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## What Two Recent California Supreme Court Rulings Mean for Analysis of Environmental Impact at Project Sites and Greenhouse Gas Emissions and Protected Species

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The California Supreme Court recently issued two important decisions involving the interpretation of the California Environmental Quality Act (CEQA). The first finds that agencies generally are not required to evaluate the impacts of the environment on a project and the second invalidates the CEQA analysis for a major housing project near Los Angeles on the basis of how greenhouse gas emissions were considered in determining whether the project will have a significant impact. Each is briefly described herein.

### *California Building Industry Association v. Bay Area Air Quality Management District*

In what may be a landmark case, *California Building Industry Association v. Bay Area Air Quality Management District* (December 17, 2015, Case No. S213478) (CBIA), the Court unanimously concluded that agencies subject to CEQA generally are not required to analyze the impact of existing environmental conditions on a project's future users or residents. However, when a proposed project risks "exacerbate" those environmental hazards or conditions that already exist, an agency must analyze the potential impact of such hazards on future residents or users. "In those specific instances, it is the *project's* impact on the environment—and not the *environment's* impact on the project—that compels an evaluation of how future residents or users could be affected by exacerbated conditions."

At issue was the interpretation of Section 21083(b) of the California Public Resources Code, which provides guidance on when "a proposed project may have a 'significant effect on the environment.'" The Bay Area Air Quality Management District (BAAQMD or District) read the statutory language to encompass the question of how existing environmental conditions or hazards in the vicinity of a proposed project might substantially, and adversely, impact future residents or users. Thus, when existing environmental conditions pose hazards to humans brought to the site by the project, the project may have potentially significant environmental impact requiring a CEQA evaluation. The California Building Industrial Association (CBIA), on the other hand, argued that BAAQMD's interpretation contradicts CEQA's clear language and distorts the intent of the statutory scheme. It further argued that BAAQMD's approach would impose procedural or substantive requirements beyond those explicitly stated in CEQA or its Guidelines, and moreover, prevent development in urban areas, which is not CEQA's intent.

The Court concluded that CEQA generally does not require an analysis of how existing environmental conditions will impact a project's future users as the express language of the statute "requires a finding of 'a significant effect on the environment' (§ 21083(b))

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whenever the environmental effects of a project will cause substantial adverse effects *on human beings*, either directly or indirectly.” (Internal quotes removed.) Concluding otherwise, according to the Court, “would require us to define environmental effects of a project in a manner that all but elides the word environmental. ... [S]uch an expansion would tend to complicate a variety of residential, commercial, and other projects beyond what a fair reading of the statute would support.”

The Court upheld the following language in the Resources Agency’s Guidelines under section 15126.2(a) to the extent that they call for evaluating a project’s potentially significant *exacerbating* effects on existing environmental hazards:

The [environmental impact report] EIR shall also analyze any significant environmental effects the project might cause by bringing development and people into the area affected. . . . Similarly, the EIR should evaluate any potentially significant impacts of locating development in other areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas) as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards areas.

The Court read this language as contemplating “analysis of a projects effects *on the environment*” (emphasis added) and that in that respect, the Guideline is consistent with the statute, in that the Guideline contemplates analyzing those existing conditions impacted directly by a project’s siting or development. The Court provided an example:

Suppose that an agency wants to locate a project next to the site of a long-abandoned gas station. For years, that station pumped gasoline containing methyl tertiary-butyl ether (MTBE), an additive—now banned by California—that can seep into soil and groundwater. ... Without any additional development in the area, the MTBE might well remain locked in place, an existing condition whose risks—most notably the contamination of the drinking water supply—are limited to the gas station site and its immediate environs. But by virtue of its proposed location, the project threatens to disperse the settled MTBE and thus exacerbate the existing contamination. The agency would have to evaluate the existing condition—here, the presence of MTBE in the soil—as part of its environmental review. Because this type of inquiry still focuses on the *project’s impacts on the environment*—how a project might worsen existing conditions—directing an agency to evaluate how such worsened conditions could affect a project’s future users or residents is entirely consistent with this focus and with CEQA as a whole (emphasis added).

Finally, the Court rejected the BAAQMD’s argument that explicit statutory language requiring evaluation of a project site’s environmental conditions regardless of whether the project risks exacerbating existing conditions showed the legislative understanding that exposing people to existing hazards and conditions falls within the meaning of “significant environmental effect” under CEQA. The Court stated that these exceptions actually demonstrate the opposite. Establishing specific exceptions reinforces that the general rule is that CEQA requires consideration only of a project’s effect on the environment, not the environment’s effects on project users. The court concluded that it “cannot, as the District urges, extrapolate from these statutes an overarching, general requirement that an agency analyze existing environmental conditions whenever they pose a risk to the future residents or users of a project.”

