Lost in Translation: Supreme Court Elucidates CEQA GHG Analysis, "Fully Protected" Species Take Prohibition, and Issue Exhaustion in Decision Finding Newhall Ranch Development EIR Flawed

By Arthur F. Coon on December 2, 2015

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In a 5-2 decision filed November 30, 2015, the California Supreme Court reversed the judgment of the Court of Appeal which had upheld the EIS/EIR for the controversial Newhall Ranch development project. *Center For Biological Diversity, et al. v. California Department of Fish and Wildlife (The Newhall Land and Farming Company, Real Party in Interest)* (2015) 62 Cal.4th 204. The high court approved the EIS/EIR's *methodology* analyzing the significance of the project's greenhouse gas (GHG) emissions in terms of reductions from projected "business as usual" (BAU) emissions consistent with AB 32's statewide reductions mandate, rather than against some absolute numeric limit above the project site's "baseline" emissions. However, it held the GHG analysis *lacked supporting substantial evidence* and a cogent explanation correlating the *project-specific* reductions to AB 32's mandated *state-wide* reductions so as to demonstrate consistency with the latter's goals under the approved methodology. The Court further held the EIS/EIR violated Fish & Game Code § 5515's prohibition on the taking of "fully protected" fish species by including mitigation measures providing for the collection and relocation by USFWS of the unarmored threespine stickleback. Finally, the Court held – under the particular factual circumstances of the case – that certain issues raised by plaintiffs during an optional public comment period on the Final EIS/EIR were timely raised so as to sufficiently exhaust administrative remedies under Public Resources Code § 21177(a).

Background

As brief background, the Newhall Ranch project consists of 20,885 dwellings (with nearly 58,008 residents), along with commercial and business uses, schools, golf courses, and community facilities proposed to be developed over 20 years on 12,000 acres along the Santa Clara River West of Santa Clarita – ostensibly one of the largest land use development projects ever proposed in California.

Defendant California Department of Fish and Wildlife ("DFW") and the U.S. Army Corps of Engineers prepared a joint EIS/EIR for two natural resources plans related to the project contemplating a streambed alteration agreement and incidental take permits for protected species. Per Justice Chin's dissent, the resulting "EIR … is one of the longest ever prepared under CEQA [.]" Of relevance to the case, the EIS/EIR found the project could significantly impact a "fully protected" species of fish (the stickleback), but that adopted mitigation measures would render the effect less than significant, and that "design commitments and existing regulatory standards" would similarly mitigate the project's potentially significant GHG emissions/climate change impacts. The trial court granted a writ petition challenging the EIS/EIR's sufficiency on several grounds, but the court of appeal reversed and rejected all of plaintiffs' CEQA claims.

The Supreme Court's Discussion of the EIR's GHG Analysis

In reversing and remanding the case to the court of appeal for further proceedings consistent with its 42-page opinion, the Supreme Court majority made the following key points with respect to its main holding on GHG analysis under CEQA.

- The AB 32 Scoping Plan's "business as usual" (BAU) model – i.e., achieving statewide GHG emissions reductions to achieve 1990 emissions levels by year 2020, which equates to about 29% less than projected 2020 BAU emissions – was the basis for the EIR's GHG analysis. (BAU represents emissions expected to occur in the absence of mitigating reduction actions.) The EIR here found the project's full buildout GHG emissions would be 390,046 metric tons of CO_2 equivalent ($MTCO_2E$) under a BAU scenario, but only 269,053 $MTCO_2E$ with required GHG mitigations included – a reduction of 31% from the BAU forecast. The EIR therefore concluded the project's GHG impacts were consistent with AB 32 and thus less than significant.

- As a preliminary but important matter, the Court held – as a matter of law – that assessing the significance of GHG impacts through a BAU analysis is a proper methodology, and does not run afoul of CEQA's rules prohibiting use of a "hypothetical" conditions "baseline." GHGs present a "cumulative impact" issue, as climate change and its effects are global in scale, not localized – i.e., whether a particular project's GHG emissions and their contribution to adverse climate change are "cumulatively considerable" does not depend on where they are emitted. The reality of continued population growth means GHG emissions are inevitable (whether at the project site or elsewhere) and "a significance criteria framed in terms of efficiency is superior to a simple numerical threshold because CEQA is not intended as a population control measure." Per the Court: "These considerations militate in favor of consistency with meeting AB 32's statewide goals as a permissible significance criterion for project emissions."

