# PACIFIC COAST FEDERATION of FISHERMEN'S ASSOCIATIONS



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29 August 2014

The Honorable Tani G. Cantil-Sakauye
Chief Justice
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303

RE: Support for Petition for Review in *North Coast Rivers Alliance v. Westlands Water District*, Docket No. S220532

Dear Chief Justice Cantil-Sakauye:

The Pacific Coast Federation of Fishermen's Associations ("PCFFA") supports the Petition for Review filed by appellants North Coast Rivers Alliance, *et al*., in the above-referenced matter. PCFFA is a non-profit tax exempt organization founded in 1976 which represents 14 fishermen's organizations from throughout California, and one each in Oregon and Washington, with a combined membership of 750 fishing men and women. Our mission is to restore Pacific Coast waterways because commercial fishermen and their families depend on abundant salmon populations and other marine fish and shellfish stocks for their livelihood. To this end, PCFFA advocates proper resource management to assure conservation and replenishment of the Pacific Coast's fishery resources.

The survival of our industry depends on informed resources management. Proper court interpretation of the California Environmental Quality Act (CEQA) is essential to guide agencies that manage the public's waters and watersheds. The salmon stocks on which our industry depends have suffered severe declines due to habitat degradation from many sources, including excessive diversions of freshwater from the Sacramento River Delta that cause increased salinity and temperature in the Delta, and entrain thousands of juvenile salmon in the diversion pumps. For this reason we are particularly concerned about the effects of Westlands' diversions of up to 1.193 million acre-feet annually on the hydrology and aquatic habitat of the Delta.

We urge this Court's review of the Court of Appeal's Opinion in *North Coast Rivers Alliance*. The Opinion misinterprets and undermines CEQA in three significant respects. First, the Opinion adopts an unduly expansive definition of CEQA's "ongoing project" exemption that conflicts with 40 years of jurisprudence. Previously, in determining whether an approval is exempt from CEQA as an "ongoing project," the courts have distinguished between, on the one hand, the continued operation of a pre-1970 project, and on the other, an *expansion or modification* of a pre-1970 project. *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 806-807. In the former case, the project is exempt; in the latter case, it is not. *Id.* But contrary to this bright-line distinction between pre-1970 projects that continue unaltered, and those that are expanded or modified, the Opinion misapplies cases that make no mention of CEQA's ongoing project exemption, such as *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 134-139. Based on these inapposite cases, the Opinion holds that the ongoing project exemption applies so long as the earliest commitment to a loosely defined project can be traced back prior to 1970. Opinion at 30-37. But this interpretation ignores the proper question under the existing case law: whether a pre-1970 project has been *expanded or modified* in a way that renders the changed project subject to CEQA.

Because of this error, the Opinion takes case law such as *Save Tara* – that properly *advances* CEQA's objectives by requiring environmental review *early* in agency decision making – and uses those rulings instead to *frustrate* CEQA by applying its requirements too *late*. This Court's review is urgently needed to clarify that where an agency proposes to *expand* an older project that partly antedates CEQA's adoption, CEQA compliance is required for the expansion. Otherwise, projects such as Westlands that have been expanded to take more water from the Delta than they did prior to 1970 will never be subject to CEQA review. Yet CEQA review is essential to protect the Delta's declining salmon and other aquatic species from extinction.

Second, the Opinion conflicts with settled case law by exempting from CEQA projects with significant cumulative impacts such as the practice of exporting more water from the Delta than its declining ecological health can sustain. For nearly 40 years, this Court has consistently ruled that "only those activities which do not have a significant effect on the environment" may be exempted from CEQA. *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205 (citing Public Resources Code section 21084). This Court has repeatedly held that "where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption [from CEQA] would be improper." *Id.* at 206. Thus, "an activity that may have a significant effect on the environment cannot be categorically exempt." *Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 124. But contrary to this established CEQA law, the Opinion holds that regardless of whether a project such as Westlands' Delta diversions will have potentially significant cumulative impacts, it is exempt from CEQA as an "existing facility." Opinion at 53-54. Of course, Westlands' diversions, deliveries and consumption of the Delta's public waters are not an "existing facility." They are a consumptive *use*. But even if these *uses* were erroneously considered a "facility," they cannot be exempted from CEQA for the simple reason that "an activity that may have a significant effect

on the environment cannot be categorically exempt." *Mountain Lion Foundation*, *supra*, 16 Cal.4th at 124. Because the Opinion departs from settled CEQA case law by exempting projects that pose significant impacts from CEQA, its legal errors should be examined, addressed, and rectified by this Court.

Third, the Opinion erroneously holds that a project's impacts can be determined by comparing the project to itself. The Opinion states that Westlands' exports of fresh water from the Delta have no effect on the environment because these diversions are "part of the existing environmental baseline." Opinion at 50. This holding is contrary to settled law. This Court has emphasized that CEQA requires that an agency must examine "the environment's state absent the project" as the baseline in order to assure that the agency considers the actual impacts of project approval on the environment. *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 315, 322. Assuming instead as the Opinion does, that approval of the project is itself the baseline, "results in 'illusory' comparisons that 'can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts,' a result at direct odds with CEQA's intent." *Id.*, quoting *Environmental Planning & Information Council v. County of Eldorado* (1982) 131 Cal.App.3d 350, 358.

Here, Westlands proposes to authorize 2 more years of massive water deliveries from the Delta. If Westlands disapproves the project, no deliveries would occur. Accordingly, Westlands can meaningfully evaluate the environmental consequences of the Project only by comparing the impacts of contract *approval* to the impacts of its *disapproval*. But the Opinion holds, contrary to settled law and CEQA's purposes, that Westlands' decision to divert water for 2 more years has *no* environmental impacts subject to CEQA scrutiny. Opinion at 50.

For each of these reasons, this Court should grant review in this matter to overturn the Opinion's mistaken interpretation of CEQA and to ensure its correct and consistent interpretation by the courts in the future.

Sincerely,

W.F. "Zeke" Grader, Jr.
Executive Director

cc: All parties as listed in the attached Proof of Service