

California Supreme Court Charts New Course For Climate Change Analysis

Court endorses significance threshold based on consistency with statewide GHG reduction goals, but nonetheless invalidates State EIR utilizing that threshold.

On Monday November 30, 2015, the California Supreme Court overturned the Department of Fish and Wildlife's (the Department) Environmental Impact Report (EIR) for the Department's approvals of the Newhall Ranch project. The Newhall Ranch project includes plans to develop almost 12,000 acres along the Santa Clara River west of the City of Santa Clarita, with up to 20,885 dwelling units housing nearly 58,000 residents as well as areas for commercial and other uses over the next 20 years.

Center for Biological Diversity v. Department of Fish and Wildlife (Newhall Land and Farming Company), S217763, (Cal. November 30, 2015)¹ struck down the Court of Appeal's determination that the EIR and State Endangered Species Act approvals for the project were adequate. The California Supreme Court summarized its holding as follows:

"We conclude, first, that as to greenhouse gas emissions the environmental impact report employs a legally permissible criterion of significance—whether the project was consistent with meeting statewide emission reduction goals—but the report's finding that the project's emissions would not be significant under that criterion is not supported by a reasoned explanation based on substantial evidence.

Second, we conclude the report's mitigation measures calling for capture and relocation of the stickleback, a fully protected species under Fish and Game Code section 5515, subdivision (b)(9), themselves constitute a taking prohibited under subdivision (a) of the same statute.

Finally, we hold that under the circumstances of this case plaintiffs exhausted their administrative remedies regarding certain claims of deficiency by raising them during an optional comment period on the final report."²

Background

The California Environmental Quality Act (CEQA) generally requires an agency to prepare an EIR that analyzes new projects' potential impacts on the environment. Case law, amendments to CEQA and CEQA Guidelines added in 2010³ have provided sometimes conflicting guidance as to the appropriate methodology and standards for lead agencies to use in analyzing greenhouse gas emissions (GHGs) in EIRs.

Litigation in the Lower Courts

The Center for Biological Diversity and other opposition groups opposed the Department's December 2010 issuance of several approvals for the Newhall Ranch project, including certification of an EIR and approval of a resource management plan, conservation plan, streambed alteration agreement and issuance of two incidental take permits.

The Los Angeles Superior Court in October of 2012 ruled that the Department abused its discretion on six issues and issued judgment for the opponents. Among other issues, the Superior Court held that the EIR's selection of a baseline for assessing the cumulative impacts of the project's greenhouse gas emissions was, as a matter of law, inappropriate.

In March of 2014, the Court of Appeal reversed on all of the issues where the trial court found violations of law, holding that the EIR's analysis of GHGs did comply with CEQA. [Latham's Clean Energy Law Report](#) analyzed the Court of Appeal's opinion on GHG issues, reporting the opinion found that consistency with Assembly Bill 32 (AB 32) is a proper CEQA significance threshold.

The Court of Appeal opinion also upheld the lead agency's determination regarding the assessment of the economic feasibility of a project alternative and, in particular, consistency with a specific plan. Finally, the court ruled that on one issue opponents had failed to exhaust administrative remedies so that the court could not consider their claims, noting that "a commenter's failure to raise an issue during the comment period prevents its relitigation in a subsequent mandate proceeding."

On a third crucial issue the Court of Appeal held that live trapping and translocation for conservation purposes — for example as part of mitigation measures for a project's potential environmental impacts — does not violate the state Endangered Species Act's prohibitions on the pursuit, catch or taking (among other activities) of protected animal species.

The California Supreme Court granted a petition for review of the Court of Appeal's decision on July 9, 2014, and Court staff provided the following statement of issues for the case. The statement focused on three issues: GHGs; exhaustion of administrative remedies; and "take" of fully protected fish under the California Endangered Species Act (Fish and Game Code Sections 86 and 5515):

This case presents the following issues:

(1) Does the California Endangered Species Act (Fish & Game Code, § 2050 et seq.) supersede other California statutes that prohibit the taking of "fully protected" species, and allow such a taking if it is incidental to a mitigation plan under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)?

(2) Does the California Environmental Quality Act restrict judicial review to the claims presented to an agency before the close of the public comment period on a draft environmental impact report?

(3) May an agency deviate from the Act's existing conditions baseline and instead determine the significance of a project's greenhouse gas emissions by reference to a hypothetical higher "business as usual" baseline?

California Supreme Court Decision

In a five to two decision, with the majority opinion authored by Justice Werdegar, the Court struck down the EIR's analysis of GHG impacts. The Court's opinion contains several important holdings on the analysis of climate change:

1. The EIR did not violate CEQA when it used — as a significance threshold — the standard of “consistency” with the California Air Resources Board Scoping Plan and Assembly Bill 32’s statewide goal for GHG reduction. The Court stated that such an approach was consistent with Section 15064.4 of the CEQA Guidelines, observing:⁴

“Given the reality of growth, some greenhouse gas emissions from new housing and commercial developments are inevitable. The critical CEQA question is the cumulative significance of a project’s greenhouse gas emissions, and from a climate change point of view it does not matter where in the state those emissions are produced. Under these circumstances, evaluating the significance of a residential or mixed use project’s greenhouse gas emissions by their effect on the state’s efforts to meet its longterm goals makes at least as much sense as measuring them against an absolute numerical threshold.”

