

DECEMBER 4, 2015

LAW ALERT

NOT EASY BEING GREEN: CALIFORNIA SUPREME COURT WEIGHS IN ON ANALYZING GHG EMISSIONS UNDER CEQA

In *Center for Biological Diversity v. California Department of Fish and Wildlife* ("DFW"), the California Supreme Court found that a 2010 environmental impact report ("EIR") prepared by DFW for a large-scale new town called Newhall Ranch failed to comply with the California Environmental Quality Act. A majority of the Court upheld the standard used to analyze greenhouse gas ("GHG") emissions but found that the EIR failed to provide substantial evidence in support of its conclusion that Newhall Ranch would cause less than significant GHG impacts. The Court also rejected proposed mitigation regarding protected fish and found that plaintiffs properly exhausted their administrative remedies when they raised objections to the EIR late in the environmental review process.

Background

In 2010, DFW certified an EIR for two natural resource plans related to Newhall Ranch. Despite only having jurisdiction over the natural resources plans, DFW analyzed all of the potential environmental impacts of Newhall Ranch that would result from approval of those plans. The EIR concluded that Newhall Ranch's emissions of GHGs would have a less than significant impact on the global climate and that mitigation measures would reduce impacts to protected fish species to less than significant levels.

Several environmental groups challenged the adequacy of the EIR. The trial court found for the environmental groups, and the Court of

Appeal reversed. The Supreme Court granted plaintiffs' petition for review.

Ruling

The Supreme Court upheld the threshold of significance used in the EIR to evaluate GHG emissions, but nevertheless it found that the EIR violated CEQA.

Statewide Reduction Goals May Be Used As the Threshold of Significance for GHG Emissions

To evaluate the project's GHG impacts, the EIR compared the anticipated emissions from the proposed project to the hypothetical emissions that would occur under a "business-as-usual" scenario in which no conservation or regulatory efforts are assumed. The California Global Warming Solutions Act of 2006, commonly referred to as AB 32, requires that, by 2020, California limit its statewide GHG emissions to the amount emitted in 1990. In order to achieve the AB 32 mandate, the California Air Resources Board ("CARB") determined California must reduce statewide GHG emissions by 29 percent as compared to business-as-usual.

The Court upheld the approach of comparing a project's anticipated GHG emissions to the business-as-usual estimate as a means of evaluating GHG impacts.

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BUT – The EIR Lacked Substantial Evidence to Connect Project-Level Reductions with Statewide Goals

Despite upholding the significance threshold used in the EIR, the Court concluded that the EIR failed to provide substantial evidence connecting the project-level reduction to the required statewide reduction. The EIR found that Newhall Ranch could achieve a 31 percent reduction in GHGs as compared to "business-as-usual." Because the 31 percent reduction was better than the required 29 percent statewide reduction, the EIR then concluded that the project's impact on GHG emissions was less than significant.

The Court held that there was no substantial evidence that a 31 percent reduction in emissions from new development projects would result in a 29 percent statewide reduction. The Court noted that *new* construction projects may need to achieve GHG reductions much greater than 29 percent to accomplish a statewide reduction of 29 percent. For example, existing buildings may not be able to feasibly achieve a 29 percent reduction in GHG emissions, and, as a consequence, new development may need to achieve even greater efficiencies.

The Court noted that local governments bear the primary responsibility for evaluating a project's impact on GHGs. It suggested that sufficiently detailed local climate action plans could create standards for GHG reduction that may simplify GHG analysis under CEQA. The Court also highlighted regional means of addressing GHGs under CEQA, such as demonstrating project compliance with an approved Sustainable Communities Strategy under the Sustainable Communities and Climate Protection Act of 2008 (commonly referred to as SB 375) or comparing project emissions to regional GHG thresholds, like those created by the Bay Area Air Quality Management District.

Other CEQA Issues

The project proposed to collect and relocate several "fully protected" fish species as a mitigation measure for the project's impacts on the fish. The Court held that collecting the fish would itself constitute a "taking" of the fish and was prohibited by State law.

Finally, CEQA requires that all comments on the adequacy of an EIR be provided before the close of the public hearings on a project. The EIR for Newhall Ranch had been prepared as a joint EIR under CEQA and an environmental impact statement under the federal National Environmental Policy Act ("NEPA"). Although DFW held no public hearing on the final EIR, public comment on the final document was invited in compliance with NEPA. DFW responded to comments received during this final review period. The Court held that under those circumstances, plaintiffs could rely on the comments submitted after the last DFW hearing to challenge the adequacy of the EIR.

Future Application

EIR preparers retain the ability to use a reduction from "business-as-usual" emissions to evaluate GHG impacts, but substantial analysis will be required to demonstrate that a project's reduction in GHG emissions is consistent with statewide emission targets. The Court further limited the application of this approach by noting that the validity of comparing project-level reductions to the statewide 2020 goal will diminish as 2020 approaches, and it may be improper for analysis of long-term projects that will not begin operations for several years.

If you have any questions, please contact Barbara Kautz, Lynn Hutchins, Eric Phillips, Justin Bigelow, or any other attorney at Goldfarb & Lipman.