DEPARTMENT 85 LAW AND MOTION RULINGS

Case Number: 22STCP02661 **Hearing Date:** October 24, 2023 **Dept:** 85

United Water Conservation District v. California Fish and Game Commission, 22STCP02661

Tentative decision on petition for writ of mandate: denied

Petitioner United Water Conservation District ("District") seeks a writ of mandate compelling Respondent California Fish and Game Commission ("Commission") to vacate (1) its approval of Intervenor California Trout's ("CalTrout") petition to list the Southern California steelhead (*Oncorhynchus mykiss* or *O. mykiss*) as an endangered species under the California Endangered Species Act ("CESA"), and (2) its adoption of a regulation during the *O. mykiss*'s candidacy period ("2084 Exception").

The court has read and considered the moving papers, oppositions from the Commission and the Intervenors[1], and consolidated reply, and renders the following tentative decision.

A. Statement of the Case

1. Petition

Petitioner District commenced this proceeding on July 18, 2022 against Respondent Commission alleging traditional and administrative mandamus. The Petition alleges in pertinent part as follows.

CESA (Fish & Game ("F&G") Code §2050 *et seq*.), was enacted to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat. F&G Code section 2070 requires the Commission to establish a list of endangered species and a list of threatened species. A "threatened species" is a native species or subspecies of bird, mammal, fish, amphibian, reptile, or plant that, although not presently threatened with extinction, is likely to become an endangered species in the foreseeable future in the absence of required special protection and management efforts. F&G Code §2067. A "candidate species" is a native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant which the Commission has formally noticed as under review by the Department of Fish and Wildlife ("DFW") for addition to either the list of endangered species or the list of threatened species, or for which the Commission has published a notice of proposed regulation to add to either list. F&G Code §2068.

Any interested party can submit a petition to list a species under CESA. The species becomes a candidate species once the Commission accepts the petition for consideration and publishes a notice of findings accepting it.

Upon receipt of a listing petition, the Commission forwards the listing petition to DFW for an evaluation report assessing whether the petition provides sufficient scientific information for each of the 12

required informational data sets to indicate that listing may be warranted. After DFW recommends that the Commission either reject or accept the petition, the Commission must hold a noticed public hearing to receive the report and consider the petition, the report, written comments, and testimony.

If the petition fails to include sufficient scientific information in each of the 12 data sets in F&G Code section 2072.3, the Commission must reject the petition. Title 14, Code of Regulations ("CCR") §670.1(b), (e)(1). A petition has sufficient information on a data set if that amount of information, when considered with DFW's written report and the comments received, would lead a reasonable person to conclude that the petitioned action may be warranted.

If the Commission approves the listing petition for consideration, the subject species becomes a candidate species and is immediately granted CESA protections during the 12-month candidacy period. The Commission can craft exceptions to this broad protection ("2084 exceptions") such as by authorizing the taking of any candidate species subject to terms and conditions it prescribes that are based on the best available scientific information.

After the Commission approves the listing petition for consideration, DFW has 12 months to prepare a more detailed and peer-reviewed evaluation report and recommendation to the Commission. The Commission must then hold another noticed public hearing for final consideration of the listing petition.

On June 7, 2021, CalTrout submitted a petition to list the Southern California steelhead (*O. mykiss*) ("steelhead") as an endangered species under CESA. *O. mykiss* has an anadromous form called "steelhead" and a resident form called "rainbow trout". Because of a rainbow trout's ability to express an anadromous life history, CalTrout's petition admitted that rainbow trout are an integral part of the steelhead population and play a central role to the continued existence of steelhead. Rainbow trout are plentiful and more viable than steelhead and contribute to the persistence of the overall species.

The CalTrout petition only seeks to protect steelhead *O. mykiss*. The CalTrout petition conflates the anadromous and resident forms of *O. mykiss*. Almost all evidence presented in the CalTrout petition concerned the steelhead *O. mykiss*. On October 4, 2021, DFW asked CalTrout to clarify whether it sought to list both forms of trout. CalTrout replied that it defined the target species as both forms of *O. mykiss*, but it never submitted additional evidence that the rainbow trout faces a threat.

DFW recommended the CalTrout petition for the Commission's consideration, but also acknowledged that the petition's information on the rainbow trout was insufficient. DFW claimed that it had internal data on rainbow trout but did not present any information to fill the outstanding gaps. Multiple interested parties provided significant evidence that the CalTrout petition failed to meet CESA's informational requirements.

The Commission held a noticed public hearing for the CalTrout petition on February 17, 2022. At the hearing, DFW presented only evidence about the steelhead *O. mykiss*. CalTrout's presentation acknowledged that the anadromous and resident varieties are distinct and that the resident rainbow trout variety has a healthy population.

The Commission continued the decision until its next meeting on April 20-21, 2022, and made clear that this continuance was to consider 2084 exceptions. District and other interested parties submitted a proposed 2084 exception on April 7, 2022.

At the April 21, 2022 hearing, the Commission approved the CalTrout petition as having sufficient information to indicate that the petitioned action may be warranted. It rejected the proposed 2084 exception and passed a more limited exception that requires any take to meet four separate requirements. This exception could compel projects currently required by court decree and supervised by federal and state agencies to either reduce operations or violate a court order. The Office of Administrative Law published the Commission's findings on May 13, 2022.

Petitioner District seeks (1) a stay of the Commission's action under CCP section 1094.5(g), (2) a writ of mandate compelling the Commission to vacate its approval of the CalTrout petition for consideration of the steelhead as a candidate species, or alternatively to vacate its approval of the limited 2084 exception, and (3) attorney's fees and costs.

2. Course of Proceedings

No proof of service is on file for the Petition.

On February 28, the court granted District's motion to augment the record with 28 attachments to an August 17, 2021 letter sent by District to DFW and the Commission.

On the same date, the court heard and continued a motion to intervene by Proposed Intervenors Center for Biological Diversity, Wishtoyo Foundation, and Ventura Coastkeeper, warning the proposed intervenors that it will not permit significant expansion of the issues or page limits by multiple intervenors.

On March 9, 2023, the court granted the motion to intervene with instructions for the Intervenors to file a joint brief and not expand the issues. Intervenors filed an Answer.

B. Governing Law

1. CESA

Certain species of fish, wildlife, and plants have been rendered extinct as a consequence of man's activities, un-tempered by adequate concern and conservation. F&G Code §2051(a). Other species of fish, wildlife, and plants are in danger of, or threatened with, extinction because their habitats are threatened with destruction, adverse modification, or severe curtailment, or because of overexploitation, disease, predation, or other factors. F&G Code §2051(b). These species of fish, wildlife, and plants are of ecological, educational, historical, recreational, esthetic, economic, and scientific value to the people of this state, and the conservation, protection, and enhancement of these species and their habitat is of statewide concern. F&G Code §2051(c).

CESA reflects the state's policy "to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat." F&G Code §2052. An "endangered species" is a species or subspecies that is in serious danger of becoming extinct through either all or "a significant portion" of its range. F&G Code §2062. A "threatened species" is a native species or subspecies of bird, mammal, fish, amphibian, reptile, or plant that, although not presently threatened with extinction, is likely to become an endangered species in the foreseeable future in the absence of required special protection and management efforts. F&G Code §2067. A "candidate species" is a native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant which the Commission has formally noticed as being under review by DFW for addition to either the list of endangered species or the list of threatened species, or for which the Commission has published a notice of proposed regulation to add to either list. F&G Code §2068.

CESA shall be liberally construed to allow the state agencies to properly carry out its conservation duties. Calif. Forestry Assn. v. Calif. Fish & Game Comm'n, (2007) 156 Cal.App.4th 1535, 1545.

a. The First Stage

CESA provides "interested person[s]" the right to petition the Commission to list a species or subspecies as endangered. F&G Code §§ 2070–2075.5. A listing petition must include information regarding the population

trend, range, distribution, abundance, and life history of a species, the habitat necessary for survival, the factors affecting the ability of the population to survive and reproduce, the degree and immediacy of the threat, the impact of existing management efforts, suggestions for future management, the availability and sources of information, and a detailed distribution map. F&G Code §2072.3; 14 CCR §670.1(d). This data, taken together, must comprise "sufficient scientific information that [listing] may be warranted." F&G Code §2072.3; 14 CCR §§ 670.1(b)-(d).

Once a listing petition is submitted, the Commission refers it to DFW. F&G Code §2073. Within the next 90 days, DFW must evaluate the petition on its face and in relation to other relevant information it possesses or receives. F&G Code §2073.5(a). DFW submits a written evaluation report recommending that the Commission either reject or accept the petition based on whether it has sufficient information to indicate that the petitioned action may be warranted. F&G Code §2073.5(a). The Commission may grant a 30-day extension upon DFW's request. F&G Code §2073.5(b).

The Commission then holds a public hearing at which any interested party may submit additional evidence on the listing petition. F&G Code §§ 2074, 2074.2(a). The Commission uses DFW's evaluation report to decide whether the petition provides sufficient information to indicate that the petitioned action may be warranted. F&G Code §2074.2(e). If not, it shall publish a notice of finding that the petition is rejected, including the reasons why the petition is not sufficient. F&G Code §2074.2(e)(1).

