GREGORY C. LOARIE, State Bar No. 215859
gloarie@earthjustice.org
MARIE E. LOGAN, State Bar No. 308228
mlogan@earthjustice.org
EARTHJUSTICE
50 California Street, Ste. 500
San Francisco, CA 94111
T: 415-217-2000 / F: 415-217-2040

Counsel for Petitioners and Plaintiffs

SUPERIOR COURT OF CALIFORNIA
COUNTY OF HUMBOLDT

ENVIRONMENTAL PROTECTION INFORMATION CENTER and CENTER FOR BIOLOGICAL DIVERSITY, Petitioners and Plaintiffs, v. CAL. DEPT. OF FISH AND WILDLIFE, Respondent and Defendant. and GREEN DIAMOND RESOURCE CO., Real Party in Interest.	Case No. DR190416 **PETITIONERS' AND PLAINTIFFS' OPENING BRIEF** Courtroom: 4 Judge: Hon. Kelly L. Neel Action Filed: January 31, 2019 Trial Date: October 30, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

FACTUAL BACKGROUND 2

STATUTORY BACKGROUND 3

The California Endangered Species Act 3

The Safe Harbor Agreement Program Act 4

PROCEDURAL BACKGROUND 5

The Commission's Decision to List Humboldt Martens under CESA. 5

The Department's Safe Harbor Agreement with Green Diamond. 6

STANDARD OF REVIEW 10

ARGUMENT 11

I. There Is No Substantial Evidence to Support the Department's Conclusion that the Safe Harbor Agreement Will Provide a Net Conservation Benefit. 11

A. It Is Entirely Speculative Whether Green Diamond's Commitment to Study the Feasibility of Assisted Dispersal Will Benefit Martens. 11

B. The Habitat Management Commitments Do Not Provide a Benefit And Only Reflect the Regulatory Status Quo Prior to the Agreement. 13

C. The Projected Increase in Average Forest Age Does Not Provide a Benefit. 17

II. Substantial Evidence Does Not Support the Department's Conclusory "No-Jeopardy" Determination. 18

III. The Safe Harbor Agreement Fails to Adequately Define the Baseline. 20

A. The Department Failed to Support its Vague Description of Baseline Conditions with Substantial Evidence. 20

B. The Department Violated the Law by Relying on Green Diamond to Define Baseline Conditions. 22

IV. No Substantial Evidence Supports the Department's Conclusory Finding that the Safe Harbor Agreement Minimizes Take to the Maximum Extent Practicable. 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Bixby v. Pierno
(1971) 4 Cal.3d 130 10

Bunnett v. Regents of Univ. of California
(1995) 35 Cal.App.4th 843 11

County of Amador v. El Dorado County Water Agency
(1999) 76 Cal.App.4th 931 22

Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection
(2008) 44 Cal.4th 459 .....19, 23

Friends of the Old Trees v. Dept. of Forestry & Fire Protection
(1997) 52 Cal.App.4th 1383 11

Gerber v. Norton
(D.C.Cir. 2002) 294 F.3d 173 25

Lucas v. Southern Pacific Co.
(1971) 19 Cal.App.3d 124 .....10, 13

National Wildlife Fed'n v. Babbitt
(E.D.Cal. 2000) 128 F.Supp.2d 1274 24-25

POET, LLC v. State Air Resources Bd.
(2017) 12 Cal.App.5th 52 21-22

San Bernardino Valley Audubon Soc'y v. City of Moreno Valley
(1996) 44 Cal.App.4th 593 24

Sierra Club v. County of Fresno
(2018) 6 Cal. 5th 502 .....10, 11

Topanga Assn. for a Scenic Community v. County of L.A.
(1974) 11 Cal.3d 506 18

Wells v. One2One Learning Foundation
(2006) 39 Cal.4th 1164, *as modified* (Oct. 25, 2006) 23-24

Western States Petroleum Assn. v. Superior Court
(1995) 9 Cal.4th 559 10

State Statutes

California Environmental Quality Act, § 21000 et seq. 21-22

California Endangered Species Act, Fish & G. Code, § 2050 et seq. 1, 3-5, 19, 24

Code of Civil Procedure § 1085 10

Code of Civil Procedure § 1094.5 ..... 10, 25

Evidence Code, § 452, subd. (b) 14

Fish and Game Code, § 79 22

Fish and Game Code, § 86 4

Fish and Game Code, § 2053, subdivision (a) 4

Fish and Game Code, § 2062 4

Fish and Game Code, § 2067 4

Fish and Game Code, § 2068 5

Fish and Game Code, § 2070 4

Fish and Game Code, §§ 2071-2075.5 4

Fish and Game Code, § 2080 4

Fish and Game Code, § 2081, subdivision (c) 5, 18-19

Fish and Game Code, § 2085 5

Fish and Game Code, § 2089.2 ..... 4, 5, 18, 20, 22

Fish and Game Code, § 2089.4, subdivision (a) 5

Fish and Game Code, § 2089.4, subdivision (b) 5, 20-23

Fish and Game Code, § 2089.4, subdivision (d) 5

Fish and Game Code, § 2089.4, subdivision (h) 11, 14-15, 18

Fish and Game Code, § 2089.6 ..... *passim*

Fish and Game Code, § 2089.10 ..... 4, 23

Federal Statutes

Endangered Species Act, 16 U.S.C. § 1531 et seq. 3, 24-25

Other Authorities

California Assembly Committee on Water, Parks, & Wildlife, Report on Sen. Bill No. 448 (2009-2010 Reg. Sess.) July 9, 2009 4

California Code of Regulations, Title 14, § 670.5 5-6

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Green Diamond, *Aquatic Habitat Conservation Plan and Candidate Conservation Agreement with Assurances* (Oct. 2006), Vol. 1 ..... 13-14, 17

Karrigan Bork, *Listed Species Reintroductions on Private Land: Limiting Landowner Liability* (2011) 30 Stanford Environmental Law Journal 177 20

INTRODUCTION

Humboldt martens are in grave danger. These shy, furry woodland creatures, at home in the old-growth coastal redwoods of California, have teetered on the brink of extinction for decades. Devastated by fur-trapping and extensive logging, only about 100 Humboldt martens survive today.

In 2015, Environmental Protection Information Center and Center for Biological Diversity ("the Centers") petitioned the California Fish and Game Commission to designate Humboldt martens as endangered under the California Endangered Species Act ("CESA"), Fish & G. Code, § 2050 et seq. Concluding that martens are indeed at tremendous risk, the Commission voted in 2016 to designate Humboldt martens as candidates for protection, and it formally listed them as endangered in 2018. The Commission's action makes it unlawful for anyone to kill Humboldt martens.

This case challenges a decision by the California Department of Fish and Wildlife that fundamentally undermines the Commission's substantial efforts to recover Humboldt martens. Specifically, this case challenges the Department's decision to enter into a "safe harbor agreement" with a logging company called Green Diamond Resources Company that owns more than 550 square miles of mostly forested land in northern California. In short, the agreement, which Green Diamond requested just one month before martens were listed, allows Green Diamond to "take"—*i.e.*, kill—an unspecified number of martens during the course of its logging operations over the next 40 years.

The Department's agreement with Green Diamond jeopardizes Humboldt martens and violates California law. Even the Department's own staff, including senior scientists, strongly objected to the agreement, given the dangers it poses to martens. The Legislature enacted the Safe Harbor Agreement Program Act, Fish & G. Code, § 2089.2 et seq., in 2009, to encourage private landowners to *enhance* endangered species' habitat. Legislators understood private landowners might be reluctant to undertake genuine conservation efforts, fearing liability for accidentally harming a protected species. The Legislature was clear, however, that safe harbor agreements must provide a net conservation benefit and must not jeopardize the species. Here, the Department misused the safe harbor program and unlawfully entered into an agreement that fails to provide any net conservation benefit to the Humboldt marten, and instead only benefits a timber company, which is now released from liability when their logging results in the death of the few remaining martens.

