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Risky "Business as Usual"

The California Supreme Court Upholds the BAU Approach to CEQA Climate Impact Analysis, but Sets a High Bar

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In Center for Biological Diversity v. Dept. of Fish and Wildlife,[1] *the California Supreme Court upheld the "Business as Usual" (BAU) approach for analyzing greenhouse gas (GHG) emissions under the California Environmental Quality Act (CEQA), but then set a precariously high bar for application of BAU. The Court generally endorsed reliance on consistency with the state's goal of reducing GHG emissions by 29 percent compared to BAU, pursuant to Assembly Bill (AB) 32, as a standard for identifying significant GHG impacts pursuant to CEQA. In this case, however, the record failed to show that the individual* project's *31 percent reduction in GHG emissions was consistent with the* statewide *goal of 29 percent reduction. The project might need to do still more than achieve a 29 percent or 31 percent GHG reduction from BAU, the Court reasoned, because other projects and existing development may do less. While this consistency showing is logical in theory, in practice it will not be easy to make.*

The Court also decided that species which are "fully protected" under state law may not be relocated from project sites as CEQA mitigation and addressed the CEQA implications of an extra 30-day comment period, mandated by the National Environmental Policy Act (NEPA), on a final joint CEQA/NEPA document.

[1] Case No. S217763 (November 30, 2015).

The Newhall Ranch EIR

The proposed Newhall Ranch project is a very large mixed-use development that would construct up to 20,885 residential units housing nearly 58,000 residents, as well as commercial and business uses, schools, golf courses, parks and other community facilities, on 12,000 acres along the Santa Clara River over 20 years. The project incorporates extensive green design features including energy efficient buildings, drought-tolerant landscaping and close proximity of homes to jobs, services and public transit. The California Department of Fish and Wildlife, as CEQA lead agency, and U.S. Army Corps of Engineers, as NEPA lead agency, prepared a joint Environmental Impact Report and Environmental Impact Statement for the project (an EIR/EIS, which the opinion refers to as "the EIR" as the Court considers only state law CEQA issues).

The Center for Biological Diversity challenged the EIR on several grounds, including its analysis of impacts from GHG emissions and its proposed mitigation for the unarmored threespine stickleback, a fish inhabiting the Santa Clara River. The Superior Court agreed with the petitioner on both issues, while the court of appeal reversed and upheld the EIR.

The BAU Approach as a CEQA Significance Threshold is Upheld

The Supreme Court first considered the BAU approach in general terms. Under CEQA, a state or local agency which proposes to adopt or approve a project must evaluate and, where feasible, mitigate, significant environmental impacts of the project. Mitigation is required if an effect of the project exceeds the relevant "significance threshold", a standard that separates impacts considered significant from those that are not. CEQA gives lead agencies broad discretion to set significance thresholds, so long as the thresholds are supported by substantial evidence. In 2007, Senate Bill (SB) 97 amended CEQA to require analysis and mitigation of impacts of GHG emissions on the global climate, but it did not specify a significance threshold for doing so.

Independently of CEQA, AB 32 required the California Air Resources Board (ARB) to determine the amount of GHG emission reductions necessary to achieve the statutory goal of returning to 1990 statewide GHG emission levels by 2020. In its AB 32 Scoping Plan, ARB concluded that, to reach this goal, GHG emissions throughout the state must be reduced approximately 29 percent below BAU; that is, the level of emissions that would have occurred in the absence of GHG reduction actions such as increased renewable power generation, building energy efficiency and vehicle fuel efficiency.

In recent years, some CEQA lead agencies, air districts and technical experts developed an approach that unifies these separate statutory directives, by relying on consistency with the state's goal of reducing GHG emissions by 29 percent from BAU as a significance threshold for CEQA purposes.[2] Following this approach, in the Newhall Ranch EIR, the project's GHG emissions were calculated under two scenarios, with and without GHG reduction assumptions from the Scoping Plan (the scenario without those assumptions representing "business as usual"). Since project GHG emissions at full buildout, with reduction assumptions, were 31 percent below BAU emissions, they remained below the threshold and the impact was less than significant.

The Court found the BAU approach to be within the lead agency's substantial discretion to set significance thresholds, as well as consistent with the global scale of GHG impacts. No one project's

[2] The BAU approach was accepted by lower courts and has been widely followed; *see Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal. App. 4th 327, 336-37; *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 841.

emissions can alter the earth's climate; rather, climate change is the cumulative effect of emissions from many sources. Moreover, if the project were not approved, its occupants would live and work somewhere, still contributing GHG to the atmosphere. As the Court noted, CEQA is not a population control measure (a remark likely to be widely cited in future cases and comments). A fixed numeric GHG threshold, as the plaintiff urged and some air districts have adopted, could limit the size of projects and work as a population control. Conversely, if a project incorporates efficiency and conservation measures, reducing its fair share of GHG emissions toward the state's reduction goal, it is reasonable to conclude that the project's contribution to the cumulative impact is insignificant and no further mitigation is required. These considerations supported utilizing the 29 percent below BAU goal as the standard of CEQA significance.[3]

The BAU Significance Threshold as Applied is Rejected

However, what the Court granted with one hand, it promptly retracted with the other. Showing that one *individual project's* emissions were 31 percent below BAU, the Court held, did not suffice to show that project's consistency with the *statewide* goal of 29 percent below BAU. The EIR did not consider whether adjustments were necessary to adapt the statewide goal to new use as a CEQA significance threshold for a particular project, and so failed to support the finding of an insignificant impact. The EIR's BAU scenario for the project was based on residential density in the project area, which might differ from the statewide residential density assumptions in ARB's Scoping Plan. In addition, the Court was concerned that not all projects could implement the same level of GHG reductions, and that designing new projects to increase energy efficiency and renewable energy use would be easier than retrofitting existing structures and facilities. If every new and existing GHG source achieves a 29 percent reduction from BAU, the statewide average would equal 29 percent; but if some achieve less, then others must do more in order to maintain the 29 percent average.