The standard for determining whether the petition provides sufficient information that a species is a candidate for listing "requires only that a substantial possibility of listing could be found by an objective, reasonable person." Center for Biological Diversity v. Fish & Game Com., ("CBD") (2008) 166 Cal.App.4th 597, 611. A "substantial possibility" of listing "means something more than the one-sided 'reasonable possibility' test for an environmental impact report [under CEQA] but does not require that listing be more likely than not." Id. at 610 (citing Natural Resources Defense Council v. Fish & Game Com., ("NRDC") (1994) 28 Cal.App.4th 1104, 1125. If a listing petition meets that standard, the Commission must accept the petition for consideration. CBD*, supra,* 166 Cal.App.4th at 599. The Commission abuses its discretion if it refuses to accept a listing petition unless there is an "absence of any substantial possibility that the species could be listed after the requisite review of the status of the species by [DFW]." Id. at 611 (emphasis added). If the balance is unclear, the court must defer to the Commission. Id.

If the petition is approved, the Commission's notice must list the petitioned species as a candidate species. F&G Code §2074.2(e)(2). Candidate species are entitled to the same protections as listed species. F&G Code §2085. Any "take" of the species is prohibited unless authorized by a provision of CESA. F&G Code §§ 2080, 2085. "'Take' means hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill." F&G Code §86. During the candidacy period, "the Commission may authorize, subject to terms and conditions it prescribes, and based on the best available scientific information … the taking of any candidate species … provided that … the take is consistent with [CESA]." F&G Code §2084(a). DFW may also authorize entities to take candidate species. See, e.g., F&G Code §2081.

b. The Second Stage

DFW has 12 months to review the status of the candidate species and produce and make publicly available on its website a final written peer reviewed report, based upon the best scientific information available, which indicates whether the petitioned action is warranted. F&G Code §2074.6. After DFW writes a draft report, it shall have the draft prepared and independently peer reviewed, and upon receiving the peer reviewers' input, shall evaluate and respond in writing to the independent peer review and shall amend the draft status review report as appropriate. F&G Code §2074.6.

The revised report shall be posted on DFW's website for a minimum of 30 days for public review. F&G Code §2074.6. The Commission then holds a hearing to decide whether the petitioned action is warranted or if

listing the petitioned species at a different status than requested by the petitioner is warranted. F&G Code §§ 2075.5(e)(1)-(2).

2. Emergency Regulations

A state agency may adopt an emergency regulation pursuant to the Administrative Procedures Act ("APA") (Govt. Code section 11340 *et. Seq*). At least five working days before submitting an emergency regulation to the office, the adopting agency shall send notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. Government Code ("Govt. Code") §11346.1(a)(2). The notice shall include the specific language of the proposed regulation and the finding of an emergency. Govt. Code §11346.1(a)(2). An agency does not need to provide such notice if the emergency clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest. Govt. Code §11346.1(a)(3).

If a state agency makes a finding that the adoption of a regulation or order of repeal is necessary to address an emergency, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal. Govt. Code §11346.1(b)(1). Any finding of an emergency shall include a written statement that contains the information required by Govt. Code section 11346.5(a)(2)-(6) and a description of the specific facts demonstrating the existence of an emergency and the need for immediate action. Govt. Code §11346.1(b)(2). A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation shall not be adequate to demonstrate the existence of an emergency. Id. If the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through non-emergency regulations, the finding of emergency shall include facts explaining the failure to address the situation through non-emergency regulations. Id.

The emergency regulation or order of repeal shall become effective upon filing or upon any later date specified by the state agency in a written instrument filed with, or as a part of, the regulation or order of repeal. Govt. Code §11346.1(d). No emergency regulation shall remain in effect more than 180 days unless the adopting agency has complied with Govt. Code sections 11346.2 to 11347.3 and files certification of such with the Secretary of State within that period. Govt. Code §11346.1(e). Failure to comply with Govt. Code section 11346.1(e) will constitute a repeal of the regulation and shall be deleted after notice to the adopting agency by the office. Govt. Code §11346.1(g).

Any interested person may obtain a judicial declaration as to the validity of any regulation or order of repeal by bringing an action for declaratory relief. Govt. Code §11350(a). The right to judicial determination shall not be affected by the failure either to petition or to seek reconsideration of a petition filed pursuant to Govt. Code section 11340.7 before the agency promulgating the regulation or order of repeal. Id. The regulation or order of repeal may be declared to be invalid for a substantial failure to comply with the APA. Govt. Code §11350(a). When the regulation was an emergency regulation or order of repeal, an attack on validity may be based upon Govt. Code section 11346.1(b)'s requirement that the facts recited in the finding of emergency constitute an emergency within the definition of that provision. Id.

In addition to any other ground that may exist, a regulation or order of repeal may be declared invalid if the agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence. Govt. Code §11350(b)(1).

C. Standard of Review

1. The Commission's Decision

There are three general categories of agency decisions challenged by mandamus: (1) quasi-adjudicative decisions in which the agency exercised its discretion, and which are challenged by administrative mandamus under CCP section 1094.5, (2) quasi-legislative decisions challenged by traditional mandamus under CCP section 1085, and (3) ministerial or informal administrative actions also challenged by traditional mandamus. *See* Western States Petroleum Assn. v. Superior Court, (1995) 9 Cal.4th 571-76.

The Commission decision to approve the CalTrout petition is an administrative decision. F&G Code §2076. CCP section 1094.5 is the administrative mandamus provision which structures the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. Topanga Ass'n for a Scenic Community v. County of Los Angeles, ("Topanga") (1974) 11 Cal.3d 506, 51415. The pertinent issues under section 1094.5 are (1) whether the respondent has proceeded without jurisdiction, (2) whether there was a fair trial, and (3) whether there was a prejudicial abuse of discretion. CCP §1094.5(b). An abuse of discretion is established if the respondent has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. CCP §1094.5(c).

CCP section 1094.5 does not on its face specify which cases are subject to independent review. Fukuda v. City of Angels, (1999) 20 Cal.4th 805, 811. Instead, that issue was left to the courts. As stated *ante*, the Commission must decide whether there is a "substantial possibility" of listing. CBD*, supra,* 166 Cal.App.4th at 599. The Commission abuses its discretion if it refuses to accept a listing petition unless there is an "absence of any substantial possibility that the species could be listed after the requisite review of the status of the species by [DFW]." Id. at 611 (emphasis added).

Whether the Commission has met this standard is reviewed by the court for substantial evidence. CBD, *supra,* 166 Cal.App.4th at 609. "Substantial evidence" is relevant evidence that a reasonable mind might accept as adequate to support a conclusion (California Youth Authority v. State Personnel Board, ("California Youth Authority") (2002) 104 Cal.App.4th 575, 585) or evidence of ponderable legal significance, which is reasonable in nature, credible and of solid value. Mohilef v. Janovici, (1996) 51 Cal.App.4th 267, 305, n. 28. Substantial evidence can be the opinion of a single expert (Coastal Southwest Dev. Corp. v. Coastal Zone Conservation Comm'n, (1976) 55 Cal.App.3d 525, 532), or opinions in a staff report (Griffin Dev. Co. v. City of Oxnard, (1985) 39 Cal.3d 256, 261).

The court considers all evidence in the administrative record, including evidence that detracts from evidence supporting the agency's decision. California Youth Authority, *supra*, 104 Cal.App.4th at 585. The court must uphold the decision unless it concludes, based on the evidence before the City, a reasonable person could not reach the conclusion reached by the administrative agency.¿¿Harris v. City of Costa Mesa,¿(1994) 25 Cal.App.4th 963, 969. Where "reasonable persons may differ," the courts will not disturb the judgment of the administrative agency. Breakzone Billiards v. City of Torrance, (2000) 81 Cal.App.4th 1205, 1246. The court does not weigh evidence or decide who has the better argument and must resolve reasonable doubts in favor of the findings and decision. Topanga, *supra*, 11 Cal.3d at 514.

2. The 2084 Exception

The Commission's 2084 exception is a quasi-legislative decision subject to an abuse of discretion standard. An agency's quasi-legislative decision is an abuse of discretion only if it is "arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." Kahn v. Los Angeles City Employees' Retirement System, (2010) 187 Cal.App.4th 98, 106; Dominey v. Dept. of Pers. Admin., (1988) 205 Cal.App.3d 729, 736. Although mandate will not lie to control the agency's discretion, it will lie to correct abuses of discretion. California Public Records Research, Inc. v. County of Alameda, (2019) 37 Cal.App.5th 800, 806. The court may not substitute its judgment for that of the agency, and it must uphold the decision if reasonable minds can differ. Id.

An agency is presumed to have regularly performed its official duties (Evid. Code §664), and the petitioner seeking administrative mandamus or quasi-legislative traditional mandamus therefore has the burden of proof. Steele v. Los Angeles County Civil Service Commission, (1958) 166 Cal.App.2d 129, 137; Afford v. Pierno, (1972) 27 Cal.App.3d 682, 691 ("[T]he burden of proof falls upon the party attacking the administrative decision to demonstrate wherein the proceedings were unfair, in excess of jurisdiction or showed prejudicial abuse of discretion).

D. Statement of Facts

1. Background

The Vern Freeman Diversion Dam ("Freeman Dam") is a concrete diversion dam spanning the width of the Santa Clara River. AR 157. District operates the Freeman Dam to conserve, maintain, and put to beneficial use the waters of the Santa Clara River watershed, with one of the primary goals to combat seawater intrusion in the Oxnard Plain. AR 157. District does so pursuant to Clean Water Act Section 404 permit 86-116-TS and the Streambed Alteration Agreement No. 5-443-89, both issued in the late 1980s. AR 697-98, 785, 891.

