencies, and wind turbine operators worked together and produced a highly specialized, quasi-administrative [3] framework for addressing these issues. The agencies and groups currently working within this framework are better equipped to address the issues at the APWRA and arrive at viable solutions than the courts.

Second, how to increase protection for birds at the APWRA is a complicated matter. Many scientific studies and numerous hearings have taken place. Despite these ongoing efforts, there is no consensus yet as to

[3] The term "quasi-administrative" is used by Respondents because this framework involves both environmental groups, governmental agencies participating in committees set up by the County of Alameda to address the issue of avian impacts.

the proper approach.

During the CUP process, the County of Alameda reviewed the history of the many scientific studies and the mitigation measures that were successful and those that were unsuccessful. It also considered the policies favoring wind power and those relating to the protection of wildlife. Alameda County established a Scientific Review Committee ("SRC") to help it better understand the science, and also formed the Wind Power Working Group to consider input from all interested stakeholders, including governmental agencies, wind turbine operators, and environmental groups.[4] Then, after several years of work, Alameda County conditioned the renewal of the CUPs on the implementation of a series of mitigation measures.

The 35,000-page administrative record created during this process was reviewed in actions brought under the California Environmental Quality Act ("CEQA") by two environmental groups, but not CBD. In consultation with the California Department of Fish and Game, the parties to the CEQA action reached a settlement (the "CEQA Settlement Agreement") that imposes conditions in addition to those specified in the CUPs. The CEQA Settlement Agreement specifies that progress in avian protection will be tracked by National Audubon, industry representatives, the SRC and the County of Alameda. It also includes provisions for "mid-course corrections" and mediation for resolving disagreements. In the event these measures fail, one or more parties can seek judicial enforcement of the CEQA Settlement Agreement.

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[4] CBD is a member of the Wind Power Working Group.

Third, the courts are not the appropriate body to balance the competing environmental public policies of encouraging clean renewable energy in the form of wind power with protecting avian wildlife. The resolution of such public policy matters are better left to the groups currently addressing them, or to the legislature.

For these reasons, abstention is appropriate. If there is any judicial role at all, the primary jurisdiction doctrine requires that it be postponed until after the processes in place have run their course. Further litigation in this proceeding serves no legitimate purpose.

II. FACTS

A. LEGISLATIVE POLICIES FAVORING WIND POWER AND THE APWRA.

1. The Wind Energy Systems Act.

In 1980, Congress enacted the Wind Energy Systems Act for the specific purpose of developing wind power as a clean, renewable energy resource. (See 42 U.S.C. § 9201 et seq.) The Wind Energy Systems Act is a clear expression of energy and environmental policy. Section 9201 of the Wind Energy Systems Act provides in pertinent part:

> (a) The Congress finds that--
>
> (1) the United States is faced with a finite and diminishing resource base of native fossil fuels and, as a consequence, must develop as quickly as possible a diversified, pluralistic national energy capability and posture;
>
> (2) the current imbalance between supply and demand for fuels and energy in the United States is likely to grow for many years;

> (3) it is in the Nation's interest to provide opportunities for the increased production of electricity from renewable energy sources;
>
> (4) the early wide-spread utilization of wind energy for the generation of electricity and for mechanical power could lead to relief on the demand for existing non-renewable fuel and energy supplies;
>
> ...
>
> (9) the widespread use of wind energy systems to supplement and replace conventional methods for the generation of electricity and mechanical power would have a beneficial effect upon the environment.

(42 U.S.C. § 9201.)

Among other things, the Wind Energy Systems Act requires the Department of Energy to "[c]onduct activities to validate existing assessments of known wind resources[,] ... perform wind resource assessments in regions of the United States where the use of wind energy may prove feasible [and] ... [i]nitiate a general site prospecting program." (42 U.S.C. § 9206.)

2. *Designation of the Altamont Pass as a Wind Resource Area to Increase Use of Renewable Energy in California.*

In response to such legislative pronouncements, the CEC designated the Altamont Pass as a "Wind Resource Area" as part of a statewide effort to identify areas suitable for the production of renewable energy by means of wind turbines. (RJN [5] 36 [Declaration of M. Joan Stewart ("Stewart

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[5] Citations to Respondents' Request for Judicial Notice filed concurrently herewith are referenced herein as **"RJN."** Citations to Respondents'

Decl.") ¶ 3]; *see also* 16 U.S.C. §2601 et seq. [Public Utility Regulatory Policies Act of 1978].)

Alameda and Contra Costa counties began issuing CUPs authorizing wind turbine operations within the APWRA in the early 1980s. The first wind turbines came online shortly thereafter. (RJN 36 [Stewart Decl. ¶ 4].) The FPL Group has operated wind turbines at the APWRA since 1998, and now operates 2,182 wind turbines in the area. (RJN 36 [Stewart Decl. ¶ 5].) There are five other operators of wind turbines in the APWRA. (RJN 36 [Stewart Decl. ¶ 5].)

3. California Legislation Requiring Increased Use of Renewable Energy.

Since the designation of the Altamont Pass as a "Wind Resource Area," a number of other governmental agencies have enacted policies favoring the continued use and further development of wind power. For example, in 2002, the California Legislature promulgated the Renewables Portfolio Standard ("RPS"), requiring that California's investor-owned utilities and competitive retail suppliers derive 20% of their retail sales from renewable energy by 2017. (RJN 37 [Stewart Decl. ¶ 8].) The CEC has adopted a goal of meeting this requirement by 2010, and has further indicated that wind power is critical to the effort. (RJN 37 [Stewart Decl. ¶ 9].)