The opinion gives no clear guidance as to how the BAU approach that it approved just a few pages earlier might be salvaged from this mathematical critique. Though emphasizing that it withheld judgment as to whether the 29 percent threshold could be supported, the Court was skeptical that the reduction from BAU should be the same for one project as for the entire state. Rather, the Court offered, analysis of the data behind the Scoping Plan's BAU model might reveal how much reduction from BAU a new project at the proposed location should contribute, to comply with the statewide 29 percent reduction goal. However, as Justice Corrigan observed in dissent, there is no assurance that it is possible to calculate how the statewide goal corresponds to specific, quantitative efficiency measures for individual projects. It remains to be seen how lead agencies and their technical experts will respond to the challenge of bolstering a BAU analysis. Those who attempt it will face both an unenviable task and inevitable litigation.

Agencies and developers unwilling to be litigation test subjects may opt for alternative ways to address GHG impacts as set out by the Court. Lead agencies may adopt numerical GHG thresholds or may rely on those adopted by air districts—though, as the Court noted, using a simple numerical GHG threshold could convert CEQA into an unintended population control measure. Another option is demonstrating compliance with regulatory programs that reduce GHG emissions from specific activities, though this option is available only to projects subject to such regulations. The Court also suggested reliance on programmatic GHG reduction approaches, such as local climate action plans and regional "Sustainable Communities Strategies" (SCSs) under SB 375, promoting "smart growth" as a means of reducing GHGs. However, some cities and counties already perceive SCSs as intruding on local land use

[3] The Court cautioned that, while the state's GHG target for 2020 could provide an appropriate threshold in this case, future EIRs may need to consider post-2020 GHG reduction goals. This aside is worth noting, as the issue is now before the Court in *Cleveland National Forest Foundation v. San Diego Association of Governments* (2014) 231 Cal.App.4th 1056.

authority and are unlikely to embrace them in the CEQA context. Finally, CEQA allows lead agencies to adopt projects based on overriding considerations if the project has significant GHG emissions that cannot feasibly be mitigated, a route that cautious agencies are likely to resort to more frequently following this decision.

Mitigation Measures May Not Take Fully Protected Species

The Court next considered mitigation for potential impacts on the unarmored threespine stickleback, a "fully protected" fish under state Fish and Game Code § 5515. For most species listed as endangered under state law, the California Department of Fish & Wildlife may authorize "taking" (which includes capturing as well as killing) that is incidental to lawful activities such as project development, with appropriate conditions. However, taking fully protected species is flatly prohibited except in limited circumstances – one of which is scientific research, defined in Fish and Game Code § 5515(a)(1) as including efforts to recover the species. The Newhall Ranch EIR incorporated mitigation measures providing for federal wildlife personnel (not subject to state restrictions) to collect and relocate sticklebacks, to protect them during project construction in or affecting the Santa Clara River. However, Fish and Game Code § 5515(a)(2) expressly excludes mitigation for a project under CEQA from the definition of "scientific research" for which taking may be authorized. Citing the statute's language and legislative history, the Court distinguished permissible capture and relocation as part of positive efforts to promote the species' recovery from mitigation intended to offset adverse impacts of a project.

The Fish & Game Code lists 37 species as fully protected: ten fish, three amphibians, two reptiles, thirteen birds and nine mammals. While the take prohibitions differ slightly for different species (e.g., fully protected birds may be relocated if they threaten livestock – not a concern for a five centimeter fish), projects affecting these species generally may no longer rely on capture and relocation as CEQA mitigation following this decision.

Effect of the Extra NEPA Comment Period on a Final EIR/EIS

Finally, the Court considered the timeliness of comments filed on a joint CEQA/NEPA document after the close of the CEQA comment period. Unlike CEQA, which does not require a comment period on a Final EIR, NEPA generally provides an extra 30 day comment period on a Final EIS before the federal lead agency may adopt a final decision. Here, the plaintiffs raised new issues in comments on the Final EIR/EIS, and the federal and state lead agencies worked closely together to respond to them. Without deciding whether the extra NEPA comment period always operates as a CEQA comment period on a Final EIR/EIS, the Court found that, in this case, the state agency effectively treated the final NEPA comment period as an extended CEQA comment period. This is an unusual situation; more commonly, plaintiffs can raise issues at the final hearing to adopt the project, but no final hearing was held in this case. Nevertheless, the decision puts CEQA lead agencies on notice that helping respond to final NEPA comments can convert them into CEQA comments.

If you have any questions about the content of this alert please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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