This case presents a question of first impression: is a safe harbor agreement that provides no discernable benefit to an endangered species lawful? Because the answer is no, the Centers ask this Court to set aside the Department's unlawful safe harbor agreement with Green Diamond.

FACTUAL BACKGROUND

Humboldt martens are small furry mammals best known for a surprising re-emergence from presumed extinction. Related to minks and otters, with large ears and bushy, oversized tails, they belong to a subspecies of Pacific martens, and they go by the scientific name *Martes caurina humboldtensis*.[1] (AR440 at -4600; AR514 at -7389; AR495 at -7065.)[2]

Figure 1: A Humboldt marten (AR192 at -2152)

Humboldt martens historically inhabited coastal forests in California from the Oregon border south to Sonoma County, and they were once relatively abundant. (AR440 at -4610; AR514 at -7409 to 7410.) They require mature, old-growth forests with complex shrub layers for denning and raising young, and occasionally forage on "serpentine" habitat—rocky and mineral-laden land with dense vegetation and sparse, stunted trees. (AR440 at -4605 to -4606; AR408 at -3892; AR007 at -0090; AR500; AR514 at -7440; AR446 at -4700.) Humboldt martens avoid young forests less than thirty years old. (AR440 at -4608 to -4610; AR532 at -8327; AR068.) Martens are explorers, and a typical home range—about 1.5 square miles—is three to four times larger than other mammals their size. (AR408 at -3897; AR514 at -7434.) Wide corridors of unbroken mature forest are therefore essential to martens. (AR415; AR514 at -7434, -7440, -7460; AR440 at -4609; AR092; AR084.)

In the late nineteenth century, trappers killed martens in earnest, reporting that marten furs were "worth their weight in gold." (AR002 at -0024; AR537 at -8880; AR528 at -7685.) In the ensuing decades, timber companies began heavily logging the forests of northern California. (AR514 at -7391, -7402 to -7403.) Devastated by trapping and loss of habitat, the Humboldt marten

[1] Older scientific literature sometimes refers to Humboldt martens as a subspecies of the American marten (*Martes americana*). Since 2012, however, taxonomists generally regard all martens west of the Rocky Mountains as members of the species *Martes caurina*. (AR514 at -7389.)

[2] Documents in the administrative record are cited herein with "AR," the number of the record in the Department's certified index, and the Bates-stamped pinpoint citation.

population plummeted. (AR537 at -8883; AR421; AR495 at -7063.) California banned most commercial trapping of martens in 1946, but by then, it was already too late. (AR537 at -8883.) From the late 1940s, despite myriad efforts, there were no verifiable sightings of Humboldt martens by trappers or anyone else. (AR537 at -8880 to -8882; AR495 at -7063 to -7064; AR514 at -7391; AR528 at -7688.) Meanwhile, logging companies accelerated their efforts in California's coastal forests, resulting in suitable marten habitat shrinking further. (AR514 at -7402; AR440 at -4610, -4615 to -4617; AR538 at -8897.) By the 1990s, many scientists suspected the Humboldt marten had gone extinct. (AR495 at -7063 to -7064; AR537 at -8880 to -8882; AR532 at -8283.) But then, in 1996, a single Humboldt marten unexpectedly left behind paw prints on a tracking plate in Six Rivers National Forest in Del Norte County, sparking celebration and a renewed focus on tracking the elusive creatures. (AR495 at -7063 to -7064; AR440 at -4614.)

Today, Humboldt martens still hover on the brink of extinction, occupying less than 5 percent of their historic range. (AR514 at -7410; AR008 at -0097; AR532 at -8283; see AR500 at -7131 to -7132.) The best available science indicates a remnant population of less than 100 Humboldt martens inhabits the northeastern corner of Humboldt County at the intersection with Del Norte and Siskiyou Counties. (AR514 at -7450 [map]; AR440 at -4615; AR008 at -0108; AR532 at -8293; see AR192 at -2159 [Department PowerPoint stating that population of "fewer than 100 individuals" is the "current population estimate for California"].) A much smaller number of martens, possibly just a few foraging individuals, also inhabits northeastern Del Norte County near the Oregon border. (AR514 at -7448; see AR388.1 at -3402 [map].) Humboldt marten populations continue to shrink. (See, e.g., AR008 at -0105 ["The magnitude of the [martens'] decline [since 2000] . . . was not anticipated."]; AR503 at -7164; AR514 at -7391, -7439.)

STATUTORY BACKGROUND

The California Endangered Species Act

The California Endangered Species Act ("CESA") is a landmark law enacted in 1984 to conserve and restore our state's incredible biodiversity for the benefit of all Californians. (Fish & G. Code, §§ 2051-2052.) Modeled on the federal Endangered Species Act, 16 U.S.C. § 1531 et seq., CESA authorizes the California Fish and Game Commission to establish, based "solely upon the

best available scientific information," a list of endangered and threatened species. (Fish & G. Code, § 2070.) The statute defines an "endangered species" as "a native species or subspecies . . . which is in serious danger of becoming extinct throughout all, or a significant portion, of its range . . . ." (*Id.*, § 2062.) A "threatened species" is a native species or subspecies "likely to become an endangered species in the foreseeable future" in the absence of special protection and management. (*Id.*, § 2067.) CESA prescribes a process by which an interested person may petition the Commission to add to the list of endangered and threatened species. (*Id.*, §§ 2071-2075.5.)

Substantively, CESA provides that public agencies "should not approve projects as proposed which would jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat essential to the continued existence of those species, if there are reasonable and prudent alternatives available . . . ." (*Id.*, § 2053, subd. (a).) Moreover, the statute provides that no person or public agency may "take" any endangered or threatened species. (*Id.*, § 2080.) The term "take" is defined broadly to include "hunt, pursue, catch, capture, or kill" or attempt to do the same. (*Id.*, § 86.) By prohibiting take, CESA aims to allow protected species to recover to the point that legal protection is no longer necessary.

The Safe Harbor Agreement Program Act

The California Legislature enacted the state's Safe Harbor Agreement Program Act ("Safe Harbor Act") as an amendment to CESA in 2009. (Fish & G. Code, §§ 2089.2–2089.25 [added by Stats. 2009, ch. 184, § 1].) Concluding that better management of private lands is critical to conserving threatened and endangered species, the Legislature intended the Act "to increase species populations, create new habitats, and enhance existing habitats." (*Id.*, § 2089.2, subd. (d).) The Act's author explained that the Legislature's intent was "to provide landowners with some assurance that they will not be penalized for their conservation efforts." (Assem. Com. on Water, Parks, & Wildlife, Rep. on Sen. Bill No. 448 (2009-2010 Reg. Sess.) July 9, 2009.)

The Safe Harbor Act provides for a reciprocal exchange: a landowner who agrees to undertake habitat improvement measures for protected species on private lands will, in turn, be granted "safe harbor" from liability for "take" of those species. (See Fish & G. Code, §§ 2089.6, 2089.10.) The Act also insulates landowners from future regulatory restrictions that could otherwise

affect the land for the duration of the agreement. (See *id.*, 2089.2, subd. (c).)

Whereas the Commission is responsible for listing threatened and endangered species under CESA, the Department is responsible for developing and implementing safe harbor agreements with private landowners under the Safe Harbor Act. (See *id.*, § 2089.4, subds. (a), (d).) Before the Department may enter into any safe harbor agreement, it must first "determine[]" baseline conditions —including estimated population size and the extent and quality of habitat—"in consultation with the applicant, . . . based on the best available science and objective scientific methodologies." (*Id.*, § 2089.4, subd. (b).) Having established baseline conditions, the Department must next ensure "implementation of the agreement is reasonably expected to provide a net conservation benefit to the species," and that there are "appropriate assurances to realize these benefits." (*Id.*, § 2089.6, subd. (a)(3).) The Department must also ensure "the landowner has agreed, to the maximum extent practicable, to avoid or minimize any incidental take"—i.e., the accidental killing of a protected species during lawful operations. (*Id.*, § 2089.6, subd. (a)(5).) Finally, the Department must ensure "[t]he take authorized by the agreement will not jeopardize the continued existence of the species," based on the "best scientific and other information that is reasonably available . . . ." (*Id.*, §§ 2081, subd. (c); 2089.6, subd. (a)(4).)