4. Alameda County's Policy to Maximize Production of Renewable Energy at the APWRA.

It is the policy of Alameda County to promote the generation of

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Appendix are referenced herein as **"RA."** Citations to Appellants' Appendix are referenced herein as **"AA."**

clean, renewable energy from wind turbines at the APWRA:

a. Windfarms Goal: To Maximize production of wind generated energy.

b. Policy 156: The County shall recognize the importance of wind power as a clean renewable source of energy.

c. Policy 157: The County shall allow for continued operation, new development, redevelopment and expansion of existing and planned windfarm facilities within the limits of environmental constraints.

d. Policy 159: The County shall work with the wind energy industry, public utilities, other agencies, and energy experts to monitor trends in wind energy developments, technology, and environmental safeguards.

e. Policy 160: The County shall establish a mitigation program to minimize the impacts of wind turbine operations on bird populations.

(RJN 37 [Stewart Decl. ¶ 10].)

B. THE COLLABORATIVE EFFORT TO REDUCE AVIAN IMPACTS AT THE APWRA.

There has been a collaborative effort to mitigate avian impacts within the APWRA that has included a number of governmental entities. [6]

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[6] The following federal, state and local agencies have been involved: U.S. Fish & Wildlife Service, Law Enforcement and Migratory Bird Office ("USFWS"); U.S. Department of Energy, National Renewal Energy Laboratory ("NREL"); the CEC; Alameda County Planning

(RJN 38, 43 [Stewart Decl. ¶¶ 11-14, 26-27].) Nongovernmental environmental groups, including CBD, have also been involved in this collaborative effort through the Wind Power Working Group created by the County of Alameda. (RJN 38 [Stewart Decl. ¶ 14].) Considerable resources have been devoted to this collaborative effort. As of 2003, the CEC alone has spent, or was intending to spend, $1.5 million to reduce avian impacts, much of it at the APWRA. (RJN 38 [Stewart Decl. ¶ 12].) Numerous scientific studies have been conducted, and many reports have been published. (RJN 39-43 [Stewart Decl. ¶¶ 17-24, 27-28].)

C. THE LONG HISTORY OF UNCERTAINTY AND CONFLICTING RECOMMENDATIONS CONCERNING MITIGATION MEASURES AT THE APWRA.

There has never been certainty regarding the most effective method to reduce avian impacts at the APWRA. The various scientific studies commissioned over the past decade have offered many recommendations that sometimes conflict with one another. Numerous mitigation measures have been attempted, studied, revised, and abandoned. For example:

- Between 1997 and 2002, Respondents and their predecessor developed various perching guard designs, installed perching guards, and monitored the results. (RJN 39 [Stewart Decl. ¶ 17].) This was done based on the recommendation of experts retained by the CEC and NREL who concluded perching was

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Department/Board of Zoning Adjustments ("BZA"); Alameda County Board of Supervisors ("Board of Supervisors"); California Department of Fish & Game; California Attorney General's Office; Alameda County District Attorney's Office; and the U.S. Attorney's Office. (RJN 38-39 [Stewart Decl. ¶¶ 13-15].)

a likely cause of avian impacts. (RJN 39 [Stewart Decl. ¶ 17].) Then, in 2003 and 2004, experts retained by the CEC and NREL decided that perching was not a likely cause of avian impacts. (RJN 39 [Stewart Decl. ¶ 17].)

- In May 1995, an NREL expert concluded that rodent control would likely reduce avian impacts. (RJN 40 [Stewart Decl. ¶ 18].) Based on that recommendation, Respondents conducted a four-year study of a rodent control program run by the County of Alameda. (RJN 40 [Stewart Decl. ¶ 18].) In 2003, another NREL expert recommended that the rodent control program be discontinued. (RJN 40 [Stewart Decl. ¶ 18].)
- In the mid-1980s, CEC experts recommended that rock piles be used to create a habitat for the prey of the San Joaquin Valley kit fox, an endangered species. (RJN 40 [Stewart Decl. ¶ 19].) In accordance with this recommendation, rock piles were created. In 2003, an NREL expert recommended that Respondents remove the rock piles, or move them away from the turbines. (RJN 40 [Stewart Decl. ¶ 19].)
- In the early 1990s, a CEC expert concluded that avian impacts could be reduced by allowing grass around turbines to grow tall so that small mammals would be less visible to raptors. (RJN 40 [Stewart Decl. ¶ 20].) In 2003, an NREL expert agreed. (RJN 40 [Stewart Decl. ¶ 20].) Accordingly, Respondents proposed in their adaptive management plan that fences be built to keep cattle from grazing near turbines.

(RJN 40, 41 [Stewart Decl. ¶¶ 20, 22].) Fire authorities objected to this plan, citing an increased fire danger. (RJN 40 [Stewart Decl. ¶ 20].)

- In 2003, Respondents agreed to implement eleven of fourteen mitigation measures recommended in an NREL report and asked for further clarification before implementing three others. (RJN 40-41 [Stewart Decl. ¶ 21].) Eight months later, in August 2004, the CEC issued a report recommending that five of the fourteen mitigation measures formerly recommended by NREL be "[w]ithdrawn from further consideration...." (RJN 41 [Stewart Decl. ¶ 23].) The CEC also recommended modifications to some of the remaining mitigation measures identified in the NREL report and proposed a series of new ones. (RJN 41-42 [Stewart Decl. ¶¶ 22-23].)
- As recently as January 2005, the CEC created yet another proposed approach to reduce avian impacts. The CEC, based on scientific studies, concluded that a seasonal shutdown of all or a large portion of turbines thought to cause most of the avian fatalities (designated as "high risk turbines") would significantly reduce avian impacts. (RJN 41-42 [Stewart Decl. ¶ 23].) The methodology for identifying those turbines that are "high risk" and should be shut down was constantly changing, and led to the development of three different lists

> of turbines proposed for seasonal or permanent shutdown.
>
> (RJN 42-43 [Stewart Decl. ¶ 25].)

Thus, after years of study and analysis, there was and still is no consensus for an effective plan to reduce avian impacts at the APWRA. (RJN 44-45 [Stewart Decl. ¶ 33].) As recently as June 30, 2005, a written summary prepared by the Director of the Alameda County Community Development Agency for a July 7, 2005, meeting of the Board of Supervisors noted:

> In spite of this progress, at the time of the last Board hearing in March 2005 there were still significant areas of disagreement related to scientific methods and procedures, selection and application of on-site management measures, how soon and by what percentage avian mortality could be reduced and extent of off-site mitigation (conservation or habitat easements).

