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REPORT TO HONORABLE MAYOR AND CITY COUNCIL MEMBERS

REVIEW OF THE 2015 CALIFORNIA SUPREME COURT DECISION *CENTER FOR BIOLOGICAL DIVERSITY v. CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE* AS IT PERTAINS TO GREENHOUSE GAS EMISSIONS ANALYSIS PURSUANT TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

INTRODUCTION

On January 26, 2016, Council Member David Alvarez requested an update on a recent case decision concerning the appropriate analysis of greenhouse gas (GHG) impacts pursuant to the California Environmental Quality Act (CEQA). This Report first provides an overview of relevant State of California GHG reduction requirements, then summarizes the decision in *Center for Biological Diversity v. California Department of Fish and Wildlife* and notes possible options for lead agencies evaluating the cumulative significance of a land use project's GHG emissions.

ANALYSIS

I. REVIEW OF STATE OF CALIFORNIA GHG REDUCTION LAWS, PROGRAMS, AND POLICIES RELEVANT TO *CENTER FOR BIOLOGICAL DIVERSITY v. CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE* DECISION¹

A. Global Warming Solutions Act of 2006 (AB 32) and Scoping Plans

In 2006, the State of California enacted the Global Warming Solutions Act of 2006, Assembly Bill 32 (AB 32) and set a goal of reducing GHG emissions to 1990 levels by 2020. Cal. Health & Safety Code §§ 38500- 38599. AB 32 also clearly recognized that GHG reductions would need to continue past 2020, and the California Air Resources Board (CARB) was directed to recommend reduction measures beyond 2020. Cal. Health & Safety Code § 38551(c).

Additionally, AB 32 required CARB to prepare a scoping plan that described the approach California would take to achieve the “maximum technologically feasible and cost-effective” GHG emissions reductions to achieve the goal of reducing emissions to 1990 levels by 2020, and to update that plan at least once every five years. Cal. Health & Safety Code

¹ There are numerous international, federal and state measures regarding GHG reduction, the summary of which is beyond the scope of this Report.

§ 38561(a), (h). CARB approved the Climate Change Scoping Plan (Scoping Plan) in 2008. The Scoping Plan determined that reducing statewide GHG emissions to the 1990 levels would require a reduction of about 30 percent from the business-as-usual emissions projected for 2020, or about 15 percent from the 2008 levels.² Climate Change Scoping Plan, Executive Summary, at ES-1. In May, 2014, CARB adopted the First Update to the Climate Change Scoping Plan (First Update). The First Update noted that California is on track to meet the 2020 limit, and is “well positioned to maintain and continue reductions beyond 2020 as required by AB 32.” Air Resources Board, First Update to the Climate Change Scoping Plan (May 2014), Executive Summary at ES2. However, the First Update also noted the need to establish a mid-term statewide reduction target to ensure a continuum of reductions, not just the achievement of goals for 2020 or 2050. *Id.* at ES6.

B. Executive Orders³

Executive Order No. S-3-05, signed June 1, 2005, established GHG reduction targets of 1990 levels by 2020 and 80 percent reduction below the 1990 levels by 2050. AB 32 codified the 1990 reduction levels. Cal. Health & Safety Code § 38550.⁴

Executive Order No. B-30-15, signed April 29, 2015, set a new interim GHG reduction target of 40 percent below 1990 levels by 2030 to ensure that California meets its targets of reducing GHG emissions to 80 percent below 1990 levels by 2050. The Executive Order also directed CARB to update the Scoping Plan to express the 2030 target in terms of metric tons of carbon dioxide equivalent (MT CO₂e).⁵

C. California Environmental Quality Act

The CEQA Guidelines,⁶ promulgated by the Office of Planning and Research (OPR) pursuant to California Public Resources Code section 21083, must contain objectives and criteria for the evaluation of projects and the preparation of environmental documents, and must specifically contain criteria for public agencies to follow in determining whether a project may have a significant effect on the environment. Cal. Pub. Res. Code § 21083(a), (b). In 2007, CEQA was amended to specifically require that the Guidelines be periodically updated for the mitigation of GHG or the effects of GHG, incorporating data or criteria established by CARB pursuant to AB 32. Cal. Pub. Res. Code § 21083.05.

² The 2020 “business-as-usual” emissions projection assumed no conservation or regulatory efforts other than those requirements in place at the time of CARB’s forecast. Air Resources Board, Climate Change Scoping Plan (Dec. 2008), App. F, at F-3.

³ Nationwide, Executive Orders may be used for various issues, such as creating boards or commissions, or addressing management of regulatory reform or environmental impact. National Governors Association, Governors’ Power and Authority, <http://www.nga.org/cms/home/management-resources/governors-powers-and-authority.html>. The Governor has implied powers to issue Executive Orders. *Id.*; The Council of State Governments, The Book of the States 2014, Table 4.5; 63 Op. Cal. Att’y Gen. 583 (1980).

⁴ Whether an EIR should include an analysis of consistency with the GHG reduction goals in Executive Order S-3-05 is pending before the California Supreme Court. *Cleveland National Forest Foundation v. San Diego Association of Governments*, 184 Cal. Rptr. 3d 725 (2015).

⁵ Pending Senate Bill 32 would codify the requirement for CARB to create a statewide GHG emissions limit that is equivalent to 40 percent below the 1990 limits by 2030. Senate Bill 32 (2015-2016 Reg. Session).

⁶ Cal. Code Regs., title 14 §§ 15000 to 15387.