PROCEDURAL BACKGROUND

The Commission's Decision to List Humboldt Martens under CESA.

On June 1, 2015, the Centers petitioned the Commission to list Humboldt martens as endangered under CESA. (See AR425.) After public hearings and a preliminary evaluation by the Department, the Commission voted in February 2016 to accept the Centers' petition and to designate Humboldt martens as a "candidate" for listing—a temporary status that afforded Humboldt martens full protection while awaiting a full scientific review of Humboldt martens by the Department. (AR396 at -3468; see Fish & G. Code, §§ 2068 [defining "candidate" species]; 2085 [applying same protections to candidates for listing as for endangered and threatened species].)

After a thorough, peer-reviewed evaluation of the best available science compiled by the Department, the Commission followed the Department's recommendation and formally designated Humboldt martens as endangered under CESA in August 2018. (See Cal. Code Regs., tit. 14,

§ 670.5, subd. (a)(6)(J).) The Commission's findings in support of its decision to list martens as endangered emphasize that "forest fragmentation . . . threatens Humboldt marten individuals and populations," and they emphasize logging's impact on essential marten habitat:

> The amount of Humboldt marten habitat in California has been substantially reduced since the species' range was first described by early naturalists, primarily as a result of past timber harvesting and timber production practices which removed the large tree structures and dense shrub layers martens require for denning and protection from predators.

(Cal. Reg. Notice Register 2019, No. 4-Z, p. 153; see generally pp. 147-170.)

The Department's Safe Harbor Agreement with Green Diamond.

In January 2016, one month before the Commission formally designated Humboldt martens as candidates for protection under CESA, Green Diamond approached the Department and proposed a safe harbor agreement on its forested lands. (See AR017.) Green Diamond's 363,967 acres are concentrated in near-coastal stretches of Del Norte and Humboldt Counties. (See AR388.1 at -3399 [map], -3372.) Of crucial importance for martens, Green Diamond owns land directly between the largest remaining Humboldt marten population and clusters of protected old-growth forest in the Redwood National and State Parks system. (See *id.* at -3402 [marten extant population depicted in black], -3398 [land ownership].) The Humboldt marten's ability to survive and recover is contingent on access to protected old-growth forests such as those found in the parks. (AR496 at -7082.) Humboldt martens cannot reach the parks without crossing Green Diamond's property.

On April 28, 2016, Green Diamond provided the Department with a proposed safe harbor agreement, drafted as if written by the Department itself. (AR023.) In exchange for permission to kill martens while logging, Green Diamond offered $245,000 and in-kind technical support to study —and possibly implement—a project to trap martens living east of Green Diamond's lands and translocate them via "assisted dispersal" to Redwood National and State Parks, west of Green Diamond lands. (*Id.* at -0390, -0399 to -0400.) The proposal included plans to monitor translocated martens with radio-collars and to dedicate a 2,098-acre "marten reserve" (about 3.3 square miles) on rocky serpentine lands where no logging would occur. (*Id.* at -0400, -0406.) Green Diamond claimed these actions, together with a commitment to retain trees in areas adjacent to streams pursuant to existing regulations, would provide martens a net benefit. (*Id.* at -0387, -0400 to -0406.)

Department staff expressed deep concerns and skepticism regarding Green Diamond's proposed agreement. On August 8, 2016, the Department's lead marten wildlife biologist assigned to review the proposal wrote a supervisor that she could not confirm the company's data or assertions. (AR030.1 at -0511.) The biologist explained:

> The time and energy [Green Diamond] put into crafting a document, as if written by [the Department], did not seem appropriate. . . . [T]he document submitted by [Green Diamond] is not one [the Department] would use. I found it makes assertions about data that are attributed to [the Department] but we cannot verify.

(*Ibid.*)[3] Department staff experts set about substantially revising Green Diamond's proposed agreement. After participating in several negotiations with the company, the biologist provided a new draft to her supervisor in May 2017, explaining:

> This is not [Green Diamond's] document. It is a new document with some of their sections, but the majority is new. *I could not corroborate all of their references/inferences etc. and I had to feel confident in the information I am producing under [the Department's] header.*

(AR144 at -1498, italics added.) She added a thorough scientific discussion of marten habitat needs and population science into the draft, as well as additional proposed habitat protection commitments. (See AR144.1.)

Green Diamond refused to accept most of the Department's changes to the agreement, refusing even to provide Department staff with data the agency had requested. (See, e.g., AR080 [Green Diamond resisting data request]; AR103.1 at -1026 [Department scientist reporting: "They were adamant this was the only data they were willing to share."]; AR159 at -1654 ["Why do you need that for the SHA?"]; AR162.) Green Diamond's intransigence proved a successful strategy. Between May and November 2017, Department supervisors retreated from nearly all of the amendments they sought to Green Diamond's original proposed agreement. (AR204 [email]; AR204.1 [memo, including table at -2262 identifying "[Department] recommendations that [Green Diamond] would not agree to"]; AR234 at -2426 [email].)

The record shows that more than half a dozen Department staff scientists and supervisors

[3] Department staff frequently referred to Green Diamond by the acronyms "GD" or "GDRCo," and to the Department itself as "CDFW." Quoted material in this brief will substitute "Green Diamond" and "the Department" for these acronyms in brackets as appropriate.

expressed serious concerns about the agreement as it was negotiated. (See, e.g., AR234 ["I believe it would be inaccurate for [the Department] to state that the extent and quality of habitat will increase over time."]; AR031 ["[W]e need to raise the bar higher for addressing fragmentation by roads."]; AR031.1; AR084; AR092; AR120 ["Seems like the shrub committment [sic] could be beefier . . ."]; AR137 ["[T]he proposed method in the [agreement] . . . may not ensure retention of existing, high value, large diameter wildlife trees . . . particularly in even-aged clear cut units."].) Ultimately, several Department staff scientists disputed that the agreement would produce the net conservation benefit the Safe Harbor Act requires. (AR051 at -0602 ["I do not find the [agreement] as proposed will provide a net conservation benefit above the baseline."]; AR341; AR220 at -2349; AR031.)

In spring 2018, as the Department higher-ups began wrapping up negotiations, a senior scientist at the Department emailed managers overseeing the agreement to express "significant moral and ethical concerns," observing that "from all that I have heard, this SHA sounds absolutely Orwellian." (AR354 [email]; AR354.1 [three-page memo].) His letter resulted in a conference call with Department upper management, including the branch chief. (AR355 at -3015 to -3016.) After the call, a manager made several trivial tweaks to the agreement, including inserting a hastily drafted segment summarizing the baseline negotiations and purported conservation benefits at the instruction of the branch chief. (*Id.* at -3015; see AR360.1 [tracked changes].) Upon learning of the tweaks, the scientist sent a second letter to Department management on April 23, 2018, confirming: "I was left with even greater concerns that [Green Diamond's] timber management and the provisions in the SHA will, as a whole, actually be harmful . . . ." (AR358 [email]; AR358.1 [letter].) He flagged in particular the Department's failure to rely on science: "Your determination that [martens] are not strongly associated with late successional forest is, in my opinion, *contrary to the best available science and all the published literature I am aware of* e.g. Slauson 2003; Hamlin et. al 2010, etc." (AR358.1 at -3020, italics added [citing AR496; AR440].)