### *Center for Biological Diversity v. California Department of Fish and Wildlife (Petitions for Rehearing Pending)*

On November 30, 2015, the Court issued an opinion in *Center for Biological Diversity v. California Department of Fish and Wildlife* (November 30, 2015, Case No. S217763), which addresses how lead agencies may consider the cumulative impacts of greenhouse gas emissions under CEQA. The decision arose out of one of many EIRs that have been prepared for the large Newhall Ranch mixed-use development that is proposed in northern Los Angeles County. At issue was a joint EIR/environmental impact statement prepared by the California Department of Fish and Wildlife (DFW) and the US Army Corps of Engineers, evaluating the impacts of several additional project approvals. In addition to its decision on cumulative greenhouse gas impacts, the Court also found that a lead agency cannot “take” a protected species as part of a CEQA mitigation measure.

**Cumulative greenhouse gas emissions.** In its evaluation of cumulative greenhouse gas impacts for the development, DFW quantified the annual emissions that would be generated as a result of the project and then determined whether these emissions “would impede the State of California’s compliance with statutory emissions reduction mandate established by AB 32 [the California Global Warming Solutions Act].” The EIR’s method for determining whether the project would impede achievement of AB 32’s goals was to compare the project’s emissions reduction to the statewide reduction from “business as usual” (BAU)

emissions projections needed to meet AB 32's 2020 goal (determined by the California Air Resources Board in its 2008 Climate Change Scoping Plan to be a reduction of 29 percent from BAU). Because the EIR estimated actual annual project emissions that were 31 percent below its BAU (and therefore exceeded the 29 percent statewide reduction goal), the EIR concluded the project's greenhouse gas emissions would not impede achievement of AB 32's goals and the cumulative impacts of the project are less than significant for CEQA purposes.

Petitioners Center for Biological Diversity (CBD) argued that this reduction from BAU criterion constituted an improper hypothetical future baseline such that actual existing reduction from emissions at the site was not compared to the likely emissions of the project. The Court disagreed, finding that the reduction from BAU was not used as a stand-in for baseline conditions but was instead used as an "efficiency" metric for determining the significance of future emissions associated with the project, which was allowed under CEQA. The Court, however, held that DWF's methodology was too simplistic in applying the 29 percent AB 32 reduction goal, without adjustment, to a particular project in order to find the project effects less than significant. The statewide goal "was developed ... as a measure of the greenhouse gas reduction effort required by the state as a whole," emphasized the Court, and was not developed to apply to any particular project or activity. Accordingly, in order to substantiate a less than significant finding using the reduction from BAU metric, a lead agency would have to show that it considered reductions from all types of sources throughout the state used to develop the statewide goal and make an appropriate adjustment applicable to the particular project at issue. Given DWF's failure to consider any adjustments to the statewide target, its finding was not supported by substantial evidence, and the issue was remanded to the agency for reconsideration.

The Court went beyond its holding to explain that it did not view its decision as creating an unreasonable burden on lead agencies to satisfy CEQA, noting that the "burden of CEQA's mandate in this context can be substantial," but asserting that "methods for complying" do exist. Perhaps sensing the likely complexity of demonstrating an appropriate adjustment to the BAU reduction goal, the Court suggested potential alternative approaches. First, a lead agency may show that the project design features comply with regulations to reduce emissions and may demonstrate that those components of emissions are less than significant. A lead agency also could demonstrate compliance with locally adopted climate plans, or given the current lack of statewide standards, apply specific numerical thresholds developed by some local agencies. Finally, the Court acknowledged that for large development projects like Newhall Ranch, where "hundreds of thousands of tons of greenhouse gasses [would be added] to the atmosphere," a significance finding may not be avoidable. Even so, noted the Court, the lead agency still could approve the project with a statement of overriding considerations.

**Impacts to fully protected species.** The Court also held that mitigation measures intended to protect species from the impacts of construction, including relocating the unarmored three-spine stickleback fish, constituted a prohibited "take" of the protected species. According to the Court, "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 decision was not unanimous. Two dissenting justices would have ruled in favor of the developer of the project (though on slightly different grounds). Both the developer and petitioner have filed petitions with the Supreme Court asking it to reconsider its decision on several grounds, including, on the part of the developer, that the holding based on the record failing to "disclose 'substantial evidence' to support the EIR's no significant impact finding" was not raised by CBD in its opening brief and therefore was not properly before the Court. The Court will decide whether to grant a rehearing on this or any other issue by February 26, 2016.

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