(RJN 44-45 [Stewart Decl. ¶ 33, underline added].)

Likewise, the August 2004 CEC report provides in pertinent part:

> This report summarizes the findings of a four-year research effort involving more than 4,000 wind turbines, and aimed at better understanding bird mortality at the world's largest wind farm, the Altamont Pass Wind Resource Area. Yet, as with most research efforts, we finished with many questions unanswered about the factors associated with fatalities at wind turbines, and about the biological significance of the mortality we estimated. [¶] Additional research that adjusts its methodology based on what we have learned, and that addresses the questions left unanswered, may one day result in additional solutions to the perplexing problems facing the

> wind industry at APWRA. We trust that the findings presented here will more effectively avoid, reduce, and offset impact caused by existing and future wind turbines in APWRA. We believe that the results presented here provide the foundation for aggressive implementation of management strategies that appear most likely to substantially reduce bird mortality. Lastly, it is our hope that our recommendations will help to reduce bird mortality at wind farms throughout the world, and to help avoid similar situations in the future.

(RJN 45, 974 [Stewart Decl. ¶ 34 and Exh. J thereto, underline added].)

Despite the uncertainty, Respondents have undertaken many steps to reduce avian impacts and are continuing to do so in conjunction with the CEQA Settlement Agreement. In addition, progress has been made on the subject of repowering, thought by many to be the best method of reducing avian impacts within the APWRA. (RJN 43 [Stewart Decl. ¶ 27].) In the first repowering project since 1993, 169 operating and non-operating turbines were removed from the APWRA and 31 "new generation turbines" were installed. This initiative was completed by the end of December 2004.[7] (RJN 43 [Stewart Decl. ¶ 27].)

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[7] In 2004 and 2005, Respondents also: (a) upgraded all riser poles to make them compliant; (b) decommissioned 53 turbines associated with avian fatalities or considered in risky locations, and relocated 44 others to safer locations; (c) removed the structures at 85 non-operating turbine sites, and (d) created 40 tower pylons at the end of the rows and at gaps in strings of turbines. (RJN 43 [Stewart Decl. ¶ 26].)

D. THE RENEWAL OF THE CUPS, THE ADMINISTRATIVE APPEAL, AND THE FILING OF THE INSTANT LAWSUIT.

Beginning in 2003, the County of Alameda began the process of extending the CUPs that authorize wind turbine operations at the APWRA. (RA 110.) CBD opposed the renewals on the grounds that better mitigation measures were needed and an Environmental Impact Report ("EIR") should be prepared. (RA 110, 114.) CBD also requested the creation of a technical advisory committee to implement additional mitigation measures. (RA 114.)

In November 2003 and January 2004, the BZA approved the extension of most of the CUPs. (RA 112, 115; RJN 43-44 [Steward Decl. ¶ 29].) CBD and Californians for Renewable Energy ("CARE") filed an administrative appeal to the Board of Supervisors. (RA 112, 117; RJN 43-44 [Stewart Decl. ¶ 29].) CBD alleged in its' appeal that the conditional use permits were improperly issued because of the injuries being caused to birds in the Altamont Pass region. The Board of Supervisors held hearings on November 4, 2004, March 3, 2005, and July 7, 2005. (RA 112, 117; RJN 43-44 [Stewart Decl. ¶ 29].)

During November 2004, while the administrative appeal was pending, CBD filed its initial complaint in Alameda County Superior Court. (RA 1-31.) CBD added a tenth cause of action for "Destruction of Public Trust Natural Resources" to its First Amended Complaint ("FAC") filed with the Alameda County Superior Court on April 18, 2005, also during the pendency of the administrative appeal. (AA 1-31 [FAC ¶¶ 134-38].)

E. THE FORMATION OF THE SCIENTIFIC REVIEW COMMITTEE.

At the July 7, 2005, hearing, the Board of Supervisors voted to add a series of conditions to the CUPs, including a seasonal shutdown of some turbines. (RJN 43-44 [Stewart Decl. ¶¶ 29-30].) In addition, because the Board of Supervisors determined "[t]hat information currently available on the impacts is incomplete [and] that additional study is required...", it mandated the formation of the SRC to "[e]nsure the maximum feasible degree of wildlife protection while maintaining the efficient production of renewable energy..." and "[r]epresent and collectively balance the fundamental interests and input of all stakeholders, including Permittee(s), the County of Alameda, other governmental agencies and the public at large." (RA 118, 155.) The SRC plays a significant role in the ongoing collaborative effort to address avian protection.

The purposes of the SRC, as outlined by the Board of Supervisors, are:

- To provide the County of Alameda with a balanced and independent panel of five technical experts with knowledge of and experience with avian safety and wind energy issues.

- Represent and collectively balance the fundamental interests and input of all stakeholders, including Permittee(s), the County of Alameda, other governmental agencies, environmental groups and the public at large.

- Ensure the maximum feasible degree of

wildlife protection while maintaining the efficient production of renewable energy.

- Provide a neutral forum for open dialogue among experts in the field with different perspectives, reach agreement on analysis and interpretation of data, and ensure sound and objective scientific review of avian safety strategies.

- Evaluate data from monitoring reports and provide reports and recommendations to the Permittee(s), the Planning Director, state and federal wildlife agencies, other agencies and organizations regarding the appropriate specific timing and implementation of the various strategies and steps set forth in the Avian Wildlife Protection Program & Schedule (AWPPS, as set forth in Attachment G), or appropriate revisions to the Program.

(RA 155.)

The tasks performed by the SRC include:

- Develop and evaluate scientifically-supported strategies to reduce injury and mortality to avian wildlife associated with wind turbine operations in the APWRA, and assess those strategies using state-of-the-art science, peer-reviewed data, and applicable local, state and federal guidelines.