On April 27, 2018, the Department's branch chief signed the safe harbor agreement over the objections of staff. (AR370.)[4] The final agreement shields Green Diamond's logging operations

[4] Although the Department and Green Diamond executed the safe harbor agreement on April 27, 2018, the Department later circulated to Green Diamond a corrected version of the agreement on

from liability for incidentally killing martens for 40 years, and secures the company into an unchanging regulatory regime. (AR388.1 at -3387.) The Department's safe harbor agreement with Green Diamond is one of only nine such agreements executed since the Safe Harbor Act's enactment in 2009.[5] Its scope—covering over 350,000 acres of "enrolled lands"—is without precedent.

Despite almost two years of negotiations, the final Humboldt marten safe harbor agreement is remarkably similar to Green Diamond's original proposal. It commits the company to $275,000 in funding (of which $30,000 is allocated only "if more funds are needed") and in-kind technical support to study the feasibility of—and possibly perform—radio-collaring, translocating, and monitoring marten, collectively known as "assisted dispersal." (See AR388.1 at -3379, -3393, -3424 to -3425.) *If* the study determines such a project is feasible, which remains an open question, Green Diamond's money will go toward assisted dispersal too. Like Green Diamond's original draft, the final agreement requires the company to refrain from logging a "marten reserve area" of 2,098 acres—about 3.3 square miles, or 0.5 percent of Green Diamond's land—on serpentine soils where wildlife biologists recently detected martens. (*Id.* at -3373, -3380 to -3381, -3401 [map].) It also establishes a "marten special management area" ("MSMA") on one-third of Green Diamond's lands, bookended by the Redwood National and State Parks to the west and known marten territory to the east. (*Id.* at -3393.) Although logging will continue on the MSMA, the agreement requires that martens undergoing assisted dispersal be released onto those lands.[6] (*Id.* at -3373, -3380.)

Ultimately, the agreement concedes that Green Diamond's logging "*may result in habitat modification and the incidental take*" of Humboldt martens. (AR388.1 at -3382.) It explains:

> Road construction, harvest operations, and forest management practices may take denning females and kits through removal of the denning structure, or disturbance causing abandonment of the occupied den resulting in death of dependent kits and possible, but unlikely, direct harm or death to the female. Vehicular strikes resulting from use of forest roads and accidental entrapment in water storage facilities resulting

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June 6, 2018 to resolve watermarking and other errors. (See AR387 and AR388.) The Centers cite to AR388.1 as the final version of the safe harbor agreement.

[5] See Cal. Dept. of Fish and Wildlife (undated) *Safe Harbor Agreements* <https://wildlife.ca.gov/Conservation/CESA/Safe-Harbor-Agreements> [listing completed agreements as of June 22, 2020].

[6] A discrepancy appears in the list of tracts that comprise the MSMA. Page 9 of the agreement indicates Tract 53 is part of the MSMA, but Tract 53 does not appear on the scorecard for the MSMA or the tract map. (Compare AR388.1 at -3380 with -3430 [scorecard] and -3405 [map].)

in death or drowning of marten may also take marten.

(*Ibid.*) The agreement nevertheless asserts without scientific basis or analysis that implementation of the agreement will not jeopardize the Humboldt marten's continued existence. (*Id.* at -3395.) It also concludes without analysis that the agreement minimizes take to the maximum extent practicable.

The Centers filed this lawsuit challenging the final safe harbor agreement in Alameda County Superior Court on January 31, 2019. The parties stipulated to transfer the lawsuit to Humboldt County in April 2019.

STANDARD OF REVIEW

The Centers have petitioned this Court to review the final safe harbor agreement through administrative mandamus under Code of Civil Procedure section 1094.5 or, in the alternative, traditional mandamus under Code of Civil Procedure section 1085. (See Verified Petn. & Complaint (Jan. 31, 2019).) In general, courts review an agency's adjudicative acts under section 1094.5, whereas "quasi-legislative" acts are reviewed under section 1085. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 566-568.) Here, the final safe harbor agreement is an agency action committing a single regulated entity to comply with a final administrative order on the basis of evidence gathered by the Department. The agreement is therefore best analyzed as adjudicatory action reviewable under section 1094.5 by administrative mandamus. (See *ibid.*)

Under section 1094.5, this Court "review[s] the entire administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law . . . ." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 144.) Factual findings are reviewed for abuse of discretion, which "is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (Code Civ. Proc., § 1094.5, subd. (c).) In assessing whether substantial evidence exists, the court considers all evidence in the administrative record, including that which fairly detracts from the evidence supporting the Department's findings, and determines whether the evidence is "reasonable in nature, credible, and of solid value." (*Lucas v. Southern Pacific Co.* (1971) 19 Cal.App.3d 124, 136, citation omitted.) Legal questions such as those involving statutory interpretation are reviewed de novo. (See *Sierra Club v. County of Fresno* (2018) 6 Cal. 5th 502, 516 [holding that where a party seeks a "determination whether statutory

criteria were satisfied, de novo review is appropriate . . . ."].)[7]

ARGUMENT

I. There Is No Substantial Evidence to Support the Department's Conclusion that the Safe Harbor Agreement Will Provide a Net Conservation Benefit.

The Safe Harbor Act requires safe harbor agreements be "reasonably expected to provide a net conservation benefit to the species listed in the application." (Fish & G. Code, § 2089.6, subd. (a)(3).) The statute defines the phrase "net conservation benefit" to mean:

> The cumulative benefits of the management activities identified in the agreement that provide for an increase in a species' population or the enhancement, restoration, or maintenance of covered species' suitable habitats within the enrolled property. . . . Net conservation benefits shall be sufficient to contribute either directly or indirectly to the recovery of the covered species. These benefits include, but are not limited to, reducing fragmentation and increasing the connectivity of habitats, maintaining or increasing populations, enhancing and restoring habitats, and buffering protected areas.

(*Id.*, § 2089.4, subd. (h).)

In this case, the Department claims the safe harbor agreement with Green Diamond will provide a net conservation benefit to Humboldt martens by (A) funding a study of the feasibility of, and possibly pursuing, an assisted dispersal program, (B) instilling various habitat management commitments, and (C) increasing average forest age over time. There is no substantial evidence these provisions will provide a net conservation benefit to Humboldt martens.

A. It Is Entirely Speculative Whether Green Diamond's Commitment to Study the Feasibility of Assisted Dispersal Will Benefit Martens.

The safe harbor agreement commits Green Diamond to an untested "assisted dispersal" program. (AR388.1 at -3379 to -3380.) Specifically, "Assisted Dispersal Commitment 1" requires Green Diamond to study whether it is feasible to capture martens in their known habitat and translocate them onto the "Marten Special Management Area" and the parks system to the west. (*Id.*

[7] By way of comparison, judicial review of quasi-legislative acts under section 1085's "traditional mandamus" asks "whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support . . . ." (*Bunnett v. Regents of Univ. of California* (1995) 35 Cal.App.4th 843, 849.) Ultimately, "[t]here is no practical difference between the standards of review applied under traditional or administrative mandamus." (*Friends of the Old Trees v. Dept. of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1389.)

at -3379, -3400 [map].) Assuming translocation is feasible, Commitments 2 and 3 require Green Diamond to support the capture and translocation of martens and to monitor them with radio-collars. (*Id.* at -3379.) Commitment 4 requires Green Diamond to provide $245,000 in funding—plus an additional $30,000 if "needed"—along with matching in-kind technical support, for these efforts. (*Id.* at -3379, -3393.) There is no substantial evidence these commitments will, in fact, translate to a net conservation benefit to Humboldt martens.

The Department's own staff scientists repeatedly objected to the safe harbor agreement's reliance on the assisted dispersal package to provide a net conservation benefit. As one Department manager queried upon reviewing an early draft: "After reading the Wildlife Program's Marten Assisted Dispersal Feasibility Analysis task, wouldn't it be prudent to complete the Analysis *first*, since it is an integral component of the conservation benefit?" (AR093 at -0927.) An internal Department memo further exposed the shortcomings of the plan: "We also do not know if it is feasible (biologically sound) to remove martens from such a small population (around 100 individuals) for translocation." (AR204.1 at -2264.)

