



CENTER for BIOLOGICAL DIVERSITY

Because life is good.

*protecting and restoring natural ecosystems and imperiled species through
science, education, policy, and environmental law*

May 18, 2009

Hon. Ronald M. George, Chief Justice
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: Amicus Curiae Letter in Support of Petition for Review / Request for Depublication:
California Native Plant Society v City of Rancho Cordova (2009) 172 Cal.App.4th 603
(Supreme Ct. Case No. S172621). (Rules of Court, rules 8.500(g) and 8.1125.)

Dear Chief Justice George:

I am writing on behalf of the Center for Biological Diversity ("Center") to express the Center's support of the Petition for Review filed by the respondent on appeal in the above-titled case, *California Native Plant Society, Inc.* ("CNPS"). (Rules of Court rule 8.500(g)). In the alternative, the Center requests depublication of this case, if review is not granted. (Rules of Court rule 8.1125.) A copy of this letter has been served on the parties to these cases, as set forth in the attached proof of service. (Rules of Court, rule 8.1125(a)(5).)

Interest of Amici Curiae

The Center for Biological Diversity is a non-profit corporation with offices in San Francisco, Joshua Tree, and Los Angeles, California; Phoenix and Tucson, Arizona; Silver City, New Mexico, Portland, Oregon, and Washington D.C. The Center is actively involved in wildlife and habitat protection issues throughout California, the United States, and the world. The Center has over 60,000 members, including many throughout California. The Center, and its members and staff, have participated in efforts to protect and preserve the habitats essential to the continued survival of threatened and endangered species, and the areas that serve as habitat and potential habitat for these species.

Center attorneys frequently bring lawsuits to enforce federal and state environmental laws, including the California Environmental Quality Act ("CEQA"). For example, in *Center for Biological Diversity v. County of San Bernardino* 2008 Cal. App. Unpub. LEXIS 9281, the Center successfully assured that the informational mandate of CEQA is achieved to provide for the disclosure of the availability and impacts to water resources and sensitive wildlife species. The Center is also very active in the use of CEQA to address the global warming impacts from proposed projects.

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The Center requests the Supreme Court grant review of *CNPS* to ensure the integrity of CEQA's public participation and environmental review process. The *CNPS* decision contradicts established precedent by requiring laypersons commenting on a project to set forth precise legal theories rather than simply informing the lead agency of environmental issues as required by well settled case law. The *CNPS* decision also improperly allows the deferral of mitigation measures of questionable effectiveness, thereby frustrating CEQA's premium on environmental protection and informational disclosure.

Statement of Facts

This case involves a large planned residential and commercial development of approximately 530 acres ("Project") in an area recognized by local, state, and federal wildlife experts as important for the protection of sensitive plant and wildlife species. The Southeastern Sacramento Valley Vernal Pool Region, where the Project is located, is home to numerous rare, sensitive, threatened, and endangered species. The Project's water supply relies upon groundwater in an aquifer that is already suffering from overdraft conditions, which has significant impacts on aquatic wildlife in the Cosumnes and San Francisco-San Joaquin Bay Delta ecosystems. In conducting environmental review for the Project the lead agency relied upon analysis and conclusions in an Environmental Impact Report ("EIR") for a development encircling the Project that was invalidated by the California Supreme Court. (*See Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 421-422 [53 Cal. Rptr. 3d 821, 150 P.3d 709] (*Vineyard*).)

Petitioner CNPS, a leader in habitat protection and conservation for native plants in California, echoed the comments of the U.S. Fish and Wildlife Service and California Department of Fish and Game regarding the Project's impacts to sensitive vernal pool systems. CNPS further noted that impacts associated with mitigation off site would have additional impacts and that information regarding off site mitigation and restoration must be provided in the EIR. The U.S. Environmental Protection Agency submitted concerns regarding the groundwater supply relied upon by the Project because the aquifer within the Project area has serious problems with overdraft and would negatively impact the Cosumnes River and Bay/Delta ecosystem.

Despite the repeated comments of impacts to sensitive species and the lack of information regarding mitigation measures and groundwater supplies, the lead agency approved the Project EIR that relied upon and incorporated an invalidated EIR. The Court of Appeal failed to reach the merits on several claims in this case by ruling that the detailed comments provided by the public and government agencies did not rise to the level necessary to exhaust the legal issues in the case. The Court of Appeal further ruled that the formulation of an "Avoidance/Mitigation Plan" at a later date did not impermissibly defer the informational requirements of CEQA.