- Develop and/or assess new and more effective strategies for avoiding and reducing avian injury and mortality due

to raptor collisions with wind turbines and infrastructure.

- Assist the County and its biological resource monitoring consultant(s) with the conduct of research, and the design of protocols and reporting procedures.

- Assist the County with monitoring Permittees' compliance with the conditions of approval, particularly the ... [Avian Wildlife Protection Program & Schedule].

- Utilize an approach under which there is a continual cycle of assessment, design, implementation, monitoring, evaluation, adjustment and re-assessment of strategies, except where the SRC deems experimentation on this basis to be in conflict with the ... [Avian Wildlife Protection Program & Schedule].

- Assist the County with evaluating the effectiveness of strategies to reduce avian injury and mortality, including both existing and anticipated repowering projects.

- Review and assess the County consultant's monitoring reports, as well as reports from consultants or others directly employed by one or more of the Permittee(s), federal, state or other governmental agencies, or other researchers or organizations.

- Provide guidance to the Planning

Director regarding the scope of work of the monitoring consultants and the EIR consultants, and other issues not currently foreseen.

- Research and develop the parameters of a mitigation program for habitat conservation areas on or off the Permit sites, or other steps to compensate for avian mortality and injury impacts that remain unaffected by the ... [Avian Wildlife Protection Program & Schedule].

- Actively participate and advise the County in formulating policies and ordinances for evaluating impacts on avian species and ecosystems for the third- and eighth-year reviews of the ... [CPUs], applications for new wind power proposals, and wind repowering projects.

- Assist wind industry operators and the County of Alameda with compliance issues related to State and Federally listed species, State species of special concern and State and Federal fully protected avian species.

- Review and provide recommendations for any adjustments to the baseline fatality rates from existing or new data used to evaluate the effectiveness of the ... [Avian Wildlife Protection Program & Schedule]... [.

- Review methods for identifying high risk

> turbines (Tiers 1 and 2 or other categories), and recommend adjustments or modifications to those methods if necessary.
>
> - Identify when independent peer review is required and assist in the selection of peer reviewers.
>
> - Meet on at least a quarterly basis (schedule to be coordinated by the Planning Director).

(RA 155-56.)

Alameda County provided that membership in the SRC represent the interests of all stakeholders, including state and federal regulatory agencies:

> The SRC will be made up of technical experts with knowledge of and experience with avian safety and wind energy issues, and shall meet minimum qualifications of education and experience with biological resource analysis, wildlife management and/or wildlife science. All members of the SRC should possess some combination of academic training, appointments, certifications, publications, employment history with a relevant governmental agency, specialist consulting firm or academically recognized institution, prior service on a scientific advisory committee, advanced degree(s) in statistics, and other relevant background. The members should have knowledge of scientific protocols, investigative procedures, inferential statistics and avian mortality issues. Availability and willingness to attend meetings, read and study reports, write recommendations and

communicate effectively among the SRC members is mandatory....

At a minimum, the Board of Supervisors appointments to the SRC shall include one member to represent the following groups or entities:

- The Permittee(s) (i.e., the wind farm companies or turbine operators and their personnel, including consultants with active contracts for services to the operators);

- The environmental community (e.g., the Center for Biological Diversity, Californians for Renewable Energy, Inc., or the Golden Gate Audubon Society);

- The County Planning Department (who may be the County biological resource monitoring consultant as provided for in Condition 6, or one of such consultants);

- A California state resource agency (e.g., the ... [CEC], or the California Department of Fish and Game);

- A United States federal resource agency (e.g., the United States Fish and Wildlife Service); and

- In the event only one state or federal resource agency nominates a representative, a fifth representative shall be appointed by the Board of Supervisors to represent the public-at-large.

(RA 156-57.)

On September 22, 2005, the Board of Supervisors passed a resolution addressing the appeal by CBD, CARE and GGAS of the BZA's decision to renew the CUPs. That resolution contains a detailed, fourteen-page summary of the administrative process. (RA 107-117.)

The administrative process is inclusive, comprehensive and incorporates extensive scientific study and review, multiple public hearings before the BZA, appeals of the grant of CUPs to the Board of Supervisors, and multiple public hearings before the Board of Supervisors. The administrative record includes 35,000 pages of documents. (RA 104.) CBD was an active participant, advocating for and obtaining significant additional mitigation measures. In its September 22, 2005, resolution, the Board of Supervisors noted:

> That the appeals by the Center for Biological Diversity, Californians for Renewable Energy and the Golden Gate Audubon Society have certain merits, and in consideration of such comments, the Board denies the appeals in part while granting other portions of the appeals by imposing specific requirements set forth in the conditions, including but not limited to:
>
> With respect to the comment in the first appeal by CBD and CARE that the approved conditions did not impose a limited permit term, and in the second appeal by CBD, CARE and GGAS that approving the facilities with 20-year terms with five-year reviews would be inadequate compared to shorter terms of three years, the Board has revised the conditions to provide for expiration of all permits in 13 years, and requires preparation of an EIR in three

years time that will address both existing turbines and the repowering program;

With respect to the comment in the second appeal by CBD, CARE and GGAS that approving the continued operation of approximately 1 percent of all the turbines, identified by the CEC-sponsored researchers as Tier-1 turbines that are associated with an unusually high rates of raptor deaths, the conditions as revised by the Board require the immediate shutdown of all Tier 1 turbines, or approximately 2 percent of all turbines, and other steps to reduce avian mortality;

With respect to the comment in the second appeal that approving the continued operation of the facilities without requirements for implementing available techniques and technologies for reducing bird deaths due to electrocution, the revised conditions require the immediate implementation of techniques identified in the CEC's August 2004 report.

With respect to the comment in the first appeal that the use permit extensions will strongly associate wind energy with adverse effects on migratory bird species and thereby give wind energy a "black eye" and less favorable comparison with fossil fuel-based energy plants, the Board has revised the conditions to require the operators to carry out substantial measures to reduce avian mortality, a program to repower the APWRA, and other steps are intended to associate wind energy with environmental stewardship as well as an economically viable source of sustainable energy.