Green Diamond's "commitments" to capture, translocate, and monitor martens therefore put the cart before the proverbial horse: the agreement first commits the company to study *whether* translocating Humboldt martens is beneficial or even feasible, but the later commitments *presume* translocation will occur. (AR388.1 at -3379.) Moreover, the record shows the Department's own experts doubted translocating martens would be feasible. As one Department staff member advised management: "[T]he scientists I've talked with (Redwood Sciences [Laboratory] and [the U.S. Fish and Wildlife Service]) say that it is unlikely, with such a small population, that the assisted dispersal feasibility study would recommend releasing martens onto Green Diamond lands without some agreement to retain home range habitat." (AR234 at -2426.) And one of the last Department scientists to review the near-final safe harbor agreement emailed management in March 2018: "[M]y biggest concern is that much of the net conservation benefits seems to derive from the proposed translocation project, but if that project is found to be infeasible will there still be a net benefit?" (AR341 at -2943; see also AR354.1 at -3013 ["A feasibility study is only a study, period."].) In the absence of any evidence that translocating martens is indeed feasible, the record does not support the

Department's conclusion that the assisted dispersal program will provide them any benefit. (See *Lucas*, *supra*, 19 Cal.App.3d at 136.)

Furthermore, there is no substantial evidence in the record to suggest Green Diamond's maximum financial commitment of $275,000, even with equivalent in-kind support, is sufficient for a full feasibility study, translocation, and monitoring. Indeed, one staff scientist cited an analogous monitoring project for fishers (a larger cousin of martens) that cost more than $250,000 *per year* for labor and transportation alone. (AR197 at -2211; see AR204.1 at -2264 [Department staff estimating $245,000 is about "1/3 of the funding needed" for assisted dispersal]; cf. AR354.1 at -3013 [Department scientist objecting that Green Diamond "throwing money at studying and monitoring this species is not conservation, protection, restoration or enhancement of existing habitats"].) In sum, the Department has failed to support its conclusion that assisted dispersal will benefit martens or that Green Diamond has even provided enough funding for the effort. Such a failure violates Fish and Game Code, section 2089.6, subdivision (a)(3).

B. The Habitat Management Commitments Do Not Provide a Benefit And Only Reflect the Regulatory Status Quo Prior to the Agreement.

The safe harbor agreement also identifies eight habitat management commitments to which Green Diamond is bound. (See AR388.1 at -3380 to -3382.) They are:

1. Implementing the federally approved Aquatic Habitat Conservation Plan ("AHCP") on Green Diamond's lands "except those [lands] not covered by the AHCP" (*id.* at -3380);
2. Retaining some living trees in logging areas based on a scorecard system (*id.*);
3. Establishing a marten special management area ("MSMA") in the stretch of land between the known marten population and the Redwood National and State Parks system, where any future dispersal of martens would occur (*id.*);
4. Creating a 2,098 acre "marten reserve" exempt from logging (*id.* at -3380 to -3381);
5. Retaining woody debris to provide structural cover for martens (*id.*);
6. Creating "slash piles . . . averaging one structure for every 5-10 acres of clear-cut," (*id.*);
7. Preserving natal and maternal marten den structures and trees nearby (*id.*); and
8. Performing self-regulated shrub management and summarizing herbicide treatments in an annual report (*id.* at -3381 to -3382).

While the list may appear extensive at first glance, the benefit to Humboldt martens is illusory.

Habitat Commitment 1 requires Green Diamond to adhere to the federal Aquatic Habitat

Conservation Plan ("AHCP") by reducing logging efforts in areas adjacent to streams called "riparian management zones" or "RMZs," which comprise about 25 percent of Green Diamond's lands. (*Id.* at -3380; see *id.* at -3373, -3375, -3404 [map depicting RMZs].) But the Department may not claim a "benefit" to martens where Green Diamond is already subject to AHCP requirements, because this merely preserves the status quo.[8] For this reason, the Department's own internal analysis concluded this specific commitment offers "no additional benefit." (AR199.1 at -2223.) Characterizing adherence to an existing regulatory requirement as a "net benefit" is especially inapt given Department staff emphasized that retaining trees in riparian areas alone would actually further fragment the forests, preventing martens from reaching the old-growth forests in the Redwood National and State Parks system. (See AR038 at -0558 ["There appears to be no scientific support that AHCP[-]wide riparian areas would be sufficient for dispersal and connectivity. . . . [This] proposal falls short of a net conservation benefit."]; AR213 at -2280 [marten expert stating "maintaining . . . the connectivity area on [Green Diamond] lands between the park and the east side of the Klamath [is] vitally important"]; see also AR234 at -2426.) The Safe Harbor Act includes "reducing fragmentation and increasing the connectivity of habitats" among the intended benefits of any safe harbor agreement. (Fish & G. Code § 2089.4, subd. (h).) By retaining only narrow strips of habitat already protected by federal regulation, this commitment effectively does the opposite.

Habitat Commitment 2 requires Green Diamond to assess living trees in logging areas using a "scorecard" system that awards points for tree features that martens depend upon, like broken tops, large cavities, and broad limbs. (See AR388.1 at -3380, -3430 to -3431.) Trees scoring above a seven-point threshold are to be left in place—even when surrounded by clearcut forest—as "wildlife trees." (*Id.*) The agreement requires Green Diamond to employ what it characterizes as a more

[8] The Aquatic Habitat Conservation Plan is available online and constitutes a federal regulation subject to judicial notice. (Green Diamond, *Aquatic Habitat Conservation Plan and Candidate Conservation Agreement with Assurances* (Oct. 2006), Vol. 1 <https://www.fws.gov/arcata/es/HCP/4_2007%20AHCP_CCAA/4a1_2007%20AHCP_CCAA.pdf> [as of June 22, 2020]; see Evid. Code, § 452, subd. (b).) Several pages of the AHCP describe "single harvest entry" limitations applicable within RMZs. (*AHCP Agreement*, at pp. S-10, 6-7, 6-11.) The AHCP is binding and enforceable. (*Id.* at p. 6-5.) The AHCP has a 50-year term, *id.* at p. 1-4, meaning it will expire within one year of the safe harbor agreement's 2057 expiration. (See AR388.1 at -3372.) Thus, the agreement's adoption of the AHCP RMZ protections simply commits Green Diamond to the status quo.

restrictive version of the scorecard system in the Marten Special Management Area ("MSMA"), the lands onto which assisted dispersal will ostensibly occur. (*Id.* at -3380, -3393, -3430 [MSMA scorecard], -3400 [map of MSMA].) Ultimately, Department scientists repeatedly objected that the scorecard system in total "requires too many features such that valuable wildlife trees are not being retained." (AR194 at -2206; see also AR051 at -0605 [staff scientist noting that "data from 2015 shows, on average, that less than 1 scorecard tree is retained every 10 acres"]; AR192 at -2200.) Staff therefore found the scorecard system would provide no benefit. (See AR199.1 at -2223 [estimating Commitment 2 might result in "1-2 [trees preserved] per 20 clearcut acres (this may be optimistic)"].) Ultimately, the Safe Harbor Act requires the benefits of any safe harbor agreement to be aimed at "enhancing and restoring habitats," not merely "retaining" some pieces. (See Fish & G. Code, § 2089.4, subd. (h).) The benefit from Commitment 2 is likewise illusory and does nothing more than maintain the status quo.

Commitment 3 provides for the creation of the Marten Special Management Area—onto which martens may be translocated if feasible—and describes plans to monitor martens there. (AR 388.1 at -3380.) This commitment suffers from the same faulty assumption as the assisted dispersal plans described in Section I.A above: it assumes without evidence that assisted dispersal *will* occur, and that translocated martens will be monitored—even though the best available science does not yet suggest translocation is feasible. Furthermore, Commitment 3 portrays monitoring as a "benefit," even though monitoring is an independent requirement of the Safe Harbor Act. (See Fish & G. Code, § 2089.6, subd. (a)(6).) The Department cannot rely on monitoring to provide the requisite net conservation benefit where the statute already requires it. (See AR031.1 [Department scientist objecting that "simply meeting the requirements stipulated by the Fish and Game Code does not guarantee approval [of a safe harbor agreement]" but rather "is the minimum for 'consideration'"].)