- Further, "[u]sing consistency with AB 32's statewide goal for [GHG] reduction, rather than a numerical threshold, as a significance criterion is also consistent with the broad guidance provided by section 15064.4 of the CEQA Guidelines." The non-exclusive factors of this guideline are intended to assist lead agencies in quantifying, collecting and considering information relevant to the analysis of the project's incremental contribution to cumulative GHG emissions, and do not mandate absolute thresholds; nor does the guideline "expressly or implicitly prohibit a lead agency from using the AB 32 goals themselves to determine whether the project's projected [GHG] emissions are significant."

- In rejecting plaintiffs' "improper hypothetical baseline" arguments, the Court distinguished the BAU model – which does not purport to represent existing physical conditions at the commencement of CEQA review – from an environmental baseline: "[DFW] employs a

hypothetical [BAU] emissions model merely as a means of comparing the project's projected emissions to the statewide target set under the Scoping Plan. The [BAU] model is used here a comparative tool for evaluating efficiency and conservation efforts, not as a significance baseline. [¶] The percentage reduction from [BAU] identified by the Scoping Plan is a measure of the reduction effort needed to meet the 2020 goal, not an attempt to describe the existing level of [GHG] emissions. Similarly, the EIR employs its calculation of project reductions from [BAU] emissions in an attempt to show the project incorporates efficiency and conservation measures sufficient to make it consistent with achievement of AB 32's reduction goal, not to show that the project will not increase [GHG's] over those in the existing environment. … [D]istinctive aspects of the greenhouse gas problem make consistency with statewide reduction goals a permissible significance criterion for such emissions. Using a hypothetical scenario as a method of evaluating the proposed project's efficiency and conservation measures does not violate Guidelines section 15125 or contravene our decision in *Communities for a Better Environment [v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310]."

- Despite its endorsement of the propriety under CEQA of using a BAU model to evaluate the significance of a project's GHG emissions impacts, the Court nonetheless held that DFW abused its discretion in making its finding that the project here would have no cumulatively significant GHG impact. Per the Court's majority opinion: "We reach this conclusion because the administrative record discloses no substantial evidence that Newhall Ranch's *project-level* reduction of 31 percent in comparison to [BAU] is consistent with achieving A.B. 32's *statewide* goal of a 29 percent reduction from [BAU], a lacuna both dissenting opinions fail to address."

- In further explanation of what was "lost in translation" between the anticipated project-specific GHG reductions and the statewide goal, the Court stated: "[T]he Scoping Plan nowhere related [its] *statewide* level of reduction effort to the percentage of reduction that would or should be required from *individual* projects, and nothing DFW or Newhall have cited in the administrative record indicates the required percentage reduction from [BAU] is the same for an individual project as for the entire state population and economy." The Court noted the observation of the Attorney General in a letter put forward by a plaintiff that new development may be required to be "more GHG-efficient than [the 29% statewide reduction target], given that past and current sources of emissions, which are substantially less efficient than this average will continue to "exist and emit."" Neither the EIR's responses to comments nor any expert opinion evidence in the record filled this "lacuna" by demonstrating "that the Scoping Plan's statewide standard of a 29 percent reduction from [BAU] applies without modification to a new residential or mixed use development project." For this and other reasons the Court held the "administrative record does not establish a firm ground for the efficiency comparison the EIR makes and thus … does not substantially support the EIR's conclusion that Newhall Ranch's 31 percent emissions savings over [BAU] satisfies the report's significance criterion of consistency with the Scoping Plan's 29 percent statewide savings by 2020." Absent an explanation, and any appropriate adjustment required, "[t]he analytical gap left by the EIR's failure to establish, through substantial evidence and reasoned explanation, a quantitative equivalence between the Scoping Plan's statewide comparison and the EIR's own project-level comparison deprived the EIR of its "'sufficiency as an informative document.'""

- In rejecting Justice Corrigan's argument that the majority's conclusion was inconsistent with the required deferential standard of review, Justice Werdegar wrote for the majority: "A lead agency enjoys substantial discretion in its choice of methodology. But when the agency chooses to rely completely on a single quantitative method to justify a no-significance finding, CEQA demands the agency research and document the quantitative parameters essential to that method.

Otherwise, decisionmakers and the public are left with only an unsubstantiated assertion that the impacts – here, the cumulative impact of the project on global warming – will not be significant."

- The majority opinion emphasized the narrowness of its decision on this point: "[W]e hold only that DFW erred in failing to substantiate its assumption that the Scoping Plan's statewide measure of emissions reduction can also serve as the criterion for an individual land use project." It then spent several pages describing "potential pathways to [CEQA] compliance" as guidance for DFW and other lead agencies evaluating the cumulative significance of a proposed land use development's GHG emissions. These methods included potentially validating the numerical comparison through further examination of the data underlying the Scoping Plan's BAU model to determine the appropriate level of reduction needed for the local project to comply with the statewide goal; analyzing and relying on (in whole or part) compliance with an applicable regulatory program designed to reduce GHGs; using a geographically specific GHG reduction plan (e.g., a climate action plan) to provide a basis for tiering or streamlining the project-level analysis; relying on consistency with an applicable sustainable communities strategy adopted pursuant to SB 375; or relying if appropriate on existing numerical thresholds of significance (and, if a significant cumulative impact were found, then potentially approving the project with a statement of overriding conditions).