In 2016, the National Marine Fisheries Service ("NMFS") released a five-year review with a summary and evaluation of the *O. mykiss* distinct population segment ("DPS"). AR 5405. It found that this DPS is endangered and includes a suite of steelhead populations inhibiting coastal stream networks from the Santa Maria River system south to the U.S.-Mexico border. AR 5407. Freshwater resident *O. mykiss* (rainbow trout) occur in the same geographic region, frequently in the same river systems as the anadromous form. AR 5407. *O. mykiss* above and below impassable dams within the Southern California DPS tended to be close relatives, suggesting that each steelhead DPS is likely the anadromous component of a corresponding Evolutionarily Significant Unit ("ESU") with both anadromous and resident *O. mykiss*. AR 5407.

The NMFS study acknowledged key knowledge gaps about steelhead ecology. AR 5426. These included uncertainty about the magnitude of normal fluctuations in adult abundance and the underlying biological mechanisms for expression of life-history diversity. AR 5426. Such mechanisms included the factors triggering anadromous versus resident life-histories within populations. AR 5426.

In the amended judgment for Wishtoyo Foundation et al. v. District Water Conservation District ("Wishtoyo") (2018), Case No. CV 16-3869-DOC.(PLAx), dated December 1, 2018, the federal district court found that District's maintenance of the Freeman Dam's fish ladder constituted an unauthorized taking of the steelhead DPS. AR 1253. The court ordered compliance with water diversion operating rules from Reasonable and Prudent Alternative 2 of NMFS's 2008 Biological Opinion for the Freeman Dam. AR 1254. District was required to achieve 100% design, including physical modeling, of fish passage infrastructure alternatives. AR 1255. These included a hardened ramp and a 400-foot notch. AR 1255. District was then required to select the preferred alternative and submit complete regulatory authorization requests to NMFS, the U.S. Fish and Wildlife Service, the U.S. Army Corps of Engineers, DFW, and the California State Water Resources Control Board. AR 1255. The judgment included a timeline for compliance, with regulatory applications due by June 30, 2020. AR 1256-58.

A winter 2020 study of *O. mykiss* found that its protection required a suite of carefully planned and expeditiously implemented recovery actions. SAR 6594. It also required recognition that protecting both resident and anadromous *O. mykiss* will help recovery of the species as a whole. SAR 6594.[2]

2. The CalTrout Petition

On June 11, 2021, CalTrout filed a petition asking the Commission to list anadromous and resident *O. mykiss* as endangered under CESA. AR 2, 7. The CalTrout petition cited over 100 scientific studies in support of its argument. AR 28-35.

a. Population Trends

DFW published a Steelhead Restoration and Management Plan in 1996, and the federal government listed the *O. mykiss* ESU as an endangered species in 1997. AR 8, 10. In 2006, the federal government modified the listing to include only the anadromous component of the ESU. AR 10.

Despite continued efforts by various agencies and organizations since 1996, the steelhead has seen little demonstrable improvement as of the CalTrout petition. AR 8. The steelhead DPS's annual run has decreased from between 32,000 and 46,000 returning adults to less than 500 per year. AR 9. One compilation of *O. mykiss* observation data from 1994 through 2018 documents only 177 observed anadromous adult Southern steelhead within the past 25 years. AR 10, 142.

The four watersheds historically exhibiting the largest annual anadromous runs are the Santa Ynez River, Ventura River, Santa Clara River, and Malibu Creek. AR 9. All four experienced 90% declines in run size. AR 9-10.

Extirpation of the steelhead population would initiate a process of extinction of other *O. mykiss* populations through loss of access to historical habitat to maintain genetic diversity. AR 9. Fish passage barriers that completely block access to freshwater spawning grounds also prevent genetic mixing on a regional scale. AR 9. This reproductively isolates the few remaining steelhead and freshwater resident native rainbow trout that maintain anadromous genetic characteristics. AR 9.

b. Range

The NMFS identified the steelhead's DPS as comprised of coastal watersheds from the Santa Maria River system south to the U.S.-Mexico border, with *O. mykiss* historically as far south as Rio del Presidio in Mexico. AR 10.

c. Distribution

The CalTrout petition included a distribution map showing the various bio-geographic population groups in Southern California. AR 12. In its explanation, the CalTrout petition reiterated that steelheads had full anadromy and resident-freshwater forms. AR 13. Habitat fragmentation from anthropogenic barriers like dams has extirpated anadromous steelhead from 60% of its historical range. AR 13.

The interplay of the life-history of steelhead and rainbow trout and historical distribution is complex. AR 13. The freshwater resident form can give birth to anadromous adults, likely based on epigenetic factors and environmental influence. AR 13. This makes the freshwater resident form an integral part of the population. AR 13. Environmental impacts from high intensity wildfires, floods, and extended drought had further reduced the number of small, isolated, remnant freshwater resident populations in the upper tributaries. AR 13.

A number of large, complex fish passage barriers remain in place or are not fully functional. AR 13. A CESA listing would help such projects progress so they can realize their potential in species recovery. AR 13.

d. Abundance

Abundance of steelhead varies greatly. AR 13. The nature of the river systems makes monitoring and quantifying run sizes difficult. AR 13. In the 1950s and 1960s, the annual run of adult steelhead for any river was in the thousands or tens of thousands. AR 13-14. Since its federal listing as endangered in 1997, annual runs of returning adults remain in the single digits for even the most productive river systems. AR 14.

Rainbow trout can express anadromy and reestablish a non-existent anadromous population. AR 14. This means that resident freshwater populations preserve the alleles needed for anadromy, and they could support re-establishing viable anadromous populations. AR 14. This also means that a resident freshwater life-history strategy plays a central role to the continued existence of the *O. mykiss* as a whole. AR 14. Unless the loss of habitat for anadromous *O. mykiss* is reversed, there will be a greater need for resident freshwater rainbow trout to produce smolts that express anadromy and enter the Pacific Ocean. AR 14.

Freshwater resident populations also are at risk. AR 14. Watershed-scale adverse anthropogenic impacts, quickening climate stress and other population level threats place freshwater resident populations at risk. AR 14. Catastrophic wildland fires, long term drought, and continued human alteration of headwater habitat add additional pressure. AR 14.

e. Life History

The life cycle of steelhead generally includes a freshwater period in coastal river systems followed by a migration to a marine environment to reach sexual maturity. AR 15. Most steelhead spend one to three years in freshwater coastal river systems before migrating to a marine environment. AR 15-16. They then spend one to four years maturing in the Pacific Ocean, during which time anadromous adults grow larger than freshwater residents. AR 15. After reaching maturity, most steelheads return to their natal river system to spawn. AR 15. Some stray to other river systems and therefore increase genetic variability and connection across basins. AR 16.

In contrast, the freshwater *O. mykiss*, or rainbow trout, will incubate, hatch, rear, mature, reproduce, and die in freshwater. AR 16. Embryo incubation times vary between three weeks and two months. AR 15.

f. Necessary Habitat

O. mykiss need a variety of habitats to exploit at different stages of their life cycles. AR 16-17. Steelhead need cool, clean water and a complex, connected habitat. AR 17.

g. Factors Affecting Ability to Survive and Reproduce

Destruction, modification, and fragmentation of native habitat are recognized as the primary causes for the decline of the steelhead. AR 18. The development of water infrastructure, agriculture, urbanization, and catastrophic wildland fire and drought have contributed to this fragmentation. AR 18.

h. Degree of Immediacy of Threat

Recent assessments of steelhead populations predict their extinction within 25-50 years due to the degradation of habitat from human development and climate crisis. AR 19.

i. Impact of Existing Management Efforts

The federal government listed the steelhead as an endangered species in 1997 and increased this geographical range of this protection in 2002. AR 20. Four U.S. national forests within the DPS have land management practices requiring protection and conservation decisions to account for listed species. AR 20. Despite federal intervention, population levels have not experienced a discernable change since 1997. AR 20.

Many steelhead migration barriers have been remediated, but others remain in place. AR 20. Significant investment over the years has supported advanced engineering design for remediation of these barriers, but implementation remains problematic. AR 20. Until the species is listed under CESA, NMFS is the only government agency with direct oversight over the condition of the species and its required habitat in most cases. AR 20.

j. Suggestions for Future Management

The CalTrout petition recommended listing *O. mykiss* as endangered under CESA while accepting the current limits of anadromy as established by the ESA listing for the species. AR 22. When the Commission lists the steelhead as endangered, DFW will have authority to oversee projects proposed within the current limits of anadromy. AR 22. CalTrout supports following the federal listing for below barrier steelhead while keeping the above barrier rainbow trout outside ESA coverage. AR 23. Steelhead are part of a precariously small population in a discontinuous spatial context trending towards extinction. AR 23. Rainbow trout are geographically dispersed but genetically demonstrable remnant populations of steelhead. AR 23.

Aside from listing *O. mykiss* as an endangered species, recommended measures include allowing only catch-and-release fishing and barbless lures. AR 24. The CalTrout petition also proposed signs and fishing survey boxes at key access points to explain the role of native rainbow trout in steelhead recovery. AR 24. DFW should stock streams with only non-reproducing rainbow trout, and barriers should prevent the escape of hatchery trout into high-priority recovery rivers. AR 24.

3. Referral to DFW

On June 23, 2021, the Commission referred the CalTrout petition to DFW for evaluation. AR 36. The Commission published notice of this referral in the California Regulatory Notice Register on July 16, 2021. AR 44. It also gave notice that it would formally receive the CalTrout petition at its August 18-19, 2021 meeting. AR 60. The public could submit any information to DFW. AR 61.