(RA 125-26.)

The September 22, 2005, resolution mandated compliance with a detailed Avian Wildlife Protection Program, the details of which are spelled out in Exhibit G to the resolution. (RA 126.) That document prescribes a year-by-year schedule of mitigation measures, including seasonal shutdowns, preparation of an EIR, implementation of mitigation measures recommended by the CEC, and repowering. (RA 161-66.)

F. THE CEQA ACTIONS AND THE CEQA SETTLEMENT.

After the Board of Supervisors issued their September 22, 2005, resolution, two environmental groups sought judicial review of the issuance of the CUPs. (RA 171-215.) Those CEQA actions were resolved and thereafter resulted in the CEQA Settlement Agreement following input from the parties and the California Department of Fish and Game. (RJN 2-8.)

The CEQA Settlement Agreement modified the CUPs issued by Alameda County and provides for a plan of adaptive management, to be implemented by the wind power operators, designed to reduce avian mortality at the APWRA. The CEQA Settlement Agreement requires that the wind power operators: (1) achieve a 50% reduction in raptor mortalities within three years and that additional adaptive management measures be implemented if that goal is not reached; (2) make modifications to the seasonal shutdown of turbines; (3) remove or relocate more turbines than required by the original Alameda County-imposed conditions; and (4) participate in the development of a Natural Communities Conservation Plan pursuant to Fish & Game Code section 2801. The CEQA Settlement

Agreement also provides for monitoring by the SRC, annual meetings to discuss the need for "mid-course corrections," and mediation for resolution of any disagreements which might arise.

III. ARGUMENT

A. THE JUDGMENT SHOULD BE AFFIRMED BASED ON THE ABSTENTION DOCTRINE BECAUSE THE TRIAL COURT HAS INHERENT LIMITATIONS AND CANNOT RESOLVE COMPLEX POLICY AND REGULATORY MATTERS SUCH AS THOSE AT ISSUE IN THIS ACTION.

The abstention doctrine is based on the principle that trial courts should be deferential to the authority of regulatory agencies (See *Farmer's Ins. Exch. v. Superior Court* (1992) 2 Cal.4th 377, 394) and mindful of the inherent limitations on their ability to effectively intervene in matters involving complex regulatory or policy issues. (See, e.g., *Desert Health Care Dist.*, *supra*, 94 Cal.App.4th at p. 795; see also *Naegele Outdoor Advertising Co. of California, Inc.*, *supra*, 38 Cal.3d at p. 523; see also *Diaz*, *supra*, 9 Cal.App.3d at p. 599.)

The doctrine applies where a case "[w]ould drag a court of equity into an area of complex . . . policy...." if "[a] finding of liability would encroach on the supervisory authority of an administrative agency...", or where the effect of granting equitable relief would be to substitute court supervision for that of a regulatory agency. [8] (See *Desert Health Care*

[8] There is a long history of California courts applying the abstention doctrine where a cause of action and the remedy sought are equitable in nature. (See *Desert Health Care Dist.*, *supra*, 94 Cal.App.4th at p. 795.) Given that the Public Trust Doctrine is an equitable doctrine pursuant to which CBD is seeking injunctive relief, the abstention doctrine provides a basis for affirming the trial court's order.

Dist., *supra*, 94 Cal.App.4th at p. 795; see also Stern, *Bus. & Prof.C. § 17200 Practice* (TRG 2008) §§ 5.90 5.94; see also *Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Assn.* (1971) 22 Cal.App.3d 303, 311 ["Legislative committees and an administrative officer charged with regulating an industry have better sources of gathering information and assessing its value than do courts in isolated cases."].)

In this case, abstention is appropriate because a highly specialized, quasi-administrative framework evolved during the CUP renewal process that is better equipped to resolve these complex issues. [9] An adjudication in this case of how to best protect avian wildlife while encouraging and supporting wind power as a vital source of renewable energy would impinge upon the ongoing work of this quasi-administrative framework and "drag a court of equity into an area of complex [regulatory] policy...." (See *Desert Health Care Dist.*, *supra*, 94 Cal.App.4th at p. 795.)

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[9] Prior to the instant action, and while it has been pending, Respondents have been working, and continue to work, with a multitude of federal, state and local agencies to find a solution to the environmental and economic issues related to the operation of the wind turbines within the APWRA. Years of collaborative effort reflected in a 35,000-page administrative record culminated in the CEQA Settlement Agreement, a product of which is a self-contained quasi-administrative mechanism for moving the process of resolving these complex issues forward. The plan of action outlined in the CEQA Settlement Agreement is currently being implemented. In addition, the plan calls for adaptive management, which means if some of the approaches are not successful, they can be modified or changed so that the parties can adapt as new scientific information becomes available. Any deficiencies which might exist or develop will be addressed under the comprehensive framework set forth in the CEQA Settlement Agreement and the CUPs.

Moreover, abstention is appropriate because it is not a judicial function to weigh competing environmental policies or to balance them against the energy and economic policies favoring the production of clean renewable energy at the APWRA. (See *ibid.*)

The existing quasi-administrative framework for resolving these complex issues, born out of the CUPs and the CEQA Settlement Agreement, not only must be afforded an opportunity to run its course, but has the best chance of resulting in success. In the unlikely event that further judicial intervention is necessary, it should take place under the auspices of the CUPs and the CEQA Settlement Agreement, not in separate litigation brought by two parties who opted to bypass the more comprehensive CEQA Settlement Agreement in an apparent effort to impose their own solution to the issue of avian protection. [10]

1. Application of the Abstention Doctrine is Proper Because the Trial Court is Inherently Limited in its ability to Resolve the Extraordinarily Complex Policy Issues Associated With the Instant Action.