Commitment 4 calls for a 2,098-acre marten reserve on which no timber logging would be allowed during the agreement's term. (See AR388.1 at -3380 to -3381.) But Department staff concluded the reserve would provide "[l]ittle to no additional benefit as the area is almost entirely on Serpentine derived soils," unsuitable for commercial logging and inadequate for martens. (AR199.1 at -2223, -2225; see AR051 at -0603 [Department staff noting "serpentine habitats do not have trees

to harvest" and "do not appear to support breeding females"]; see AR008 at -0106 [describing "low productivity" of serpentine habitats, and noting such areas "may be lower quality habitat for martens than Old Growth non-serpentine habitats"]; AR446 ["stunted" tree growth on serpentine lands].) There is nothing in the record to show that the proposed "reserve" will provide any discernable benefit to Humboldt martens, and it represents no more than business as usual for Green Diamond.

The remaining commitments, meanwhile, consist of routine maintenance activities that Department staff concluded were already Green Diamond's common practice. Commitment 5 commits Green Diamond to retain an unspecified amount of "downed large woody debris," even though the Department is aware the company already leaves behind any such debris from which it cannot derive profit. (AR388.1 at -3381; AR199.1 at -2223.) Commitment 6 commits Green Diamond to leaving behind one "slash pile" (comprised of residual limbs and wood left behind after clear-cutting) every five to ten acres, rather than burning the piles as some companies do—but this provides "little additional benefit" as the Department's inspector notes that Green Diamond rarely burns its slash piles. (AR388.1 at -3381; AR199.1 at -2223.) Furthermore, the record indicates martens tend to use slash piles with much less frequency than large, living trees. (See AR116.1 at -1283 [citing AR514 at -7426].) Again, the Department fails to require any new measures or changes in Green Diamond's operations that would improve habitat as required by the Safe Harbor Act.

Commitment 7 obliges Green Diamond to retain trees around known marten den sites, an approach which the Department concluded provides "little to no additional benefit" because the primary thrust of the safe harbor agreement is to authorize clearcutting forests around the dens. (AR388.1 at -3381; AR199.1 at -2223; see AR358.1 at -3020 [Department staff questioning "what credible report, study or science" can support the idea that "fragmenting and converting tens of thousands of acres" of forest into clearcuts "will actually improve [marten] population trends"].) Commitment 8, finally, commits Green Diamond to self-policing its own shrub management activities, which internal Department review concluded is an unenforceable promise providing "no additional benefit." (AR388.1 at -3381 to -3382; AR199.1 at -2223.) In sum, there is no substantial evidence the nominal inclusion of the so-called habitat commitments in the safe harbor agreement will provide a net conservation benefit to Humboldt martens. Rather, the Department's own staff

experts concluded the habitat commitments reflect the regulatory status quo.

C. The Projected Increase in Average Forest Age Does Not Provide a Benefit.

The safe harbor agreement also posits "average forest age is projected to increase" over the length of the agreement, portraying this as a benefit to martens. (AR388.1 at -3375 ["goal of this Agreement is to increase average forest age"], -3376 [Table 1 showing increase in average forest age], -3393.) Yet the record shows that this promise, too, is illusory.

As a Department staff biologist explained in a March 2017 memorandum, "[a]veraging age across the landscape . . . *distorts the picture* of what is really habitat on the ground for marten[s]." (AR103.1 at -1026, italics added.) The memo explained, "[a] 10 year old clear cut adjacent to a 80 year riparian area is not currently suitable [habitat for marten], but by averaging the riparian acres *shows acres of older forest that do not exist*." (*Ibid.*) In other words, averaging a 10-year-old stand of trees with an adjacent, equally sized 80-year-old stand results in an average stand age of 45 years for that area (10 plus 80, divided by 2)—even though martens would avoid fully half of this land (i.e., the 10-year-old portion) due to lack of overhead cover and higher predation risks. (See AR68; AR440 at -4608 to -4610.) Staff scientists therefore repeatedly objected that average age was too imprecise a metric, and they instead requested that Green Diamond quantify the actual acres of trees on its lands by age, which would reveal whether the habitat will *actually* improve over time. (See AR068; AR080 [Green Diamond rejecting scientists' requests for data]; AR084; AR178 at -1887.) Another Department scientist reviewing the near-final agreement recommended that Green Diamond provide estimates of actual acreage by decade. (AR342 at -2952.) Instead, the Department blindly accepted Green Diamond's invalid assumption that an increase in average forest age would benefit Humboldt martens. The Department can point to no substantial evidence that an increase in average forest age will provide such a benefit.[9]

[9] Averaging forest age is particularly misleading because 25 percent of Green Diamond's lands are in riparian management zones already protected from logging under the Aquatic Habitat Conservation Plan. (AR388.1 at -3375; see Section I.B and fn. 8, *supra*.) As long as trees on these protected lands continue to age each decade (a benefit that will occur *regardless* of the safe harbor agreement), the average age of Green Diamond's forests will be inflated, even if the remaining 75 percent of the company's lands are harvested at consistent rates. (See AR234 at -2426.)

Taken collectively, the benefits the safe harbor agreement purports to provide are, in fact, illusory. Claiming that these status quo commitments represent actual benefits to martens—particularly given Green Diamond expects to harm martens while pursuing logging operations—subverts the legislative intent behind the Safe Harbor Act, which is first and foremost to enhance and restore habitat. (Fish & G. Code, § 2089.4, subd. (h); see *id.*, § 2089.2, subd. (b); see AR220 at -2349 [Department staff handwritten notes stating "My scientific opinion[:] the agreement does not provide a net conservation benefit."].)

II. Substantial Evidence Does Not Support the Department's Conclusory "No-Jeopardy" Determination.

The Department's conclusory finding that the safe harbor agreement "will not jeopardize" Humboldt martens is also unsupported by substantial evidence. (See AR388.1 at -3395.) To approve a safe harbor agreement, the Department must conclude "[t]he take authorized by the agreement will not jeopardize the continued existence of the species"—and this determination must be based on the "*best scientific and other information that is reasonably available*," including "consideration of the species' capability to survive and reproduce, and any adverse impacts of the taking on those abilities in light of (1) known population trends; (2) known threats to the species; and (3) reasonably foreseeable impacts on the species from other related projects and activities." (Fish & G. Code, §§ 2089.6, subd. (a)(4), 2081, subd. (c), italics added.)

Here, the Department's statement in support of the no-jeopardy determination merely recites the statutory language verbatim without any analysis. (Compare AR388.1 at -3395 with Fish & G. Code, § 2081, subd. (c).) The Department's failure to identify any substantial evidence that would explain or support its no-jeopardy determination falls short of what the law requires. The Supreme Court has long held that an agency "must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision . . . ." (*Topanga Assn. for a Scenic Community v. County of L.A.* (1974) 11 Cal.3d 506, 515.) "Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency." (*Id.* at 516.)

An analogous case is *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459 (hereafter *EPIC*). There, the California Supreme Court reviewed the adequacy of findings supporting a permit issued under CESA that authorized a logging company to "take" (capture or kill) two kinds of protected birds during lawful operations. (*Id.* at 507, 516.) The Court held that CESA findings in support of such an "incidental take" permit "do not need to be extensive or detailed," but "mere conclusory findings without reference to the record are inadequate." (*Id.* at 516-517.) The Court concluded the CESA findings at issue in *EPIC* were passable, although they "le[ft] something to be desired," because they cited to specific documents in the administrative record, which in turn provided additional scientific support for the agency's action. (*Ibid.*) The *EPIC* Court indicated the agency would have been better served by incorporating the supporting evidence directly into the incidental take permit findings, rather than referring to external documents in the record. (*Id.* at 517.) Here, the Department has done far less than the agency in *EPIC*. The Department's findings merely recite the statutory language that the Department's actions will "not jeopardize" the species, providing no factual analysis whatsoever, nor any citations to the record. (AR388.1 at -3395.) This is particularly remarkable given the agreement is based on a novel and untested plan to capture and release martens onto unfamiliar lands.