On August 18, 2021, the Commission publicly received the CalTrout petition and approved DFW's request for a 30-day extension to prepare its report. AR 1444.

4. District's Submission

On August 17, 2021, District submitted information opposing the CalTrout petition. AR 235. District objected to the assertion that the Freeman Dam had not been remediated. AR 157. It already provides passage of anadromous steelhead, with two confirmed upstream migrations observed in 2020. AR 157. District also continues to prepare a Habitat Conservation Plan per the federal ESA to rehabilitate the dam's fish passage facility. AR 157. Meanwhile, the District States Bureau of Reclamation was physically modeling alternative

fish passage designs. AR 157. District continuously consults with NMFS and DFW on all these measures. AR 157.

District asserted that the CalTrout petition and NMFS both acknowledge the interplay between steelhead *O. mykiss* and freshwater resident trout. AR 240-41. The CalTrout petition states that fish expressing the resident life-history strategy are central to the continued existence of southern steelhead. AR 240. A 2020 study emphasized the importance of protecting existing populations and all life history expressions. AR 241. The limited consideration of purely anadromous fish for the recovery goal was biologically inappropriate. AR 242.

CalTrout calculated the number of necessary anadromous spawners per year as 4,150 based on a study that relied solely on anadromous spawners. AR 241. This excluded the contribution of resident trout to recovery goals for the resident trout. AR 241.

NMFS's 2016 study made the same assumptions but as a risk-adverse strategy. AR 241. It stated that further scientific work would fill key knowledge gaps about the magnitude of normal fluctuations in adult abundance and the underlying biological mechanisms for expression of life-history diversity. AR 242. These findings and research questions need to be closely considered by DFW. AR 242.

A 2020 study found that resident and anadromous *O. mykiss* are tightly integrated at the population level. AR 242. This supported revising the viability criterion requiring 100% anadromous spawners in smolt production. AR 242.

Various surveys between the 1990s and 2005 observed high levels of *O. mykiss* per 100 feet but relatively few smolts migrating out to the ocean. AR 243. This suggests that rivers like the Santa Clara River have a naturally low fraction of anadromy, which is common when the cost to migrate to and from the ocean is high. AR 243.

One 2015 paper reviewed various studies documenting the factors that may influence the fraction of anadromy, one of which was migration cost. AR 244. For example, seasonally dry stream reaches and lagoon sandbar formations can limit migration opportunities. AR 244. Historic planting of steelhead *O. mykiss* may have inflated anadromy for a period. AR 244. District recommended more studies on the relationship between anadromous production and environmental factors before any CESA listing. AR 244. The resident contribution should cause the viability of the species as a whole to rise. AR 244.

In a 2008 study, the National Oceanic and Atmospheric Administration ("NOAA") Southwest Fisheries Science Center failed to find any genetic basis for dividing the population of the Southern California steelhead and the South-Central Coast steelhead into distinct biological groups. AR 245. This study used nuclear DNA, a superior approach to those in other studies like allozyme analysis and chromosome sampling. AR 245.

CESA provides for listing a species or subspecies as endangered, not a DPS. AR 245. CalTrout recommends listing only anadromous steelhead *O. mykiss* as endangered, but it does not identify it as a subspecies separate from rainbow trout. AR 245. DFW has previously recommended not listing certain Northern California summer steelhead ecotypes as endangered because it was not its own subspecies. AR 245. The same conclusion should apply here. AR 245.

5. <u>DFW's Recommendation</u>

In November 2021, DFW released its evaluation of the CalTrout petition. AR 132. The proposed action would list the steelhead as endangered under CESA. AR 133.

On October 4, 2021, DFW asked CalTrout to clarify the definition of "Southern California steelhead" for its petition. AR 138. CalTrout replied that the petition included all *O. mykiss*, including anadromous and resident

life histories, below manmade and natural complete barriers to anadromy from the Santa Maria River in San Luis Obispo County to the U.S./Mexico border. AR 133, 138. The petition excluded any above-barrier resident *O. mykiss*. AR 149. DFW then reviewed letters and scientific information from various sources, some attached to the report and some posted online. AR 138-39.

DFW concluded that the CalTrout petition presented sufficient scientific information to indicate that listing steelhead as endangered under CESA may be warranted. AR 133-35. The Commission should therefore accept and consider it. AR 135.

a. *O. mykiss* Overview

Although the *O. mykiss* has a resident and an anadromous phenotype, the two are sympatric. AR 139. They interbreed through much of the habitat range, and offspring can express either life history depending on genotype, individual condition, and environmental factors. AR 139. Juveniles from each group are difficult to distinguish without genetic, morphological, or physiological evaluations. AR 139-40.

Even their early life stages are identical until anadromous *O. mykiss* migrate to the ocean. AR 140. After they hatch as fry, they spend a few months developing into parr in shallow water. AR 140. After growing for another 1-4 years, the parr begin transitioning into smolts. AR 140. They migrate downstream to estuaries and lagoons where they complete smolting, which are a series of morphological and physiological changes preparing them for a marine environment. AR 140. These anadromous smolt then migrate to the ocean when ideal based on connectivity between the ocean and the estuary or lagoon at issue. AR 140. Adult steelhead returning from the ocean are easier to identify because they are larger and have an overall steel grey color. AR 140.

b. Sufficiency of the Petition's Evidence

DFW found that CalTrout provided sufficient scientific information on all required categories, including future management suggestions, to demonstrate that the proposed listing may be warranted. AR 141, 149-50. The CalTrout petition cited relevant studies for most points, and those studies also supported some uncited statements. AR 141. DFW assumed that the remaining unsupported statements were accurate but acknowledged that it would need to further verify them if the Commission accepted the CalTrout petition for further consideration. AR 141.

Because most of CalTrout's data on population abundance and trends concerned the anadromous *O. mykiss*, DFW relied on internal data on resident *O. mykiss* observations in various southern California streams. AR 142. DFW and the Santa Monica Mountains Resource Conservation District collected this data from 2004 to 2021. AR 142. DFW acknowledged that such observations do not equate to total estimates of population abundance in those streams. AR 142-43. Nevertheless, the available data did show a downward *O. mykiss* population trend. AR 142. Only eight of the 52 priority recovery watersheds listed in the species' NMFS recovery plan contained a remnant population, and most of those are above total barriers. AR 142.

As to abundance, the CalTrout petition emphasizes that resident *O. mykiss* are important contributors to anadromous *O. mykiss* populations. AR 144. Recent studies showed that resident *O. mykiss* have the alleles associated with anadromy. AR 144. This suggests they have the potential to contribute to anadromous populations. AR 144. However, the shrinking population of resident *O. mykiss* can lead to loss of genetic diversity, including genes for anadromous populations. AR 144.

As to factors affecting the ability to survive and reproduce, large dams and other complete migration barriers block Ventura River, Santa Clara River, Santa Ynez River, and Malibu Creek. AR 147. These obstructions block access to upstream habitats and impede smolt migration to the ocean. AR 147.

As to the immediacy of the threat, the CalTrout petition had sufficient scientific information to show that the various present threats leave the Southern California steelhead in immediate danger of extirpation. AR 148. As to the impact of existing measures, federal protections have not led to positive change in population abundance since the 1997 listing under the federal ESA. AR 148.

As to future management, the proposed CESA listing would include all *O. mykiss* below man-made barriers but exclude any above-barrier resident *O. mykiss*. AR 149. This would allow any above-barrier rainbow trout fishing to continue, but it also would allow emergency translocation of trout to either develop broodstock or enhance genetic and geographic diversity. AR 149.

6. The December 2021 Commission Meeting

At its December 15, 2021 meeting, the Commission considered the DFW's report and heard oral comments from the public. AR 333. The Commission voted to schedule a more comprehensive debate on the CalTrout petition in February 2022. AR 359, 362.

7. The Orange County Water District's Comment

On February 3, 2022, the Orange County Water District ("OCWD") submitted a letter in opposition to the CalTrout petition. AR 508. OCWD asserted that the inclusion of resident trout below barriers in the request to list the species as endangered was a significant deviation. AR 509. It created a deficiency in the CalTrout petition, which did not have any information relevant to the rainbow trout. AR 509. This inherently meant the provided information was insufficient to justify listing the species on the CESA endangered list as defined. AR 509.

The Commission needs to consider and evaluate all readily available information about the combined population dynamics and demographics of both types of *O. mykiss*. AR 509. Readily available data and literature show that resident trout are more abundant and in more viable populations than anadromous *O. mykiss*. AR 509, 511, 517-18. Its population has also trended upward in favorable years. AR 511, 517-18. The rainbow trout also contribute substantially to the persistence of the overall species. AR 509. The combined life history supports a determination that listing is not warranted. AR 509.

8. The February 2022 Commission Meeting

At its February 17, 2022 meeting, the Commission discussed whether to designate the steelhead as a candidate species. AR 1281.

CalTrout delivered a presentation in support of its petition. AR 612. CalTrout asserted that residential and anadromous *O. mykiss* are two distinct life histories. AR 1283. While the range at issue had a healthy population of residential trout, the fraction of *O. mykiss* expressing anadromy had been pushed to the brink of extinction. AR 1303.

A scientist with DFW's Anadromous Fishes Conservation and Management Program presented its conclusions. AR 1282. Although resident trout help maintain the anadromous population to some extent, DFW had not determined abundance and trends for resident fish because of the limited data available. AR 1292. Overall, the steelhead's population status had not improved since the Southern California steelhead was federally listed in 1997. AR 1292.