CBD asks this Court to intervene in complex regulatory issues involving competing environmental policies (*i.e.*, the policies promoting

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[10] If the ruling of the trial court is correct as a matter of law, it will not be disturbed on appeal, whatever the reasons given by the lower court, and even if those reasons were incorrect. (See *Yarrow v. State of California* (1960) 53 Cal.2d 427, 438; see also *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329 ["If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion."].) Therefore, even though the trial court did not give abstention as a reason for dismissing CBD's FAC, if the abstention doctrine provides a ground for dismissing the FAC, the judgment of the trial court should be affirmed.

clean, renewable energy and the protection of certain avian species), which are extremely difficult to reconcile.

California courts, however, are mindful of the inherent limitations on their ability to effectively intervene in matters involving complex regulatory or policy issues and apply the abstention doctrine in recognition of such limits. (See, e.g., *Desert Health Care Dist.*, *supra*, 94 Cal.App.4th at p. 795; see also *Naegele Outdoor Advertising Co. of California, Inc.*, *supra*, 38 Cal.3d at p. 523; see also *Diaz*, *supra*, 9 Cal.App.3d at p. 599.)

There are strong environmental public policies at play in this case that are enormously complex and require balancing. On the one hand, there is public policy support for renewable energy in the form of wind power, while on the other hand, there is the public policy support for the protection of wildlife. In addition, promoting wind power is also a matter of economic policy, since there is a growing imbalance between the supply of, and demand for, fossil fuels. (See, e.g., 42 U.S.C. § 9201(a).)

The strong public support for wind power is reflected in a number of governmental actions. Congress passed the Wind Energy Systems Act for the specific purpose of developing wind power as a clean, renewable energy resource. (42 U.S.C. § 9201.) The CRC then designated the Altamont Pass as an area that would be good for the development of wind power.

After the designation of the Altamont Pass as a "Wind Resource Area," the California Legislature promulgated the RPS, requiring that California's investor-owned utilities and competitive retail suppliers derive 20% of their retail sales from renewable energy by 2017. (RJN 37 [Stewart

Decl. ¶ 8].) The CEC has adopted a goal of meeting this requirement by 2010, and has further indicated that wind power is critical to the effort. (RJN 37 [Stewart Decl. ¶ 9].)

Alameda County, where a number of the wind turbines are located, has recognized the importance of wind generated energy and has stated that it is its goal to maximize production from wind turbines of clean, renewable energy. (RJN 37 [Stewart Decl. ¶ 10].)

At the same time, there is public support for the protection of avian wildlife. For example, Alameda County, in its policy statement supporting wind energy stated that programs should be instituted to minimize the impact of the wind turbines on the bird population within the APWRA. (RJN 37 [Stewart Decl. ¶ 10].)

Efforts to balance these competing public policies have been undertaken by governmental agencies, environmental groups, scientists, and Respondents that have culminated in the CEQA Settlement Agreement which includes a three year program of adaptive management involving more stringent conditions than those imposed by Alameda County. The CEQA settlement includes monitoring by the SRC to ensure compliance with the mitigation targets identified in the settlement. If the targets are not met, there is a provision for mediation, and if necessary, judicial enforcement of the Settlement Agreement's terms. (RJN 7-8.) This highly specialized mechanism offers the best hope of balancing the environmental, economic and energy policies that underlie wind turbine operations within the APWRA with the policy of preserving wildlife.

Furthermore, where, as here, the relief sought is injunctive, it would

be impractical for the trial court to draft, supervise, and enforce an injunctive order regulating the wind power industry and providing a program for avian protection. (See *Desert Health Care Dist., supra*, 94 Cal.App.4th at p. 795; see also Stern, *Bus. & Prof.C. § 17200 Practice* (TRG 2008) §§ 5.90 5.94; see also *Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Assn.* (1971) 22 Cal.App.3d 303, 311.) Such matters are best left to the legislature and any governmental agencies previously engaged in working toward a resolution of these issues.

2. The Quasi-Administrative Framework is Best Suited to (1) Consider the Input from all Interested Stakeholders; (2) Adapt to the Ongoing Implementation of Frequently Changing Mitigation Measures; (4) Supervise the Implementation of Various Mitigation Measures; and(5) Actually Reduce Avian Impacts.

In our case, because a host of agencies, governmental bodies, environmental groups, scientists, and industry experts are already involved in supervising the collaborative effort to fashion a solution to the issues raised in our case, and because such groups are better equipped to deal with these issues, the court should abstain from hearing this case.

Courts often abstain where the issues are complicated and there are other bodies better equipped to address such matters. In *Naegele Outdoor Advertising Co. of California*, an Indian tribe contracted with defendant Naegele to construct and maintain more than a dozen outdoor billboards on a portion of its land abutting an interstate highway. (See *Naegele Outdoor Advertising Co. of California, Inc., supra*, 38 Cal.3d at pp. 512-13.) A competitor alleged unfair competition because Naegele violated

California's Outdoor Advertising Act, and obtained an order enjoining Naegele from maintaining the billboards. (See *id.* at p. 514.)

On appeal, the California Supreme Court reversed, holding that a finding of unfair competition could not be based on a violation of California's Outdoor Advertising Act because federal law preempted state regulation of outdoor advertising on Indian reservations. (See *Naegele Outdoor Advertising Co. of California, Inc.*, *supra*, 38 Cal.3d at p. 523.) The Supreme Court further held that the abstention doctrine precluded reliance on the federal Highway Beautification Act as a predicate to support the finding of an unlawful business practice. The Court stated:

> [W]e have concluded that [the U.S. Department of the] Interior . . . is the appropriate agency to enforce the act's provisions. The sound counsel of the *Diaz* decision, therefore, mandates state abstention in reliance upon federal enforcement in this case.

(*Naegele Outdoor Advertising Co. of California, Inc.*, *supra*, 38 Cal.3d at p. 523.)

In *Diaz*, the decision referenced in the excerpt above, a group of migrant farm workers brought an unfair business practices action against three ranches for knowingly hiring illegal immigrants. (See generally *Diaz, supra*, 9 Cal.App.3d 588.) The court acknowledged the harm to plaintiffs, but nonetheless denied injunctive relief on the grounds that federal authorities were in a superior position to address the problem, stating:

> Plaintiffs seek the aid of equity because the national government has breached the commitment implied by national . . . policy. It is more orderly, more effectual, less

> burdensome to the affected interest, that the national government redeem its commitment. Thus the court of equity withholds its aid.

