



California Supreme Court Finds Newhall EIR Insufficient, But Partially Upholds Greenhouse Gas Analysis

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On November 30, 2015, the California Supreme Court issued its much-anticipated decision in *Center for Biological Diversity v. Cal. Dept. of Fish & Wildlife*, Case No. S217763 (Nov. 30, 2015). The decision is the first in a series of anticipated opinions regarding the California Environmental Quality Act's (CEQA) requirements for greenhouse gas (GHG) emissions analysis. The decision is part of the two decade long legal battle over the Newhall Ranch multi-use development project (Newhall Ranch).

Greenhouse Gas Emissions Issue: The Court concluded that CDFW appropriately relied on project consistency with statewide emissions reduction goals, as set forth in the California Global Warming Solutions Act of 2006 (AB 32) and the California Air Resources Board's 2008 Climate Change Scoping Plan, adopted pursuant to AB 32, as a CEQA significance threshold. Nevertheless, the Court struck down CDFW's no significant impact finding for lack of substantial evidence.

Fully Protected Species Issue: The Court also held that a relocation of fully protected species pursuant to a CEQA mitigation measure is prohibited as a take under Fish and Game Code section 5515 and that comments submitted after the close of the public comment period on a Draft EIR are sufficient to exhaust administrative remedies for CEQA purposes.

The decision further complicates the already treacherous terrain of CEQA compliance, and compliance with the Fully Protected Species statutes. Nossaman filed an amicus curiae brief in this case on behalf of several public transportation and water agencies.

Newhall Ranch was approved as a mixed-use development on nearly 12,000 acres along the Santa Clarita River. Following the 2010 certification of the Newhall Ranch EIR, the Center for Biological Diversity, Friends

of the Santa Clara River, Santa Clarita Organization for Planning the Environment, California Native Plant Society, and the Wishtoyo Foundation/Ventura Coastkeeper (collectively, Plaintiffs) filed suit alleging that CDFW's EIR was inadequate under CEQA and that CDFW authorized take of the fully protected unarmored threespine stickleback in violation of the Fish and Game Code. The superior court found for the Plaintiffs on several issues, but the Court of Appeal rejected each of the Plaintiffs' claims.

The Supreme Court granted review of three issues: (1) whether the Newhall Ranch EIR properly concluded that the project would not have a significant GHG impact by using a Business-As-Usual threshold; (2) whether the project's mitigation measure allowing for the collection and relocation of the unarmored threespine stickleback, violates fully protected species laws; and (3) whether Plaintiffs' comments submitted after the close of the CEQA comment period were timely to exhaust administrative remedies.

Business-As-Usual Is a Valid CEQA GHG Significance Threshold

The 2008 Scoping Plan established that a 29 percent reduction from the projected 2020 Business-As-Usual GHG emissions level would achieve AB 32's statewide GHG emissions reduction target for 2020. The 2008 Scoping Plan's Business-As-Usual scenario assumed no conservation or regulatory efforts beyond those that were in place in 2008. Relying on the 2008 Scoping Plan, CDFW concluded that if the project's actual emissions were equal to or lower than 29 percent below the 2008 Scoping Plan projected 2020 Business-As-Usual emissions, the project would be consistent with statewide emissions reduction goals and GHG emissions would be less than significant. The Plaintiffs argued that this approach violates CEQA because it relies on a hypothetical GHG emissions level. The Court disagreed with the Plaintiffs, holding that a significance threshold may rely on a hypothetical emissions level.

Writing for the majority, Justice Werdegar noted that CDFW's use of a Business-As-Usual significance threshold was permissible and appropriate. The decision establishes that public agencies may rely upon the 2008 Scoping Plan Business-As-Usual methodology and Sustainable Communities Strategies to assess the significance of GHG emissions from a proposed project. However, the majority decision held that CDFW's finding that the project was in fact consistent with AB 32 and the 2008 Scoping Plan was unsupported by substantial evidence. The Court observed that CDFW failed to explain why a 29 percent reduction, adopted as the necessary statewide target (applying to new construction, as well as the transportation and energy sectors), should guarantee sufficient reductions for the mixed-use Newhall Ranch project.

The Court offered potential methods for establishing the necessary link between project level GHG emissions reductions and statewide GHG emissions reduction goals, including assessing the project's compliance with regulatory programs adopted by state agencies, such as Metropolitan Planning Organizations' Sustainable Communities Strategies established under SB 375. Though the Court did not endorse all SB 375 plans as universally CEQA compliant, the Court suggested that a public agency's reliance on such plans is likely to be upheld if challenged. As noted by Justice Corrigan's concurring and dissenting opinion, the Court's endorsement of AB 32's Business-As-Usual methodology is tarnished by its invalidation of CDFW's use of that methodology in this case. The precarious balance struck by the majority will likely usher in additional CEQA challenges to projects based on allegedly inadequate GHG analyses. The Court did not address whether GHG analyses are required to analyze consistency with Executive Orders establishing GHG reduction goals for the years 2030 and 2050 – those issues are before the Court in *Cleveland National Forest Foundation v. San Diego Association of Governments*, Case No. S223603.

Collection and Relocation of Fully Protected Species as Part of a CEQA Mitigation Measure is a Take

The Newhall Ranch EIR allowed U.S. Fish and Wildlife Service personnel or their authorized agents to collect

and relocate fully protected fish species as a CEQA mitigation measure. Adopting the Plaintiffs' reading of the law, the Court ruled that the Fish & Game Code section 5515 prohibition on the taking of fully protected fish species includes take by means of avoidance or conservation as part of a CEQA mitigation measure. In so finding, the Court rejected the Court of Appeal's attempt to harmonize the fully protected species statutes with the California Endangered Species Act. Complicating the Court's ruling, the majority noted that although collection and relocation measures may not be undertaken as mitigation for a project, they may be independently undertaken by CDFW as a part of ongoing species recovery efforts separately acknowledged in a project's EIR.

Justice Werdegar's opinion barely acknowledged the internally contradictory nature of this ruling. The majority's reasoning hinges on a game of semantics – collection and relocation of fully protected species can be undertaken, just not as mitigation. Justice Chin rightly calls out this contradiction that makes conservation measures legal in one context, but illegal if undertaken as mitigation. This posture will certainly make it more difficult, if not impossible, for many projects to comply with the Fully Protected Species statutes – even where the project as a whole contributes to the recovery of the species. The Court did not address more conventional compliance strategies, such as designing a project to avoid take.

Administrative Exhaustion

Finally, the Court found that where, as in Newhall Ranch's case, the environmental document was both a CEQA and a National Environmental Policy Act document, that comments submitted after the close of the CEQA comment period can serve to exhaust administrative remedies. Reasoning that CEQA provides for optional comment periods on a Final EIR, and that CDFW was actively involved in responding to post-EIR comments, the Court ruled Plaintiffs' late-filed comments on Native American cultural resources impacts and impacts to steelhead smolt to be timely.