District noted that CalTrout had agreed via settlement agreement that the Freeman Dam adequately protected the steelhead. AR 1332-33. The CalTrout petition does not mention this or ask for an exception for

the Freeman Dam. AR 1333. If the Commission took any action that might change the guidelines in the settlement agreement, a federal court would prohibit that as state interference with a federal injunction. AR 1333. District implored the Commission to analyze other contributors to the population's decline more thoroughly. AR 1334.

At the end of the meeting, the Commission voted to continue deliberation by up to 60 days, until its next meeting in April 2022. AR 1387-88. It directed staff to work with DFW, interested parties, and local tribes to explore a possible 2084 Exception. AR 1387.

9. The Proposed 2084 Exception

District submitted a proposed 2084 exception for the Santa Felicia and Freeman Dams, their ongoing operations, and improvements thereto. AR 1586. These projects provide a sustainable, clean and reliable water supply for over 400,000 people within a nearly 213,000-acre region. AR 1587. The proposed regulation would exempt projects or activities if the proponent shows the project (1) relates to flood control, (2) provides one of a defined set of services necessary to either protect public peace, health, safety, or general welfare or conserve, preserve, or protect species, and (3) either is not required to have take authorization from NMFS or has such authorization under the federal ESA. AR 1589. The project proponent must also be legally mandated to perform the activity. AR 1589.

10. The April 2022 Commission Meeting

At its April 21, 2022 meeting, the Commission voted to find that the CalTrout petition provided sufficient information to indicate the proposed action may be warranted. AR 1626-27.

The Commission then discussed staff's proposed 2084 exception for conditional take of the candidate species. AR 1628. The proposed exception had three requirements. AR 1631. First, any project must be a highway project or a flood control or other water project that would meet the APA's definition of an emergency if operations were to stop or be delayed. AR 1631. Second, the project proponent would need to provide documentation of federal take coverage through a biological opinion or an incidental take permit from NMFS. AR 1631. Third, the project would need to demonstrate compliance with F&G Code section 1602. AR 1631.

Staff acknowledged that the proposed regulation would not cover all agencies and all circumstances as there are unique circumstances that require more specific consideration. AR 1631. For such projects, CESA authorizes a take through other means like a DFW-issued permit under F&G Code section 2081. AR 1631-32. DFW's director invited such project proponents to call DFW for individual permitting or to assess the project's risk profile. AR 1637.

District noted that CalTrout had recognized the abundance of residential trout in watersheds like the Sespe Creek and Santa Paula Creek. AR 1652-53. CalTrout also had acknowledged that if both *O. mykiss* populations were counted together, the abundance in those watersheds would not merit CESA protections. AR 1653.

DFW's director noted that DFW only had 60 days since the last Commission meeting to create a 2084 Exception. AR 1690. It therefore did not have time to consider every affected project with a possible relationship to the fish at issue. AR 1690.

The Commission voted to find it necessary to address an emergency situation under Govt. Code section 11346.1 and approve a modified regulation. AR 1700-02.

11. Findings

On May 11, 2022, the Commission issued written notice of its findings on the CalTrout petition. AR 1835. The Commission found that the information in the CalTrout petition, when considered in light of DFW's evaluation report and comments received, would lead a reasonable person to conclude there is a substantial possibility the requested listing could occur. AR 1835. As a result, the Commission provided notice that the *O. mykiss* is a candidate species under F&G Code section 2068. AR 1835. DFW was directed to prepare a written report within one year of publication of the findings. AR 1835.

The notice was published in the California Notice Register on May 13, 2022. AR 1836, 1846-56.

On May 16, 2022, the Office of Administrative Law approved the 2084 Exception as an emergency regulatory action. *See* 14 CCR §749.13. AR 1831-32. The regulation authorizes taking of the candidate species if the project (1) relates to flood control, a highway, or diversion, impoundment, or discharge of water, (2) provides flood protection, water supply or treatment, and highway maintenance necessary to protect public peace, health, or safety, and (3) has valid take authorization from NMFS through a federal incidental take statement or incidental take permit under the federal ESA. AR 1833 (14 CCR §§ 749.13(a)(1)-(3)).

If DFW decides to issue take authorization, the proponent shall undertake the project or activity as described in the project or activity's federal incidental take statement or incidental take permit. AR 1834 (14 CCR §749.13(c)). The state take authorization shall be for the same type and amount as the federal take authorization. AR 1834 (14 CCR §749.13(c)). The proponent loses take authorization if the federal authorization is amended or revoked. AR 1834 (14 CCR §749.13(d)).

E. Analysis[3]

Petitioner District raises two main issues: (1) the Commission abused its discretion in finding that listing SCS as endangered may be warranted; and (2) the Commission refused to consider all relevant factors when adopting the 2084 exception.

1. The Commission Was Not Required to Find That Substantial Evidence Supports Each of the 12 Factors in F&G Code Section 2072.3

The Commission uses DFW's evaluation report to decide whether a petition provides sufficient information to indicate that the petitioned action may be warranted. F&G Code §2074.2(e). The standard for determining whether the petition provides sufficient information that a species is a candidate for listing "requires only that a substantial possibility of listing could be found by an objective, reasonable person." CBD, *supra,* 66 Cal.App.4th at 611. A "substantial possibility" of listing "means something more than the one-sided 'reasonable possibility' test for an environmental impact report [under CEQA] but does not require that listing be more likely than not." Id. at 610. If a listing petition meets that standard, the Commission must accept the petition for consideration. Id. at 599. The Commission abuses its discretion if it refuses to accept a listing petition unless there is an "absence of any substantial possibility that the species could be listed after the requisite review of the status of the species by [DFW]." Id. at 611 (emphasis added). If the balance is unclear, the court must defer to the Commission. Id.

District notes that CalTrout's petition must comply with the strict process required by both CESA and Commission regulations and argues that the petition must include "sufficient scientific information" for each of 12 factors.[4] As the California Supreme Court stated, F&G Code section 2072.3 "sets forth the requirements a petition must satisfy for acceptance." Cent. Coast Forest Ass'n v. Cal. Fish & Game Comm'n, (2017) 2 Cal. 5th 594, 604-05 ("At a minimum…the petition shall include sufficient scientific information that a petitioned action may be warranted. The section then lists specific information the petition "shall

include"….). CESA requires sufficient scientific information in each of the 12 factors for a crucial reason: without information in each of those data, there is no way to bridge the gap between the raw evidence and the ultimate decision or order. *See* Topanga, *supra,* 11 Cal. 3d at 515. The Commission's regulations also require that it reject a listing petition that fails to include sufficient scientific information for each of the 12 factors. 14 CCR §670.1(b), (e)(1). Pet. Op. Br. at 10-11.

Based on this authority, District argues that the Commission's decision finding that listing SCS as endangered may be warranted is unlawful because it did not receive substantial evidence on each required element. A species does not qualify for candidate status if there is not sufficient information that would lead a reasonable person to conclude that the petitioned action may be warranted. NRDC*, supra,* 28 Cal. App. 4th at 1119. As expressly admitted in DFW's evaluation report, each of the CalTrout petition's 12 factors had little to no information about rainbow trout. In fact, the petition presented no evidence at all for the population and abundance of rainbow trout. Where a statute requires an agency to consider certain elements, its failure to do so constitutes a lack of substantial evidence. Topanga, *supra,* 11 Cal. 3d at 515 (zoning ordinance required comparative analysis and failure to include that analysis constituted lack of substantial evidence); Cal Ass'n Health Services v. DHS, (2012) 204 Cal. App. 4th 676, 688-89 (DHS decision for reimbursement lacked substantial evidence where it was based on studies done in another state which may or may not be relevant given differences in cost of living and population size). This disconnect between the evidence presented (almost entirely on steelhead) and the decision (which purport to cover both anadromous and resident life forms) is a clear violation of the Topanga rule. Pet. Op. Br. at 11-12.

District adds that the DWF evaluation report's reference to its internal data does not save the Commission's decision because the evaluation report expressly admits: "though the Department has internal data on resident *O. mykiss* observation in various southern Californian streams . . . these *O. mykiss* observations do not equate to total estimates of population abundance in streams for which they are available." AR 142-43. Accordingly, DFW's internal data provides no estimate of rainbow trout population abundance which CESA expressly requires. District concludes that, because the Commission failed to analyze the status of *O. mykiss* under each of the required 12 data sets, it failed to proceed in the manner required by law, thereby prejudicially abusing its discretion. CCP §1094.5(b). Pet. Op. Br. at 12.

District is mixing concepts. Topanga is not a substantial evidence case. Rather, Topanga held that CCP section 1094.5 implicitly requires the administrative agency to set forth findings that bridge the analytic gap between the raw evidence and the decision. 11 Cal.3d at 515. An agency's failure to perform this task is not a failure of evidence, it is a failure to proceed in the manner required by law. The Commission points out that it has no duty to make any finding other than the statutory requirement that there is sufficient information to indicate that listing SCS may be warranted. Comm. Opp. at 14-15. In reply, District clarifies its position to argue that there is insufficient evidence to support each of the 12 factors. Reply at 6. While it continues to argue an analytic gap, District abandons any Topanga issue that the Commission was obligated to make findings on each of the 12 factors. The court views District's argument fundamentally as the contention that the Commission lacked substantial evidence to make its decision.