(*Diaz, supra*, 9 Cal.App.3d at p. 599.)

In our case, Respondents, various governmental entities, scientists, and environmental groups have been working together in a collaborative process. What has emerged from this process is that there is no clear solution, that it is an exceedingly complex matter, and that everyone, including Respondents, are continuing to seek ways to successfully mitigate impacts to avian wildlife at the APWRA.

There can be no dispute that achieving a solution to this problem is complex and uncertain. Many scientific studies have been completed and based upon them, numerous mitigation proposals have been made to improve the protection of birds within the APWRA. The problem is that most of these proposals have been, and currently are, constantly being changed, revised, and abandoned.

For example: the scientific experts first recommended that perching guards be installed on the wind turbines in order to discourage the birds from perching on the towers, then they later changed their minds and recommended the abandonment of the perching guards. (RJN 39 [Stewart Decl. ¶ 17].) In 2003 scientific experts recommended that fourteen mitigation measures be implemented. (RJN 40-41 [Stewart Decl. ¶ 21].) Eight months later the CEC withdrew five of those mitigation measures, and recommended modification to some of the remaining measures. (RJN 41 [Stewart Decl. ¶¶ 22-23].) As recently as January 2005, the CEC came up with yet another approach to reduce avian impacts. This plan focused on

seasonal shutdowns for high risk turbines, those turbines determined by the scientists to be the most harmful. (RJN 42 [Stewart Decl. ¶ 24].) Even these proposals have fluctuated wildly in their selection of the turbines to be eliminated. Just two months after selecting a specific group for shutdown, the scientists changed their minds and came up with a different group to shut down. (RJN 42-43 [Stewart Decl. ¶ 25].) After another four months, the scientists again changed the list of turbines to be shut down. (RJN 42-43 [Stewart Decl. ¶ 25].)

In summary, after years of study and analysis, there has been no consensus as to the best plan to reduce avian impacts. In 2004 the CEC observed that the problems were perplexing and that there were many questions that remain unanswered. (RJN 45, 974 [Stewart Decl. ¶ 34 and Exh. J thereto, emphasis added].) Then, in 2005, the County of Alameda noted that there was still significant disagreement as to what measures to adopt and implement. (RJN 44-45 [Stewart Decl. ¶ 33, underline added].)

To assist in determining the best mitigation measures to approve, the County of Alameda mandated the formation of the SRC, to "[e]nsure the maximum feasible degree of wildlife protection while maintaining the efficient production of renewable energy..." and "[r]epresent and collectively balance the fundamental interests and input of all stakeholders, including Permittee(s), the County of Alameda, other governmental agencies and the public at large." (RA 118, 155.) The SRC is made up of technical experts (scientists) with expertise in avian wildlife management. The members of the SRC include representatives of the wind power

companies, environmental groups, the County of Alameda, and a California state resource agency. (RA 156-57.)

As demonstrated by the constantly changing plans and recommendations, resolving the environmental and economic issues attendant to the operation of the wind turbines within the APWRA is an imperfect science. Because that science is likely to remain imperfect and in flux for some time, based upon the comprehensive framework established by the formation of the SRC, the issuance of the CUPs and the CEQA Settlement Agreement, any injunction requiring that particular mitigation measures be implemented is likely to conflict with and/or require modification after modification as scientific analysis and the implementation of plans born out of the programs in place continue to evolve. This will make judicial supervision and enforcement of any injunctive order virtually impossible. The following observations stated in *Larez v. Oberti* (1972) 23 Cal.App.3d 217 apply with equal force here:

> [I]n our opinion, the impracticality 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.

(*Larez, supra,* 23 Cal.App.3d at pp. 222-23.)

In our case, as in *Larez*, it would be impractical if not impossible to draft, supervise and enforce an injunction. In addition, it is likely that other environmental groups would file new lawsuits alleging violations of the Public Trust Doctrine, seeking additional or inconsistent injunctive relief.

These difficulties with granting injunctive relief, and existence of other bodies that are better suited to address avian protection, coupled with the fact that this case involves a balancing of complex pubic environmental policies, make the instant action particularly suitable for abstention by the trial court.

3. Judicial Intervention, at Least at this Early Stage, Would Subject Respondents to Conflicting Mandates.

Any judicial attempt to fashion injunctive relief before the CEQA Settlement Agreement's three-year adaptive management program expires raises significant concerns. Is CBD asking this Court to issue a different set of directives than those set forth in the comprehensive CUPs and CEQA Settlement Agreement? If not, why is further litigation necessary? If so, which directives should Respondents follow? Successive litigation involving the same subject matter places Respondents in the unenviable position of choosing between contempt citations for violating a lawful order of this Court. Abstention is therefore appropriate. (See *Diaz*, *supra*, 9 Cal.App.3d at p. 599; see also Code of Civ. Proc., §§ 1209 et seq.)

4. In the Unlikely Event Judicial Intervention Becomes Appropriate, it Should Occur Only After the Quasi-Administrative Framework Has an Adequate Opportunity to Run its Course Under the Terms of the CEQA Settlement Agreement.

If at some later point, after the quasi-administrative framework has been completed and judicial intervention becomes necessary, any judicial action should be pursued by enforcing the provisions in the CEQA Settlement Agreement. (RJN 4, 7-8.) For example, if the comprehensive plan laid out in the CEQA Settlement Agreement is not met, the parties can

seek mediation pursuant to the provisions of that agreement. If mediation is not successful, it may then be appropriate for an entity to seek judicial intervention in order to obtain relief related to the enforcement of the provisions of the CEQA Settlement Agreement.