The Supreme Court's Discussion of the EIR's Mitigation Measures Providing For "Take" of Fully Protected Fish

With respect to the stickleback "take" issue, the majority characterized its analysis and holding as a straightforward matter of statutory interpretation supported by legislative history. Holding that EIR biological impact mitigation measures providing for the protective collection and relocation of special status fish (including the "fully protected" stickleback) during construction in or diversion of the Santa Clara River were impermissible, the Court stated: "[S]pecifying these actions as mitigation in an EIR violates the Fish and Game Code section 5515's prohibition on authorizing the taking or possession of fully protected fish in mitigation of project impacts under CEQA." Thus, "DFW may conduct or authorize capture and relocation of the stickleback as a conservation measure 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." The law defines "take" to include "captur[ing]" and "catch[ing]" (Fish & Game Code, § 86), and § 5515 strictly forbids taking or possessing "fully protected fish or parts thereof" unless for DFW-authorized scientific research and recovery efforts, which are expressly defined to *exclude* "actions taken as part of specified [CEQA] mitigation for a project[.]" The majority backed its "plain language" holding with an extensive discussion of § 5515's legislative history, but also noted the limits of its holding, as follows: "Consistent with this history and statutory language, we read … section 5515, subdivision (a) as allowing the trapping and transplantation of fully protected fish species as part of a species recovery program, but *not* as mitigation for a project …. We … say nothing to preclude DFW's use or authorization of trapping and transplantation to protect the stickleback from threats to its survival and recovery, as expressly allowed under … section 5515, subdivision (a)(1); based on subdivision (a)(2) …, we hold only that such actions may not be relied on or "specified" as project mitigation measures pursuant to CEQA." While Justice Chin, in dissent, criticized the majority's holding in this regard as having "little substance" because all it "prohibits is referring to the [capture and relocation] program as a binding mitigation measure in the EIR[,]" the majority countered by observing that this point has real significance: "Decisionmakers and the public could well be influenced in their evaluation of a project by the existence or nonexistence of such enforceable mitigation measures."

The Court's Discussion of Issue Exhaustion

The Court's final CEQA holding – that plaintiffs sufficiently exhausted issues concerning Native American cultural resources and steelhead smolt under Public Resources Code § 21177(a) by raising them during the public comment period provided by CEQA – was clearly tied to the unique factual and procedural context surrounding the EIS/EIR at issue in the case. Per the Court: "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 omitted]."

Conclusion and Implications

While undoubtedly frustrating for DFW and Newhall Ranch, the Supreme Court's majority opinion at least incrementally advances the cause of judicial CEQA reform by clarifying numerous rules relevant to the GHG analysis that is required under CEQA.

First and foremost, plaintiffs will not succeed in arguing that a lead agency's use of a GHG significance criterion based on reductions from BAU is per se a violation of CEQA's general rule requiring impacts to be measured against an "existing conditions" (rather than "hypothetical") baseline; the Court makes clear that a BAU model and a "baseline" are two different CEQA concepts that measure different things and are used for different purposes, and that the very nature of GHG emissions and the climate change impacts they cumulate to cause make BAU analysis appropriate.

Second, the Court will not tolerate a sloppy or incomplete quantitative GHG analysis – a comparison of project emissions reductions from BAU (no matter how accurately quantified) to a statewide or regional goal that cuts across and encompasses *all* land uses and emissions sources will not cut the scientific mustard unless a logical basis for comparison of the reduction percentage numbers is shown. That was the key ingredient missing here, and could potentially have been supplied by a GHG expert's opinion establishing the validity of the comparison made; without such evidence in the record, however, the Supreme Court essentially held that the decision makers and public could not tell whether the comparison was "apples to apples" – as the EIR's "no significant impact" conclusion assumed – or "apples to oranges" (as further study of the Scoping Plan's underlying data might or might not demonstrate).

Ultimately, the defects in the Newhall Ranch EIS/EIR found by the Court may well be remedied on remand by relatively simple drafting fixes. Still, as those in the CEQA litigation trenches can attest, things rarely turn out to be simple or easy where dedicated opposition to a project exists. Justice Chin's dissent makes a valid point in observing that an already "green" mega-project will now be substantially exposed to further CEQA claims and litigation brought by project opponents upon and following remand and the ensuing public review process.

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