Intervenors are correct (Int. Opp. at 7-8) that District misreads CESA's requirements for listing petitions. The statute provides that a listing petition "shall, at a minimum, include sufficient scientific information that a petitioned action may be warranted." F&G Code §2072.3. The petition must include "information regarding the population trend, range, distribution, abundance," and other factors, but there is no requirement that the petition include "sufficient scientific information" for each of the 12 factors listed. Therefore, District's argument fails.

If the meaning of F&G Code section 2072.3 is not plain, Intervenors point out (Int. Opp. at 8) that a "basic tenet" of statutory construction is that "a court cannot add or subtract words to or from the statute." Scottsdale Indemnity Co. v. National Continental Ins. Co., (2014) 229 Cal.App.4th 1166, 1172. In suggesting that F&G Code section 2072.3 requires the petition to include sufficient scientific information for each of the 12 factors, District is asking the court to delete the bolded, bracketed language from F&G Code section 2072.3: "To be accepted, a petition shall, at a minimum, include sufficient scientific information [**that a petitioned action**

may be warranted. Petitions shall include information] regarding the population trend, range, distribution, abundance…."

CESA mandates that the Commission accept a listing petition, despite limited or no information in one or more categories, when other information in the record suffices to meet CESA's threshold for candidacy. CBD, *supra,* 166 Cal.App.4th at 612 (the listing petition must be accepted whenever "an objective, reasonable person clearly would conclude there is a substantial possibility that listing could occur."). No authority supports District's contention that the Commission must reject a listing petition that lacks sufficient scientific information for one or more of the 12 factors.

District replies that the CESA regulations make crystal clear that sufficient scientific information for each of the 12 factors is required. 14 CCR section 670.1(b) states: "A petition shall be deemed incomplete if it is not submitted on FGC-670.1 (3/94) or fails to contain information in each of the required categories set forth in subsection (d)(1)." (emphasis added). Similarly, 24 CCR section 670.1 (e)(1) expressly states that a petition "will be rejected by the Commission if it fails to include sufficient scientific information under the categories of [F&G Code section 2072.3(d)(1)(A)-(L)]." Reply at 6-7.

This argument does not aid District. Neither of 14 CCR section 670.1(b) and (e)(1) sets forth a requirement for the Commission's evaluation of a petition. The regulation only concerns the information which a petition must include and only states that the petition must provide scientific information in each of the 12 categories and that the scientific information provided must be sufficient. This does not mean that the information must be sufficient in each category. CESA requires only that the petition include sufficient scientific information that a petitioned action may be warranted. F&G Code §2072.3. The listing petition must include information regarding the 12 factors. F&G Code §2072.3; 14 CCR §670.1(d). Nothing in F&G Code section 2072.3 requires the petition to include sufficient scientific information for each of the 12 factors; it only requires sufficient scientific information that the petitioned action may be warranted. This is a collective evaluation, not a category-by-category one.

District's position to the contrary is directly at odds with CBD. In that case, the court found that the Commission erred in rejecting a petition to add the California tiger salamander to the list of endangered species. 166 Cal.App.4th at 599. The Commission found the petition lacked sufficient information for several of the 12 categories of information required, including population trends, abundance, range, degree and immediacy of threat, and impacts of existing management. Id. at 606-07. The Commission concluded that "[a]bsent an accurate assessment of the history or current population of a species, any determination of threat to the species would be speculation." Id. at 606.

The CBD court held that the issue is not whether there are deficiencies in the listing petition's showing on any subordinate issue, but "rather whether they warrant the ultimate, statutory finding required to reject the petition." Id. at 609. The "Commission is not free to choose between conflicting inferences on subordinate issues and thereafter rely upon those choices in assessing how a reasonable person would view the listing decision. Its decision turns not on rationally based doubt about listing, but on the absence of any substantial possibility that the species could be listed.…" Id. at 611. The Commission also is required to draw available inferences from the information in support of listing the species. Id. at 612.

The evidence showed that the salamander does not breed prolifically, is vulnerable to several significant threats, has lost most of its original habitat, and has been displaced by a hybrid competitor from most of its range. Id. at 599. The "absence of …population counts does not greatly diminish the strength of the inferences of threat or endangerment that arise from the showing of habitat loss." Id. at 612. The court relied almost exclusively on just two categories of information: loss of habitat and hybridization that "independently affords a strong inference of threat or endangerment" due to competition with another species. Id. at 611-12. Based on this information, a "reasonable person clearly would conclude there is a substantial possibility that listing could occur," and this was all that was required at this first stage of the CESA process. Id. at 612.[5]

District distinguishes CBD, arguing that the court excused the lack of information on total population based primarily on the difficulty of distinguishing between the native species sought to be protected and the

hybrid/non-native species that were not a part of the petition. Id. at 602-03. Reply at 7-8. Whatever the reason, CBD clearly did not require that there be sufficient scientific information for each of 12 factors in F&G Code section 2072.3.[6]

2. The Commission's Finding Is Supported By Substantial Evidence

District contends the Commission lacked sufficient information about rainbow trout to support the decision that listing may be warranted. Pet. Op. Br. at 11.

As both the Commission and Intervenors argue (Comm. Opp. at 15; Int. Opp. at 10), CalTrout asked that SCS -- which includes both anadromous and resident life histories below barriers to anadromy -- be considered for listing. "[T]he CESA listing include all O. mykiss, including both anadromous and resident life histories, below manmade and natural fish passage barriers, while excluding above-barrier resident O. mykiss." AR 149.

Thus, the issue is whether the Commission had substantial evidence that there is a substantial possibility of listing SCS as endangered after DFW's second stage review. *See* CBD, *supra,* 66 Cal.App.4th at 611. In determining this issue, the Commission was entitled to look at the 12 categories in F&G Code section 2072.3 collectively.

DFW evaluated the information regarding SCS, and the Commission concluded that sufficient scientific information supported a determination that listing SCS as endangered may be warranted. According to Intervenors, the CalTrout petition paints a sobering picture of threats arising from dams, human development, wildfires, climate change, and habitat loss, the combination of which will likely result in SCS's extirpation from Southern California. AR 1. The current threat to steelhead is so extreme and immediate that this population is in danger of extinction within the next 25-50 years. AR 19. Existing management efforts have failed, with federal protection of federally listed steelhead in anadromous waters not leading to any "discernable change in total population size[.]" AR 20, 148-49. Int. Opp. at 10.

Intervenors contend that the CalTrout petition and DFW evaluation included "information regarding" population trend and abundance. The petition presented information regarding the dramatic decline of steelhead, from 20,000 to 30,000 steelhead in the 1970s to 1000 adults in 2012. AR 13. More recently, steelhead have experienced "declines in run size of greater than 90 percent." AR 10. Int. Opp. at 12.

The CalTrout petition noted that the interplay of the two life histories is critical to support current and future abundance for SCS. AR 12. The petition further explained that freshwater resident populations too have seen a downward trend since they also "are at risk from watershed-scale adverse anthropogenic impacts". AR 14. Recent studies on the population of *O. mykiss* on the Pacific coast indicate that the population of anadromous remain endangered and resident forms that co-exist within watersheds are similarly declining. AR 10. Int. Opp. at 12-13.

DFW's evaluation report similarly observed that "while abundance estimates are not available for all populations of [SCS], available presence/absence data shows a downward trend." AR 142. DFW noted that multiple populations have been extirpated and the largest historical populations in the Santa Ynez River, Ventura River, Santa Clara River, and Malibu Creek watersheds all have declined over 90%. AR 10. Data show only 177 observed steelhead within the past 25 years. AR 10. Int. Opp. at 13.

DFW also considered its "internal data on resident *O. mykiss* observations" below barriers. AR 141-42. While DFW admitted that "these *O. Mykiss* observations do not equate to total estimates of population abundance", DFW explained that data is not available because juvenile *O. mykiss* are "difficult to distinguish without genetic, morphological, or physiological evaluations." AR 139-40. According to Intervenors, this discussion satisfies CESA's requirement that the petition provide information regarding population and abundance.[7] Int. Opp. at 13.

District correctly replies that the population numbers cited in CalTrout's petition relate solely to anadromous populations and there is no information related to population trend and abundance for resident *O. mykiss*. At

most, Intervenors cite evidence that resident populations are at risk from standard, universal factors affecting most species: "wildland fires, long-term drought, and climate stress." Universal risks that are presented to most species cannot substitute for the required information on population trend and abundance of resident *O. mykiss*. These risks also must be slight because, as CalTrout admitted, there is a healthy population of resident *O. mykiss*. AR 1303. Additionally, DFW's internal data on resident *O. mykiss* do not meet the statutory requirement for information on population abundance by DFW's admission. AR 142-43. Reply at 9.

Although the CalTrout petition and DFW evaluation report lack evidence on rainbow trout, the Commission correctly notes that both documents discussed the interconnection between the two life histories, and DFW's report discusses the fact that "the two forms are sympatric, i.e., they can interbreed, throughout much of their range, and offspring can express either life history. The expression of anadromy or residency is subject to a fish's genotype, individual condition, and environmental factors." AR 139 (citations omitted). "Juvenile steelhead and Rainbow Trout are difficult to distinguish without genetic, morphological or physiological evaluations." AR 139-40 (citations omitted). Comm. Opp. at 15-16.