Grounds for Supporting Review

Review or depublication of the Court of Appeal's decision in *CNPS* is necessary to 1) prevent the gradual erosion of the public participation process and 2) retain the importance of information disclosure in the CEQA process for analysis and mitigation of significant impacts.

Two of the basic purposes of CEQA are to inform governmental decisionmakers and the public about the potential significant effects of proposed activities and to provide opportunities for other agencies and the public to review and comment on draft environmental documents. The latter is crucial to the effectiveness of the former. In *CNPS* the Court of Appeals subverts these bedrock foundations of CEQA.

First, by narrowing the effectiveness of public comments to place the lead agency on notice of violations of CEQA the Court of Appeals has begun to subvert the importance of the public and government agencies during environmental review and comments. "Public participation is an essential part of the CEQA process" and CEQA encourages wide public involvement. Guidelines § 15201; *see* Pub. Res. Code § 21000(e). The Court of Appeal in *CNPS* places too high a standard on the layperson public in commenting on the deficiencies of environmental documents in the CEQA process by requiring the public to put forward precise legal theories rather than simply informing the lead agency of environmental issues as required by well settled case law. *See e.g. East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155; *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745.)

Moreover, the *CNPS* Court expands the exhaustion doctrine to raise the bar and prohibit CEQA petitioners from arguing issues raised by Responsible agencies and others during the public comment period process on an EIR. The *CNPS* Court, following the lead agency, went so far as to disregard comments submitted and exhausted by the U.S. Environmental Protection Agency that specifically raised the problems with the Project's groundwater and impacts to aquatic resources that invalidated the super-ceding EIR. Expanding the exhaustion doctrine in such a fashion allows lead agencies to rely on information and analysis from an EIR that has been invalidated in Court, thus disregarding important deficiencies during the environmental review process for resources relied upon by the very same projects under review. Reliance upon an EIR that has been invalidated because it did not properly analyze water supply runs contrary to CEQA. *Friends of the Santa Clara River v. Castaic Lake Water Agency* (2002) 95 Cal.App.4th 1373.

Second, the *CNPS* Court permits lead agencies to hide behind their failure to gather, analyze, and disclose the potentially significant impacts of a Project and its proposed mitigation contrary to CEQA. Pub. Res. Code § 21002.1(a); Guidelines § 15144. In the present case the Court permits the development of an Avoidance/Mitigation Plan that does not disclose the impacts to off-site resources, general location of off-site impacts or mitigation, monitoring of off-site mitigation, or maintenance of the off-site mitigation areas. Without such information it is impossible for the public to determine the mitigation measures' impacts. This case involves a project level approval and EIR where a greater level of certainty is required than for a programmatic EIR.

Specific measures are needed to ensure that significant impacts are truly mitigated and to provide the public with the opportunity to comment on proposed mitigation. The decision prohibits an analysis of the effectiveness of mitigating the impacts to endangered vernal pool ecosystems or the viability of off-site vernal pool creation as mitigation. The effectiveness of vernal pool restoration itself is questionable due to the unique substrate needed for vernal pools, the

endangered status of vernal pool species, and the negative effects of invasive species on vernal pool restoration sites. Deferral of the collection and dissemination of this information violates the fundamental principle of an EIR as a valid information disclosure document. Pub. Res. Code §§ 21061.

Request for Depublication

In the event the Court does not grant review, the Center requests, for the same reasons stated above, that the Court order depublication of the Court of Appeal's published decision in *CNPS v. City of Rancho Cordova*. (Rules of Court, rule 8.1125)

Conclusion

For the foregoing reasons, the Center urges the Court to grant review in *CNPS v. City of Rancho Cordova*, or, at a minimum, that the Court order depublication of the Court of Appeal's published decision. Review or depublication is warranted in this case to uphold the importance of participation by the general public in the environmental review process and to maintain the importance of information disclosure in the CEQA process.

Sincerely,



Center for Biological Diversity

cc:

See attached service list

SERVICE LIST

CASE: *CNPS v. City of Rancho Cordova, et al.* (Third Appellate District Case No. C057018; Sacramento County Superior Court Case No. 06 CS 01311)

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DECLARATION OF SERVICE VIA U.S. MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

I am employed in the County of San Francisco, State of California. I am over the age of eighteen and am not a party to the within action; My business address is 351 California ST, San Francisco, CA. 94104.

On May 18, 2008, I served the foregoing document(s) described as:

Amicus Curiae Letter in Support of Petition for Review / Request for Depublication

to the interested parties in this action, listed on the attached sheet.

[X] BY U.S. MAIL

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

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

Executed May 18, 2008, at San Francisco, California.