2. There was no claim that looking at the Scoping Plan’s goal for GHG reductions by the year 2020 was insufficient for an EIR prepared in 2010, but the Court noted that later EIRs may have an obligation to look beyond the year 2020.⁵

“Plaintiffs do not claim it was improper for this EIR, issued in 2010, to look forward only to 2020 for a guidepost on reductions in greenhouse gas emissions, and we therefore do not consider the question whether CEQA required the EIR to address the state’s goals beyond 2020. Nevertheless, over time consistency with year 2020 goals will become a less definitive guide, especially for longterm projects that will not begin operations for several years. An EIR taking a goal-consistency approach to CEQA significance may in the near future need to consider the project’s effects on meeting longer term emissions reduction targets”

3. The Department’s use of the “business-as-usual emissions model” as a “comparative tool for evaluating efficiency and conservation efforts, not as a significance baseline”⁶ was acceptable under CEQA. The Court also stated: “Using a hypothetical scenario as a method for evaluating the project’s efficiency and conservation measures does not violate Guidelines section 15125 or contravene our decision in *Communities for a Better Environment*.”⁷

4. The Department “abused its discretion in finding on the basis of the EIR’s business-as-usual comparison, that the project’s greenhouse gas emissions would have no cumulatively significant impact on the environment”⁸ because the administrative record “discloses no substantial evidence that Newhall Ranch’s *project-level* reduction of 31 percent in comparison to business as usual is consistent with A.B. 32’s *statewide* goal of a 29 percent reduction from business as usual . . .”⁹

5. Agencies have several options for evaluating greenhouse gas emissions. The Court described “several potential options for [the Department of Fish and Wildlife] on remand and for other agencies faced with evaluating the cumulative significance of a proposed land use development’s greenhouse gas emissions.”¹⁰ Those options include:

- a. Examination of the “data behind the Scoping Plan’s methodology” to determine the level of expected project-level reductions from new land development at the proposed project’s location¹¹
- b. Analyzing the project’s “compliance with regulatory programs designed to reduce greenhouse gas emissions from particular activities”¹²

- c. Utilizing previously adopted local plans, such as general plans or climate action plans, or metropolitan regions' "sustainable communities strategies" that may analyze greenhouse gas emission for the relevant area¹³
- d. Reliance on "existing numerical thresholds of significance for greenhouse gas emissions" adopted, for example, by local air districts¹⁴

Regarding the second issue in the case, the Court held that, in the somewhat unique circumstances of the case, opponents had exhausted administrative remedies and had complied with CEQA as to comments on the subjects of Native American cultural resources and potential impacts on steelhead smolt fish. The Court noted that the Department's EIR was prepared as a joint federal and state document to satisfy both California and federal environmental laws, and that as a result an optional comment period under federal law also counted as a comment period under CEQA. Therefore, since the challenged comments were made during that federal comment period, they also satisfied CEQA's requirement that the comment be made during a public comment period provided by CEQA. The Court stated¹⁵:

"Where the lead agency under CEQA has treated a federal comment period on a final EIS/EIR as an opportunity to receive additional comments on CEQA issues as well and has responded to those comments and included the responses in its final decision document, the lead agency has effectively treated the federal period as an optional comment period on the final EIR under Guidelines section 15089, subdivision (b). Such an optional comment period is — provided by CEQA for purposes of section 21177."

On the third issue in the case, the Court held that the Fish and Game Code Section 5515, which lists 10 "fully protected" fish, does not permit a "take" of such fish in mitigation of a project's impacts. The Court stated,¹⁶ "We must reject the claim DFW [the Department] may authorize, as CEQA mitigation, actions to protect a fully protected species from harm when, as here, those actions are otherwise prohibited as takings." The Court's analysis was based on an analysis of the legislative history of key sections of the Fish and Game Code regarding the protection of endangered species.

Justice Werdegar's majority opinion was joined by Chief Justice Cantil-Sakauye and Justices Liu, Cuellar and Kruger. Justice Corrigan filed a concurring and dissenting opinion and Justice Chin filed a dissenting opinion — both Justices would have upheld the EIR's climate change analysis.

Conclusion

The Court's opinion in Newhall Ranch provides a detailed discussion of greenhouse gas analysis required by CEQA. The majority opinion provides over 22 pages of analysis of this complex topic and indicates that project proponents and approving agencies must proceed carefully in preparing future EIRs and other CEQA documents, including findings, to consider all of the issues the Court addressed.

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Endnotes

¹ The Opinion can be found at: <http://www.courts.ca.gov/opinions/documents/S217763.PDF>

² Slip Opinion at page 2.

³ CEQA Guidelines Sections 15064.4, 15183.5

⁴ Slip opinion at page 13.

⁵ Slip opinion at pages 16-17.

⁶ Slip opinion at page 19.

⁷ Id.

⁸ Id.

⁹ Id. (emphasis in original)

¹⁰ Slip opinion at page 24.

¹¹ Slip opinion at page 25

¹² Id. (citing to CEQA Guidelines Sections 15064(h)(3), 15064.4(a)(2), and 15064.4(b)(3)).

¹³ Slip opinion at pages 26-27.

¹⁴ Slip opinion at pages 27-28.

¹⁵ Slip opinion at page 39.

¹⁶ Slip opinion at page 31.