The CalTrout petition explained the central role that resident *O. mykiss* play in the continued existence of steelhead. Resident and anadromous *O. mykiss* forms are sympatric, i.e., they can interbreed, and the offspring of the resident form can express anadromous life history. *See* AR 132-39. The plasticity between the two life histories, and their close integration, indicate that harm to resident *O. mykiss* decreases the population of fish capable of anadromy or anadromous offspring. SAR 5405 (juvenile resident and anadromous *O. mykiss* overlap in population, so viability and preservation considerations for anadromous fish necessitates including the resident form). As steelhead continue to decline in population, "there will be a greater need for resident freshwater rainbow trout to produce the vast majority of smolts that express anadromy." AR 14. Int. Opp. at 10-11.

The CalTrout petition emphasized that the resident form is critical not only to maintaining steelhead numbers, but also to preserving the genetic material associated with anadromy. AR 14, AR 144. Resident *O. mykiss* contain the genetic material to pass along anadromy to their offspring. AR 1292. DFW's evaluation notes that "resident *O. mykiss* are important contributors to [SCS] populations." AR 144. Recent genetic studies indicate that resident *O. mykiss* "have the potential to express anadromy and contribute to anadromous populations" and that "shrinking populations of freshwater resident *O. mykiss* are vulnerable to loss of genetic diversity and fitness, including the potential loss of genes associated with anadromy." AR 144. Given future opportunity through restoration activity, resident *O. mykiss* could therefore support re-establishing viable steelhead populations. Int. Opp. at 11.

Large dams and obstructions have blocked off much of the historical spawning and rearing habitat of steelhead. AR 147. Due to these ongoing threats, populations of resident *O. mykiss* are now "vulnerable to loss of genetic diversity and fitness, including the potential loss of genes associated with anadromy." Id. Currently, the "fraction of [resident *O. mykiss*] population expressing anadromy has been pushed to the brink of extinction" and this pressure will prevent the transmission of anadromy to future progeny. AR 612. Int. Opp. at 11.

Intervenors conclude that the record thus provides sufficient information showing that the loss of resident *O. mykiss* in co-existing watersheds with steelhead would hasten SCS extirpation. AR 148. The record shows that "limited consideration of purely anadromous fish for the recovery goal is biologically inappropriate for this species," and [] an important consideration to prevent extinction is 'protecting existing populations and all life history expressions." AR 161. NMFS indicates that protection of resident *O. mykiss* is crucial given "their importance to the viability of anadromous [] populations." AR 162. Scientific evidence indicates that "[t]he future of [anadromous *O. mykiss*]…will depend on a suite of carefully planned and expeditiously implemented recovery actions but most importantly, recognition that protecting both resident and anadromous O. mykiss together is beneficial for the recovery of the species as a whole." SAR 3959. Int. Opp. at 11-12.

Intervenors add that juvenile resident and anadromous *O. mykiss* are nearly indistinguishable without genetic, morphological, or physiological evaluations. AR 139. The early life stages of the resident and the anadromous *O. mykiss* are extremely similar until the anadromous form migrates to the ocean. AR 140. Juvenile resident

and anadromous *O. mykiss* both reside in freshwater. AR 15-16. *O. mykiss* embryos take anywhere from "three weeks to two months to hatch depending on water temperature" and then continue to grow for "an additional 1-4 years" before each form diverges in its migration route. AR 15-16. For these reasons, the CalTrout petition and DFW concluded it would be practically impossible to protect only juvenile anadromous *O. mykiss* and not also the resident form. Int. Opp. at 12.

District replies that these arguments are a sleight of hand that asks for protection for both resident and anadromous *O. mykiss* while simultaneously arguing that data limited to anadromous *O.mykiss* is sufficient to support the Commission's findings. DFW's evaluation expressly stated that "[m]uch of the information presented in the [CalTrout] Petition is focused on the anadromous life history" of steelhead. AR 142. The assertion of an interconnection between the two life histories is part of this shell game of ignoring rainbow trout populations (which are plentiful) while simultaneously claiming that both resident and anadromous populations should be protected. This unsupported leap purposefully omits information related to resident rainbow trout populations and therefore the Commission's findings are unsupported by evidence. Reply at 2-3.

District argues that it and others presented extensive evidence demonstrating the impropriety of failing to consider resident rainbow trout in connection with population, abundance and range, while simultaneously seeking to protect them. *See* AR 240-41; SAR 5282 (CalTrout's petition's population viability goal inappropriately depends on models that consider only anadromous spawners and disregards the contributions of resident *O. mykiss*); AR 241-42; SAR 5405, 5426 (citing most recent NMFS five-year review recommending criteria that protected only anadromous *O. mykiss* and acknowledging that further scientific research is needed to fill "key knowledge gaps"); AR 241; SAR 3948-68 (2020 study and NMFS five-year review showing that resident and anadromous forms are tightly integrated at the population level); AR 242-43 (discussing evidence of abundant rainbow trout and suggesting levels of anadromy may be tightly related to variable environmental conditions); AR 245; SAR 3634 (discussing discrepancies in CalTrout petition and DFW recommendation against listing northern California summer steelhead ecotypes because it failed to meet the definition of a subspecies—a finding that equally applies to anadromous and resident *O. mykiss*); AR 508-18 (discussing disconnect between evidence presented on anadromous life histories and CalTrout petition's protection of both resident and anadromous life histories); AR 513 (discussing evidence that returning steelhead "likely originate as migratory smolts produced from resident headwater trout populations, many of which persist above man-made and natural barriers to anadromy" and "the polygenic nature of anadromy indicates that the trait can persist for a long time in a large resident population."). Reply at 3-4.

In other words, the Commission's findings are doublespeak. They assert the interconnection of resident and anadromous *O. mykiss* while simultaneously asserting that the abundance, population, range, and distribution of resident *O. mykiss* may be disregarded in determining whether both resident and anadromous fish are threatened or endangered. There is little to no evidence in the CalTrout petition that resident *O. mykiss* are threatened, let alone endangered. DFW was so confused that it was forced to ask CalTrout to clarify whether it sought to list both anadromous and resident *O. mykiss*. AR 138. Although CalTrout clarified, it did not submit any additional evidence demonstrating any threat to resident *O. mykiss*. Reply at 4-5.

Intervenors argue that District is quibbling with the evidence at this early stage in the process, which is something that CBD expressly forbade: "[I]f the information clearly would lead a reasonable person to conclude there is a substantial possibility that listing could occur, rejection of the petition is outside the Commission's range of discretion under section 2074.2." 166 Cal.App.4th at 611. The Commission may not choose to reject a listing petition by "choos[ing] between conflicting inferences on subordinate issues…." Id. at 611. Where there are "conflicting inferences" that can be drawn from existing information on population trend and abundance, the Commission is bound to accept the petition for further consideration. Even if the "balance is unclear" and there is evidence or argument to the contrary, CBD requires the court to "defer to the Commission." Id. at 611. The Commission exercised its expert judgment and made its decision based on the available evidence and DFW's evaluation, and accepted CalTrout's petition for further consideration. Petitioner's quibble about the sufficiency of information or "conflicting inferences" does not warrant disturbing that decision. Int. Opp. at 13-14.

District replies that this is not a case of conflicting inferences or even one where the balance is unclear. Far from being a quibble, there are large swaths of required information missing which are relevant to the population that the CalTrout petition seeks to protect—namely both resident and anadromous *O. mykiss*. There is no conflicting inference on whether rainbow trout populations are healthy and abundant because they are. While there are many differences in opinion on the meaning and import of the evidence presented to the Commission, District is not asking the court to reweigh that evidence or engage in an evaluation of conflicting inferences. Instead, it is asking that a petition seeking to protect both resident and anadromous *O. mykiss* should contain sufficient information about both as required by 14 CCR section 670.1 (d)(1) and F&G Code section 2073.2. Reply at 10.

The court accepts the fact that District is contending that the record lacks information on rainbow trout population trends and abundance, and it is not claiming different inferences from the evidence. While District is correct that there are no real numbers for the population trend and abundance of rainbow trout, there is no requirement in F&G Code section 2073.2 that there be any.

The Commission is required to assess the F&G Code section 2073.2 factors collectively and the record shows that steelhead are clearly at risk of extirpation as their returning population has declined from between 32,000 to 46,000 returning adults to less than 500 (AR 9-10, 142-43), SCS are located in coastal rivers downstream of total barriers and are cut off from about 60% of their historical range (AR 13, 144), steelhead had estimated annual runs in the tens of thousands while current annual runs are only in the single digits (AR 13-15, 144-45), abundance numbers have not increased since steelhead were listed as endangered under the federal ESA in 1997 (AR 14), and steelhead populations appear to be extremely depressed and it is likely that remaining populations are in immediate danger of extirpation (AR 19-20, 148).

Rainbow trout play an important role in maintaining the anadromous life history of steelhead because they can and do produce offspring that express the anadromous life history, making them an important genetic reservoir to support the anadromous life history. In other words, the relationship between steelhead and rainbow trout, described by the parties as plasticity – meaning the expression of anadromy or residency is based on a combination of the fish's genes, individual condition, and environmental factors – means that steelhead can survive prolonged droughts and resume anadromous behavior when flow conditions allow for resumed connection between their natal freshwater streams and the ocean. AR 23.

The scientific evidence is that large dams and other substantial migration barriers have made it far less likely for adult steelhead to successfully return to their natal streams and spawn. AR 9-10. As a result, the historical populations in these watersheds have declined over 90%. AR 10. With these barriers in place, the continued survival of steelhead relies on resident *O. mykiss* to produce anadromous offspring (smolts) which can then later make it successfully to the ocean. AR 140. Such smolts are a critical contribution to the population of the remaining oceangoing steelhead found in Southern California ocean waters because they create the potential for adult steelhead to return and spawn successfully in freshwaters when barriers to anadromy are reduced. AR 16, AR 140, 144. Accordingly, a key factor in the future survival of steelhead is the production of smolts as the offspring of resident adult *O. mykiss*. AR 140.

