



California Supreme Court Ponders Greenhouse Gas, Fully Protected Species Issues

09.03.2015

The California Supreme Court heard argument yesterday in a greenhouse gas (GHG) and fully protected species case with important state-wide implications. (*Center for Biological Diversity v. Department of Fish and Wildlife (Newhall Land and Farming Company)*, No. S217763.) The case involves challenges to the California Department of Fish and Wildlife's (Department) environmental impact report (EIR) and approval of the Newhall Ranch project in Los Angeles County. The Supreme Court is reviewing three issues: (1) whether the California Environmental Quality Act (CEQA) allowed the Department to adopt a GHG threshold of significance based on the "Business as Usual" (BAU) methodology adopted by the California Air Resources Board (CARB) in its A.B. 32 Scoping Plan, (2) whether the Department's measures requiring the collection and transplantation of a fully protected fish (the unarmored threespine stickleback) to avoid project impacts is "take" in violation of the state law prohibition on take of a fully protected species, and (3) whether the CEQA restricts judicial review to issues raised prior to the close of comments on a draft EIR. The Court of Appeal ruled in favor of the Department. (*Center for Biological Diversity v. Department of Fish and Wildlife (Mar. 20, 2014) No. B245131 [Court of Appeal decision].*)

GHG Issue: While predicting court decisions based on oral argument is always a risky proposition, a majority of the Justices appeared to side with the Department on the GHG issue. Several justices sharply questioned the Center for Biological Diversity's (CBD) argument that the Department violated CEQA when it used the CARB BAU measure for determining the significance of the project's anticipated GHG emissions. Only Justice Liu suggested that it may not be appropriate to use CARB's "abstract" statewide Scoping Plan standard as the CEQA threshold of significance for a particular development project. None of the justices questioned the Department's argument that use of BAU as a threshold of significance does not violate the "normal" CEQA baseline requirement that project impacts be compared against "existing conditions." Several Justices asked CBD's counsel to identify an appropriate GHG threshold of significance that the Department should have used in lieu of the BAU standard, but CBD's counsel declined to identify an

acceptable standard. This exchange led to a comment by Chief Justice Cantil-Sakauye that it was easy for CBD to attack the threshold selected by the Department without identifying an acceptable standard. Interestingly, no Justice mentioned the bifurcated position that the Governor's Office of Planning & Research took in its amicus brief – that the use of the BAU methodology complied with CEQA at the time that the Department prepared the EIR, but that subsequent revisions to the CEQA Guidelines preclude use of the CARB's BAU methodology to determine a GHG threshold of significance.

Fully Protected Species Issue: The Justices' questions and comments did not suggest a clear majority position on the fully protected species issue. Justices Cuéllar and Liu posed challenging questions to counsel for both sides. Justice Cuéllar suggested that the Court should defer to the Department unless the Department's interpretation is clearly wrong. He later suggested, however, that the Court should interpret each term in the definition of "take" in Fish and Game Code section 86 to have independent meaning. Justice Liu suggested that the Department's collection and transplantation measure qualified as an allowable conservation measure in the Fish and Game Code (and therefore was not take), but later implied that Department's stickleback conservation measure constituted take. The Chief Justice and Justice Werdegar expressed concern regarding the practical impact of a decision that state law prohibits conservation measures meant to protect the stickleback and other such fully protected species because the conservation measures themselves constitute "take."

The Court did not address in substance whether or not comments under CEQA are restricted to public comment on a Draft EIR. The Court is expected to issue its decision in the case by early December 2015.

Nossaman filed an amicus curiae brief in the case on behalf of several public transportation, and water agencies.