Ultimately, the best available science refutes the Department's conclusory finding the safe harbor agreement will not jeopardize Humboldt martens. The record demonstrates the Department is aware there are only about 100 Humboldt martens left, and that this tiny population is still in decline. (AR503 at -7164; AR192 at -2156 [Department PowerPoint]; see Fish & G. Code, § 2081, subd. (c)(1); see Section III.A, *infra*.) Prominent wildlife biologists and state and federal agencies equally concur that extensive logging throughout the marten's historical range is a leading cause of decline. (AR514 at -7402; AR440 at -4610, -4615 to -4617; see Fish & G. Code, § 2081, subd. (c)(2).) The best available science therefore compels the conclusion that giving Green Diamond a free pass to "take"—i.e., kill—an unspecified number of Humboldt martens during logging operations puts them in jeopardy. (See Fish & G. Code, § 2081, subd. (c).) The Department has failed to support its conclusion to the contrary with any substantial evidence, which violates the law.

III. The Safe Harbor Agreement Fails to Adequately Define the Baseline.

Establishing the "baseline" is the "most critical component of any safe harbor agreement," because the baseline defines existing conditions on the land at the time of approval, which the landowner must maintain for the duration of the agreement. (See Bork, *Listed Species Reintroductions on Private Land: Limiting Landowner Liability* (2011) 30 Stan. Environmental L.J. 177, at pp. 203-204.) The Safe Harbor Act defines "baseline conditions" as "the existing estimated population size" of the protected species, the "extent and quality of habitat," or both. (Fish & G. Code, § 2089.4, subd. (b).) A landowner whose property falls beneath baseline will be liable for "take" of the protected species. (See *id.*, §§ 2089.2, subd. (d) [safe harbor agreements "shall not" reduce existing populations from baseline], 2089.6, subd. (a) [Department may authorize take only when landowner meets conditions for approval; take is "otherwise prohibited"].) This makes intuitive sense, because the purpose of a safe harbor agreement is first and foremost to benefit the species. (*Id.*, § 2089.2.)

Here, the Department made two critical errors. *First*, the final baseline set forth in the safe harbor agreement is extraordinarily vague, noting the supposedly inconclusive state of the science on marten populations and habitat requirements, which directly contravenes opinions of the Department's own scientists, as well as the consensus of dozens of scientific articles. *Second*, the Department unlawfully ceded its authority to set baseline conditions to Green Diamond, enabling the company not only to author the final baseline section, but also to unilaterally modify the definition of baseline for the next 40 years. Both errors violated the Safe Harbor Act.

A. The Department Failed to Support its Vague Description of Baseline Conditions with Substantial Evidence.

Spanning less than three pages, the safe harbor agreement's vague description of baseline conditions does not incorporate or reflect the best available science. The agreement claims Humboldt martens are "rare or absent from the majority of the Enrolled Lands," that "it is *not possible* for [the Department] to include a reliable trend assessment for the [Humboldt marten's] population," and that the marten's "use of habitat within the Enrolled Lands remains *unknown* . . . ." (AR388.1 at -3375, italics added.) Most concerning, the agreement wrongly asserts "a *reliable and accepted definition* of suitable habitat for [Humboldt martens] on managed coastal redwood forest

does not exist." (*Ibid.*, italics added.) In support of these fundamental conclusions, the agreement cites only three scientific articles, two of which predate World War II. (*Id.* at -3397.)

The final agreement's description of the baseline does not reflect the wealth of scientific documents in the record describing and assessing the marten's habitat needs and demographics. For example, as to the marten's population status and trends, a 2013 report—prepared by leading marten scientists and submitted to the Department itself—summarized the state of the Humboldt marten population as follows: "[T]here has been considerable effort to determine the size of the remnant population of Humboldt martens . . . [T]he remnant population of the Humboldt subspecies likely contains <100 individuals . . . *The current trend in population size for the Humboldt marten is known to be decreasing* . . . ." (AR503 at -7164, italics added; see also AR532 at -8292 to -8293 [2015 federal report on Humboldt marten: "[I]t is likely the entire coastal marten population in northern coastal California contains fewer than 100 individuals (Table 8.3), which we consider to be the current population estimate for California."].) Rather than cite to any of these comprehensive analyses or rely on its own scientists' work product, the Department inexplicably omitted any discussion of this research from the final safe harbor agreement. (See AR388.1 at -3374 to -3376.)

The agreement's conclusory assertions that Humboldt martens' habitat use is "unknown" and that a reliable definition of suitable habitat "does not exist" also dramatically misrepresent the state of the science. The administrative record contains hundreds of pages on marten habitat needs published in scientific journals. (See, e.g., AR007; AR008; AR513; AR407; AR408; AR415; AR423; AR443; AR452; AR500; AR501; AR519; AR526; AR527.) Several reports produced for government agencies likewise chronicle and analyze this information. (AR440; AR503; AR514; AR532; AR414; AR425.) Taken together, these publications all agree: martens depend primarily on old-growth forests with dense foliage and shrubbery to survive. By adopting a description of baseline that ignores the best available science, the Department failed to support its safe harbor agreement with substantial evidence. (See Fish & G. Code, § 2089.4, subd. (b) ["Baseline conditions . . . shall be based on the best available science and objective scientific methodologies."].)

In the analogous context of the California Environmental Quality Act ("CEQA"), courts have long held that an environmental impact report's description of existing baseline conditions must be

"realistic," providing "the most accurate picture practically possible . . . ." (*POET, LLC v. State Air Resources Bd.* (2017) 12 Cal.App.5th 52, 79, citation omitted; see *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 954.) In *POET*, the court held that an agency had failed to define baseline adequately where it had failed to reference or address key research and documentation. (12 Cal.App.5th at 76, 80.) The Department made the same error here. Short, incomplete, and scarcely referenced, the safe harbor agreement fails to acknowledge the state of the science on the size of the Humboldt marten population or the extent and quality of habitat on Green Diamond's lands—the two requisite elements crucial to defining baseline under the Safe Harbor Act. (See Fish & G. Code, § 2089.4, subd. (b).) Without an adequate baseline here, it is impossible to determine to what degree habitat conditions are worsened by logging in the future.

B. The Department Violated the Law by Relying on Green Diamond to Define Baseline Conditions.

In addition to adopting an unlawfully vague and unsupported baseline, the Department violated the plain language of the Safe Harbor Act by allowing Green Diamond to define baseline conditions. The Safe Harbor Act provides that "[b]aseline conditions *shall be determined by the [D]epartment*, in consultation with the applicant . . . ." (Fish & G. Code, § 2089.4, subd. (b), italics added; see *id.*, § 79 [defining "shall" as "mandatory"].) The responsibility to determine baseline is so important that California's Legislature reiterated the Department's role in legislative findings: "[S]afe harbor agreements shall not reduce the existing populations of species present *at the time the baseline is established by the [D]epartment*." (Fish & G. Code, § 2089.2, subd. (d), italics added.)