B. THE PRIMARY JURISDICTION DOCTRINE PROVIDES AN ADDITIONAL BASIS FOR AFFIRMING THE TRIAL COURT'S JUDGMENT BECAUSE THERE ARE AGENCIES AND GROUPS BETTER ABLE TO BALANCE COMPETING ENVIRONMENTAL POLICIES AND DEVELOP MEANINGFUL AVIAN MITIGATION PLANS.

The judgment of the trial court should also be affirmed under the primary jurisdiction doctrine. There is no rigid formula for determining when this doctrine applies. (See *Farmers Ins. Exch. v. Superior Court*, *supra*, 2 Cal.4th at p. 391, citing *United States v. Western Pacific R. Co.* (1956) 352 U.S. 59, 64.) Rather, the question in each instance is whether a case raises "issues of fact not within the conventional experience of judges," but within the purview of an agency's responsibilities; whether the "limited functions of review by the judiciary are more rationally exercised, by preliminary resort" to an agency better equipped than courts to resolve an issue in the first instance; or, in a word, whether preliminary reference of issues to the agency will promote that proper working relationship between court and agency that the primary jurisdiction doctrine seeks to facilitate. (See *Far East Conference v. United States* (1952) 342 U.S. 570, 574-75; see also *Western Pacific R. Co.*, *supra*, 352 U.S. at pp. 63-65.)

As indicated, a quasi-administrative framework has evolved through the CUP renewal process and the CEQA Settlement Agreement. This framework is in a far better position than a court in a collateral proceeding

to balance the various policy issues involved. Judicial intervention in the form of a collateral proceeding is inappropriate at least until this framework has run its course.

C. THE TRIAL COURT'S JUDGMENT OF DISMISSAL CANNOT BE AFFIRMED BASED ON THE FAILURE TO JOIN AN INDISPENSIBLE PARTY.

The Court also inquired whether the trial court's judgment could be affirmed based on the failure to include an indispensable party. Respondents do not believe the judgment can be affirmed on that basis.

The counties may be necessary parties under Code of Civil Procedure section 389 in that they have a compelling governmental interest in the subject matter of this litigation, it may be impossible to grant complete relief without them, and any injunctive relief granted herein may conflict with the conditions the counties attached to the use permits and/or the conditions imposed by the settlement of the CEQA action. [11] Other

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[11] Subdivision (a) of section 389 specifies which parties ought to be joined if possible:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations

governmental entities may also be necessary parties for the same or similar reasons. [12] However, in order for the judgment of the trial court to be affirmed on this alternative basis, the Court would have to conclude that such entities are also indispensable parties in the sense that they cannot be joined due to sovereign immunity, the statute of limitations, or some other

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> by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.
>
> (Code of Civ. Proc., § 389(a).)

The purpose of Code of section 389 of the Code of Civil Procedure is to help a trial court make "a complete disposition" of a case by requiring the joinder of all parties "materially interested in the subject of the action" whenever such joinder is feasible. (4, Wiktin, *California Procedure* (1997) Pleading § 164, quoting Advisory Committee Note to Code of Civ. Proc. § 389.) Section 389 requires the joinder of a party "where the absence of [that party] may result in substantial prejudice to that [party] or to the parties already before the court." (*Ibid.*)

[12] In *Sierra Club v. Leslie Salt Co.* (N.D.Cal.1972) 354 F.Supp. 1099, the district court acknowledged that there may be some public trust cases in which the state is a necessary party under Federal Rule of Civil Procedure 19, upon which the California joinder statute is modeled. (See *Sierra Club, supra,* 354 F.Supp. at p. 1105 ["Similarly, we cannot say at this time that the State of California is an indispensible party. The complaint simply alleges that the dikes were constructed in violation of the public trust in the navigable waters and shorelands of the State of California. There is no allegation that the State has somehow abdicated or abused its responsibility in the administration of the public trust. Should it appear at some future time that this action involves the issue whether the State has violated the public trust in approving the dikes or otherwise acting or failing to act, a motion to join the State as a party will be similarly considered at that time."]; see also *County of San Joaquin, supra,* 54 Cal.App.4th at p. 1152 [federal Rule 19 precedent is instructive in California because the California rule is modeled on the federal rule].)

bar. (See *County of San Joaquin v. State Water Resources Control Board* (1997) 54 Cal.App.4th 1144, 1149.) Respondents cannot identify any such impediments that would prevent governmental agencies from being joined to this action.

IV. CONCLUSION

The abstention and primary jurisdiction doctrines provide appropriate grounds to sustain the trial court's dismissal of CBD's lawsuit. It simply makes no sense to involve a court in the complex issues raised by this case. There are industry, environmental, scientific, and governmental agencies and groups who are much better equipped to find a method of reducing avian impacts while carrying out the strong public policies favoring wind power as a critical source of renewable energy. Even if the court were to hear the matter, it would be difficult if not impossible to fashion appropriate injunctive relief and then adequately monitor its terms. How would the trial court develop, supervise, and then force such an injunction? Would the terms of the injunction be in addition to or conflict with the terms of the CUPs and/or the CEQA Settlement Agreement? Would the court have periodic hearings to monitor the progress being made?

Given that (1) this case requires the balancing of competing environmental policies; (2) a solution involves complex and highly technical studies and recommendations as to which there is no current consensus; and (3) it would be difficult if not impossible to craft and then enforce the injunctive relief sought here, it is respectfully submitted that the dismissal of this case by the trial court should be sustained on the grounds

of abstention and/or primary jurisdiction.

Respectfully submitted,

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PROOF OF SERVICE—C.C.P. §1013A, F.R.C.P. §5

I, the undersigned, declare: I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within action. I am employed by Ferguson & Berland, 1816 Fifth Street, Berkeley, California 94710, and am readily familiar with this firm's business practice of processing of documents for service.

On the date listed below I served a true and correct copy of the attached **LETTER BRIEF RE: RESPONSE TO COURT'S REQUEST AND INQUIRIES** on the following parties by the method indicated below:

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

Executed on March 26, 2008, at Berkeley, California.

Raquel Rivera