Center for Biological Diversity v. Department of Fish and Wildlife (Nov. 30, 2015) _ Cal.4th __
With this decision, a 5-2 majority of the California Supreme Court has complicated how lead agencies may evaluate the significance of greenhouse gas emissions from individual projects.

The case involves the joint EIR/EIS certified in 2010 for the Resource Management and Development Plan and Spineflower Conservation Plan for the Newhall Ranch development (originally approved in 2003) in northern Los Angeles County. Although DFW has direct authority only over biological resource impacts, its EIR examines all environmental impacts from the resource plans, and the Newhall Ranch development that would be facilitated by their approval. The EIR/EIS found that the development's GHG emissions would be less than significant because they would be 31% less than business as usual and that mitigation for impacts to a fully protected fish species would reduce the development's impact to a less than significant level. The Court of Appeal upheld the EIR's adequacy in the face of a legal challenge from CBD. The California Supreme Court invalidated the EIR and sent it back to the Court of Appeal for re-consideration.

CBD presented three claims to the California Supreme Court: the greenhouse gas (GHG) emissions analysis incorrectly used "business as usual" as the baseline for analysis and the 29% emissions reductions goal in the Air Resources Board AB 32 Scoping Plan's as a significance threshold; the EIR's mitigation measure to relocate members of a fully protected species (unarmored three-spine stickleback fish) violated the species "fully protected" status under California law; and the comments on Native American cultural resources and steelhead smolt impacts submitted after the close of the draft EIR review period should be admissible claims in CEQA litigation.

The Court denied part of the first claim: business as usual is not being used as the baseline, the EIR disclosed existing GHG emissions as the baseline. The Court held that emissions reduction below business as usual may be employed as a non-numerical threshold. However, it invalidated the GHG analysis in this EIR because the analysis failed to demonstrate how this project-specific 31 percent reduction in emissions is consistent with the Scoping Plan's state-wide 29 percent reduction goal. In other words, the Scoping Plan does not establish a threshold unless the GHG analysis includes sufficient adjustments to correlate project-specific circumstances with the Scoping Plan. The Court offered the following "potential options" for evaluating the significance of project-specific GHG emissions:

> First, … a business-as-usual comparison based on the Scoping Plan's methodology may be possible. On an examination of the data behind the Scoping Plan's business-as-usual model, a lead agency might be able to determine what level of reduction from business as usual a new land use development at the proposed location must contribute in order to comply with statewide goals.
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> Second, a lead agency might assess consistency with A.B. 32's goal in whole or part by looking to compliance with regulatory programs designed to reduce greenhouse gas emissions from particular activities. (See Final Statement of Reasons, *supra*, at p. 64 [greenhouse gas emissions "may be best analyzed and mitigated at a programmatic level."].) To the extent a project's design features

> comply with or exceed the regulations outlined in the Scoping Plan and adopted by the Air Board or other state agencies, a lead agency could appropriately rely on their use as showing compliance with "performance based standards" adopted to fulfill "a statewide . . . plan for the reduction or mitigation of greenhouse gas emissions." (citation deleted)
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> A significance analysis based on compliance with such statewide regulations, however, only goes to impacts within the area governed by the regulations. That a project is designed to meet high building efficiency and conservation standards, for example, does not establish that its greenhouse gas emissions from transportation activities lack significant impacts…
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> Third, a lead agency may rely on existing numerical thresholds of significance for greenhouse gas emissions, though as we have explained (*ante*, p. 14), use of such thresholds is not required. (Guidelines, § 15064.4, subd. (b)(2); see, e.g., Bay Area Air Quality Management Dist. (BAAQMD), CEQA Guidelines Update: Proposed Thresholds of Significance (May 3, 2010), pp. 8–21 [regional air quality district for the San Francisco Bay Area proposes a threshold of 1100 $MTCO_2E$ in annual emissions as one alternative agencies may use in determining CEQA significance for new land use projects].)[footnote deleted] Thresholds, it should be noted, only define the level at which an environmental effect "normally" is considered significant; they do not relieve the lead agency of its duty to determine the significance of an impact independently. (citations deleted)

Regarding the second claim, the Court opined that specifying collection and relocation of fully protected fish as mitigation in an EIR violates Fish and Game Code section 5515(a)'s specific prohibition on the taking or possession of fully protected fish for that purpose. The Court noted that: "DFW may conduct or authorize capture and relocation of the stickleback "as part of a species recovery program" to protect the fish and aid in its recovery, but the agency may not rely in a CEQA document on the prospect of capture and relocation as mitigating a project's adverse impacts."

On the third claim, that comments submitted after the end of the draft EIR public comment period can still preserve claims that may be raised in CEQA litigation, the Court similarly held in favor of CBD. Public Resources Code Section 21177(a) provides that an alleged ground for noncompliance with CEQA must be "presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination" if it is to be brought up in later litigation. DFW does not hold public hearings on its approval of projects such as the one at issue, so a plaintiff would be limited to comments submitted during the public review period. DFW and the U.S. Army Corps of Engineers prepared a joint EIR/EIS for this project. As part of the NEPA process, the Final EIS was circulated for a 30-day comment period prior to its approval by the Corps of Engineers. The comment letters were submitted during that period and DFW coordinated with the Corps of Engineers on responses to those comments contained in a jointly prepared addendum that modified portions of the final EIR/EIS prior to its certification and adoption. The Court found that this preserved those comments as litigation claims:

> We need not decide whether every federally mandated comment period on a final combined EIS/EIR also constitutes a CEQA comment period for purposes of

section 21177, subdivision (a). In this case, the lead state agency, DFW, participated fully in the post-final EIS/EIR process, helping to prepare responses to the comments received and including those comments and responsive changes in the version of the final EIR it certified as compliant with CEQA when approving the project. 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. (citations deleted)