Here, the Department's own scientists acknowledged in internal correspondence that Green Diamond drafted the baseline section. (See AR234 at -2426 ["I would recommend keeping the baseline section italicized . . . as *the company wrote the baseline section*."], italics added; see also AR155.1 at -1611.) Even more alarming, the agreement enables Green Diamond to modify unilaterally its description of baseline at any point during the safe harbor agreement's 40-year term:

> Green Diamond may add newly acquired forestland and timber harvesting rights acquired after the Effective Date of this Agreement to the Enrolled Area by providing written notice to [the Department] *describing the additional Enrolled Lands and the effect of adding such lands on landscape baseline conditions.*

(AR388.1 at -3373, italics added.) This matters because, under the agreement, Green Diamond will

be liable for harming martens only if it causes the habitat to fall beneath baseline. (See Fish & G. Code, §§ 2089.10, 2089.6, subd. (a).) With this permission, Green Diamond can now insulate itself against future liability by simply rewriting the standard (i.e., baseline) against which any future actions (i.e., logging) will be measured. By ceding to Green Diamond full authority to define baseline conditions into the future, the Department abdicated its own obligation to do so, and violated Fish and Game Code, section 2089.4, subdivision (b).

The California Supreme Court's opinion in *EPIC* is again instructive. In that case, the Court held the Department of Forestry and Fire Protection violated the California Forest Practice Act by relying too heavily on a timber company's contributions to compiling a final timber management plan. (*EPIC, supra*, 44 Cal.4th at 491-497.) The Court criticized the agency because it had "improperly delegated to Pacific Lumber the task of finalizing the contents of the [timber management plan] after it was approved, abdicating the agency's basic function of making that determination itself . . . ." (*Id.* at 496.) The Court's opinion in *EPIC* reflects an understood unwillingness to allow private companies to take control over an agency's core regulatory function.

Here, similarly, the Department not only improperly relied on Green Diamond to define present conditions, but also allowed Green Diamond to modify its description of the baseline with any land acquisition in the next 40 years. This represents an obvious conflict of interest for Green Diamond, which has every incentive to designate baseline conditions favorable to its own timber operations. The Department's approach in this case cannot be squared with *EPIC*'s prohibition against improper delegation, particularly in light of the Safe Harbor Act's clear statutory mandate.

That the Safe Harbor Act allows private parties to assess some aspects of baseline does not detract from the Department's ultimate obligation to establish baseline *itself*. The Safe Harbor Act allows for a "qualified person that is not employed by the [D]epartment" to "*conduct habitat surveys*" to "establish[] baseline conditions." (Fish & G. Code, § 2089.4, subd. (b), italics added.) If the Legislature had intended to allow the Department to entirely delegate its duty to establish baseline to a "qualified person," the Safe Harbor Act would have stated as much—but the statute *only* enables qualified persons to "conduct habitat surveys." (*Ibid.*; see *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190, *as mod.* (Oct. 25, 2006) ["If the words themselves are not

ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs."].) In sum, the Department violated the Safe Harbor Act by allowing Green Diamond to describe baseline conditions and then modify them unilaterally at any point in the next 40 years.

IV. No Substantial Evidence Supports the Department's Conclusory Finding that the Safe Harbor Agreement Minimizes Take to the Maximum Extent Practicable.

The Department may approve a safe harbor agreement only after concluding "the landowner has agreed, *to the maximum extent practicable,* to avoid or minimize any incidental take authorized in the agreement . . . ." (Fish & G. Code, § 2089.6, subd. (a)(5), italics added.) Here, the record is devoid of evidence the Department assessed the practicality of more stringent measures to prevent Green Diamond from taking martens. The Department failed to support its finding, that the agreement will avoid take to the maximum extent practicable, with any evidence. (See AR388.1 at -3395.)

The safe harbor agreement requires Green Diamond to follow just three bare-bones measures to avoid or minimize take: (1) retaining trees martens are actively using as dens; (2) ensuring water tanks are "marten-proofed to prevent entrapment and/or drowning," and (3) limiting access to private lands via security patrols and locked gates. (AR388.1 at -3383 to -3384.) Tellingly, Green Diamond offered identical measures in its original proposed agreement to the Department. (Compare AR023 [Green Diamond draft] at -0407 to -0408 with AR388.1 [final agreement] at -3383 to -3384.) The Department's subsequent analysis confirms that none of these measures require Green Diamond to do more than what it is already doing. (AR199.1 at -2223 to -2224 [chart analyzing impact of avoidance measures and finding no added benefit]; see also AR354.1 at -3013 [staff scientist alerting management that Green Diamond has maintained locked gates on property "for decades"].) The record contains no evidence that these measures represent the maximum practicable protections.

Case law construing the phrase "maximum extent practicable" in the context of the federal Endangered Species Act's incidental take permitting requirements is instructive. (See *San Bernardino Valley Audubon Soc'y v. City of Moreno Valley* (1996) 44 Cal.App.4th 593, 603 ["CESA was in large part modelled upon [the federal] ESA; thus, federal decisional law must be given great weight."].) In *National Wildlife Fed'n v. Babbitt* (E.D.Cal. 2000) 128 F.Supp.2d 1274, 1292, the court held "the most reasonable reading of the statutory phrase 'maximum extent practicable' . . .

requires the [agency] to *consider an alternative* involving greater mitigation." (Italics added.) In that case, the court found a federal agency's approval of an incidental take permit to be arbitrary and capricious where the record was "devoid of evidence" the agency had analyzed practicable alternatives at any level. (*Ibid.*) Similarly, in *Gerber v. Norton* (D.C.Cir. 2002) 294 F.3d 173, 185, the court held a federal agency's approval of an incidental take permit violated the federal Endangered Species Act where "no evidence in the record" indicated the agency had ever concluded greater minimization measures would be "impracticable." (*Ibid.*) In reaching this holding, the court confirmed "[w]hen a statute requires an agency to make a finding as a prerequisite to action, it must do so"—"conclusory recitations" are insufficient. (*Ibid.*)

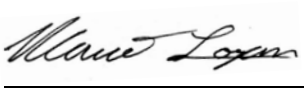
The administrative record in this case compels the same outcome here, because there is no indication the Department ever analyzed the practicability of more stringent measures to minimize incidental take during Green Diamond's planned logging. The record is replete with instances in which Department staff urged additional measures to avoid and minimize take. (See, e.g., AR031 ["[W]e need to raise the bar higher for addressing fragmentation by roads."]; AR116.1 at -1285 [proposing adding shrub protection commitment]; AR137 [proposing additional mitigations for wildlife trees].) Yet, the record contains no analysis of the practicability of imposing these or other mitigations. The Department's conclusion that Green Diamond agreed to avoid taking martens "to the maximum extent practicable" is unsupported by substantial evidence. By failing to consider the practicality of more stringent measures, the agency violated the law.

CONCLUSION

For the foregoing reasons, the Centers request that this Court declare that the Department violated the Safe Harbor Act, and direct the Department to set aside the Green Diamond safe harbor agreement. (See Code Civ. Proc., § 1094.5, subd. (f).)

Dated: June 26, 2020

Respectfully submitted,



Marie E. Logan, State Bar No. 308228
Gregory C. Loarie, State Bar No. 215859
EARTHJUSTICE
50 California Street, Ste. 500
San Francisco, CA 94111
Tel: 415-217-2000 / Fax: 415-217-2040

Attorneys for Petitioners

PROOF OF SERVICE

I am a citizen of the United States of America and a resident of the City and County of San Francisco; I am over the age of 18 years and not a party to the within entitled action; my business address is 50 California Street, Suite 500, San Francisco, California.

I hereby certify that on June 26, 2020, I served via electronic mail one true copy of the document herein Petitioners' and Plaintiffs' Opening Brief on the parties listed below:

California Department of Fish and Wildlife

Daniel S. Harris
Daniel.Harris@doj.ca.gov
Sara Van Loh
Sara.VanLoh@doj.ca.gov
Deputy Attorneys General
1515 Clay Street, 20th Floor
Oakland, CA 94612

Green Diamond Resource Company

Chris Carr
Chris.Carr@bakerbotts.com
Navi Dhillon
Navi.Dhillon@bakerbotts.com
Baker Botts LLP
101 California Street, Ste. 3600
San Francisco, CA 94111

I certify under penalty of perjury that the foregoing is true and correct. Executed on June 26, 2020 in Oakland, California.

Rikki Weber