A winter 2020 study of *O. mykiss* found that its protection required a suite of carefully planned and expeditiously implemented recovery actions. SAR 6594. It also required recognition that protecting both resident and anadromous *O. mykiss* will help recovery of the species as a whole. SAR 6594. Rainbow trout can express anadromy and reestablish a non-existent anadromous population. AR 14. This means that resident freshwater populations preserve the alleles needed for anadromy, and they could support re-establishing viable anadromous populations. AR 14. This also means that a resident freshwater life-history strategy plays a central role to the continued existence of the *O. mykiss*. AR 14. Unless the loss of habitat for anadromous *O. mykiss* is reversed, there will be a greater need for resident freshwater rainbow trout to produce smolts that express anadromy and enter the Pacific Ocean. AR 14.

These facts are dispositive for the conclusion that the Commission had substantial evidence that SCS is a candidate for endangered species listing. *See* CBD, *supra,* 66 Cal.App.4th at 611. District may be correct that an evaluation of rainbow trout abundance and its ability to produce smolts is required before SCS could be the

subject of stage two protection for an endangered species. But that is not required for stage one candidacy. There is substantial scientific evidence from which a reasonable person could conclude there is a substantial possibility that listing of SCS may be warranted.

3. The 2084 Exception

After the Commission made its determination affording SCS protection from take under CESA during the candidacy period, the Commission adopted an emergency regulation to authorize take of SCS under certain conditions, including that the entity already possess an incidental take permit under the federal ESA. AR 1614, 1700-02, 1831-36, 1849-56.

The District contends that the Commission's decision to reject the District's proposed 2084 exception and implement a more stringent exception that does not allow incidental take where a project is required by court decree but does not have a federal incidental take authorization, risks harming anadromous steelhead and is thus arbitrary and capricious. An agency action is necessarily arbitrary and capricious when it is inconsistent with and undermines the purpose of the statute. McGill v. Regents of Univ. of Cal., (1986) 44 Cal. App. 4th 1776, 1786; Govt. Code § 11342.2 ("no regulation is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute"). Pet. Op. Br. at 12, 14.

The Commission's rejection of District's proposed 2084 exception and its implementation of a more stringent exception that disallows incidental take on the projects and activities that District is legally required to perform under a federal court order risks harming steelhead. This is because District's court-mandated actions are carefully designed to protect federally listed steelhead. District's Freeman Dam operates in accordance with a 2016 NMFS mandate and federal court injunction which imposes standards from a final (but unadopted) 2008 Biological Opinion issued by NMFS. AR 1252-68. The 2008 standard permits incidental take of two adults and 90 anadromous steelhead per year. District's current operations of the Freeman Dam fish ladder are in accordance with Streambed Alteration Agreement No. 5-443-89 and the terms and conditions of Clean Water Act Section 404 permit 86-116-TS. Id. In other words, water diversion and fish ladder operations at the Freeman Dam are highly regulated. The permanent injunction requires District to design and construct a new fish passage facility in coordination with NMFS, the U.S. Fish and Wildlife Service, and DFW. All these requirements serve to protect anadromous *O. mykiss*. By extending CESA's protections to the abundant rainbow trout and by refusing to allow incidental take of that abundant resident form, the Commission's 2084 exception threatens to delay District's court-mandated project to build a new fish passage facility and threatens anadromous *O. mykiss*. As such, the Commission's decision to implement a stringent 2084 exception is arbitrary and capricious. Pet. Op. Br. at 12-13.

The Commission argues that District's claim is moot. "A case is moot when the decision of the reviewing court can have no practical impact or provide the parties effectual relief." MHC Operating Ltd. Partnership v. City of San Jose, (2003) 106 Cal.App.4th 204, 214; *but see* Doe v. Wilson, (1997) 57 Cal.App.4th 296, 304 (judicial review of emergency regulation not always barred on mootness grounds where it may be replaced by permanent regulation). The only relief that District could obtain under the APA is a declaration that the emergency regulation is void. Govt. Code §11350. However, an emergency regulation can exist for only 180 days from the date of its filing. Govt. Code §11346.1(e). The Commission's emergency regulation was filed with the Secretary of State on May 16, 2022 (AR 1832) and became inoperative on or about November 12, 2022. The Commission concludes that District's fact-specific claim should be dismissed as moot. Comm. Opp. at 18.

District does not reply to this argument. As a result, it does not contend that its claim concerning the 2084 exception is not moot because an exception to the mootness doctrine applies, such as if the Commission were in the process of promulgating a permanent regulation. The claim is moot.

If, *arguendo*, District's claim is not moot, it fails on the merits. District offers no evidence that the 2084 exception's failure to permit the take of rainbow trout during the candidacy period "threatens to delay" its efforts to retrofit the Freeman Dam. District also does not explain how the 2084 exception's protection of

rainbow trout from take during the candidacy period threatens to delay District's efforts to design a new fish passage facility to avoid take of federally listed steelhead. Comm. Opp. at 18-19; *see* Int. Opp. at 15.

Moreover, District's fact-specific claim does not undermine the Commission's general decision to require the existence of a federal ESA take permit as a condition of qualifying for take authorization under CESA. That is a reasonable choice for a regulation of general applicability, especially given the Commission's express recognition that DFW could address "unique situations" like District's on an individual basis by issuing a take permit pursuant to F&G Code section 2081. AR 1631-32, 1637, 1680. *See* Comm. Opp. at 19; Int. Opp. at 15.[8]

F. Conclusion

The Petition is denied. The Commission's counsel is ordered to prepare a proposed judgment, serve it on all other counsel for approval as to form, wait ten days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for December 7, 2023 at 9:30 a.m.

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[1] Intervenors 16-page opposition violates both the 15-page limit of CRC 3.1113(d) and the court's order. Intervenors' counsel is admonished that the 15-page limit does not mean 15 pages plus a signature page.

[2] SAR 6594 is not included in the joint appendix.

[3] The court adopts the Commission's and Intervenors' use of the acronym "SCS" for the species subject to CalTrout's petition, both its anadromous and resident life histories and below impassible barriers from San Luis Obispo County to the U.S./Mexico border, "steelhead" for the anadromous *O. mykiss* that travel to the ocean to mature before returning to freshwater to spawn, "resident" or "rainbow trout" for the *O. mykiss* that spend their entire lives in freshwater, and "federally listed steelhead" for the distinct population segment of steelhead listed as endangered under the federal ESA.

[4] The 12 factors are: (1) Population trend; (2) Range; (3) Distribution; (4) Abundance; (5) Life history of a species; (6) Factors affecting the ability to survive and reproduce; (7) Degree and immediacy of threat; (8) Impact of existing management efforts; (9) Suggestions for future management; (10) Availability and sources of information; (11) Kind of habitat necessary for survival; and (12) A detailed distribution map. F&G Code §§ 2072.3, 2074.2; 14 CCR §§ 670.1(b), 670.1(d), 670.1(e)(1).

[5] The Commission notes that, like CBD, NRDC overturned the Commission's finding that a listing petition did not meet the "may be warranted" standard as an abuse of discretion. In NRDC, the court found that the Commission applied too strict a standard when it interpreted F&G Code section 2074.2's phrase that the "petition provides sufficient information to indicate that the petitioned action may be warranted" to mean that it must be "reasonably probable that listing will occur." 28 Cal.App.4th at 1116, 1120 (emphasis added). F&G Code section 2074.2 only requires a "substantial possibility that listing could occur." Id. at 1125 (emphasis added). Comm. Opp. at 16-17.

[6] District argues that Intervenors miss the mark in arguing that juvenile steelhead and rainbow trout are difficult to distinguish like the salamanders in CBD and therefore CalTrout's petition should be accepted "despite extremely limited information in one or more categories". Int. Opp. at 12. Unlike the CBD petition which sought to protect only the native salamander species, CalTrout's petition seeks to protect both resident and anadromous forms of *O. mykiss*. Any difficulty in distinguishing between the two forms is a red herring since a total population number for the species to be protected (both resident and anadromous) can be reasonably estimated. The reason why CalTrout's petition did not include such overall estimates is simple and

was admitted by Cal Trout: resident *O. mykiss* are abundant and would not qualify for CESA protection. AR 622, 1303. Reply at 8.

District misunderstands the reason why Intervenors raised the nearly indistinguishable nature of juvenile rainbow trout and steelhead. Intervenors did not contend that this fact made it hard to estimate populations but rather pointed out that CalTrout's petition and DFW both concluded that it would be practically impossible to protect only juvenile steelhead and not juvenile rainbow trout. Int. Opp. at 12.

[7] The statewide abundance of rainbow trout, including those above barriers to anadromy, does not factor into the Commission's assessment whether SCS -- defined as *O. mykiss* below complete barriers to anadromy -- may qualify for CESA protections. Int. Opp. at 13, n. 7.

[8] The relief District seeks also is unavailable. District asks that the court "order the Commission to reconsider the [2084 exception] to provide for incidental take of resident *O. mykiss* on projects subject to an ongoing court order." But the APA does not give courts authority to order agencies to undertake new rulemaking; the court can only issue a declaration as to the validity of the regulation. Govt. Code §11350(a). *See* Comm. Opp. at 18.