In 2010, CEQA Guidelines section 15064.4 was adopted, which provides that the “lead agency should make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project.” CEQA Guidelines § 15064.4(a). For each project, a lead agency has the discretion to determine whether (1) to use a model or methodology to quantify the GHG from the project, and which method or methodology to use, provided the decision is supported by substantial evidence, or (2) to rely on a qualitative analysis or performance based standards. CEQA Guidelines § 15064.4(a)(1), (2).

The factors to be considered in determining the significance of a project’s emissions are: (1) the extent to which the project may increase or reduce GHG compared to the existing environmental setting; (2) whether the emissions exceed a significance threshold that the lead agency has determined applies to the project;⁷ and (3) the extent to which the project complies with regulations or requirements adopted to implement a publicly adopted statewide, regional, or local plan for the reduction or mitigation of GHG. CEQA Guidelines § 15064.4(b)(1)-(3). If there is substantial evidence that the possible effects of the project are still cumulatively considerable, an EIR is required. CEQA Guidelines § 15064.4(b)(3). In addition, CEQA Guidelines section 15183.5 provides that lead agencies may analyze and mitigate the significant effects of GHG emissions at a programmatic level, and that later projects may tier from that programmatic analysis. CEQA Guidelines § 15183.5(a).⁸

II. *CENTER FOR BIOLOGICAL DIVERSITY v. CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE*

On November 30, 2015, the California Supreme Court decided the case of *Center for Biological Diversity v. California Department of Fish and Wildlife*, 62 Cal. 4th 204 (2015), concerning the approvals of the Newhall Ranch Project, a large land development project in northwest Los Angeles County.⁹ While the decision addressed several issues, this Report only discusses the ruling as it relates to the Court’s determination that the Department of Fish and Wildlife, the lead agency that certified the Environmental Impact Report (EIR) and approved the project, abused its discretion by determining that the project’s GHG impacts would have no significant impact, because this conclusion was not supported by a “reasoned explanation based on substantial evidence.”^{10, 11} *Id.* at 213.

⁷ The City currently uses the 900 MT CO₂e as a screening threshold for determining whether GHG analysis is required.

⁸ “Tiering” refers to the “coverage of general matters in broader EIRs . . . with subsequent narrower EIRs or ultimately site-specific EIRs incorporating by reference the general discussions and concentrating solely on the issues specific to the EIR subsequently prepared.” CEQA Guidelines § 15385.

⁹ A petition for a rehearing has been filed and the Court has extended the time for granting or denying the rehearing to February 26, 2016.

¹⁰ “Substantial evidence” can be summarized as enough relevant information and reasonable inferences from the information that a fair argument can be made to support a conclusion, even if other conclusions could also be reached. CEQA Guidelines § 15384(a). Substantial evidence includes facts, reasonable assumptions based on facts, and expert opinion supported by facts. CEQA Guidelines § 15384(b)

¹¹ Noncompliance with either the information disclosure provisions or the substantive requirements of CEQA constitutes prejudicial abuse of discretion. Cal. Pub. Res. Code § 21005. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. Cal. Pub. Res. Code § 21168.5.

The method of analysis used in the EIR was to consider “whether the proposed Project’s emissions . . . would impede the State of California’s compliance with the statutory emissions reduction mandate established by AB 32.” 62 Cal. 4th at 218. The conclusion in the EIR was that the project would not impede AB 32’s reduction mandate because the project’s projected emissions were 31 percent less than the business-as-usual projections, which exceeded CARB’s determination that a 29 percent reduction from business-as-usual was necessary statewide to meet the AB 32 goals.¹²

The EIR was determined to be deficient because there was no substantial evidence that the *project’s* GHG emissions reduction of 31 percent in comparison to the statewide reduction to business-as-usual GHG emissions was consistent with AB 32’s *statewide* goal of a 29 percent reduction from business-as-usual. *Id.* at 227. The Court noted that the Scoping Plan did not contain any project level reduction that should be required from individual projects, and the Newhall Ranch Project record did not contain any evidence to support a conclusion that the percentage reduction for a project is the same as that necessary for the entire state population and economy. *Id.* at 224. In fact, the Court agreed with plaintiffs that it may be the case that new buildings and infrastructure may need to be much more GHG efficient than existing development in order for the 29 percent reductions to be achieved statewide. *Id.* at 226. This is because it is easier for new development to incorporate new building standards, energy efficiency, and renewable energy than it is for older structures and systems to be retrofit. *Id.* at 226.

Further, the Court found that even if the state-wide and economy-wide percentage reductions in the Scoping Plan could be shown to be appropriate significance measures for individual projects, the EIR was still inadequate because it assumes, without showing the basis for the assumption, that the statewide density measures used in the Scoping Plan were the same at those in the Newhall Ranch Project area. *Id.* at 226-27.

The Court concluded that, based on the record, the EIR failed to provide substantial evidence to support its use of the Scoping Plan’s statewide 29 percent reduction from business-as-usual as an appropriate standard for a specific land use development.

III. CURRENT OPTIONS

The Court attempted to provide some guidance for public agencies faced with evaluating the cumulative significance of a proposed land use project’s GHG emissions, although it noted that it could not guarantee that any of the approaches would satisfy CEQA’s demands for any particular project. Some possible options noted by the Court were:¹³ (1) utilize the Scoping Plan’s business-as-usual reduction goals, but provide substantial evidence to bridge the gap between the statewide goal and the project’s reductions; (2) assess AB 32’s goal by looking to compliance with specific regulatory programs designed to reduce GHG emissions from particular activities, to the extent the impacts are governed by the regulations; and (3) use existing numerical thresholds of significance for GHG emissions, and if the project exceeds such thresholds, then adopt feasible mitigation or project alternatives to reduce the effect to

¹² The plaintiffs also challenged the use of AB 32’s reduction goals as a significance threshold, however, the Court upheld its use. 62 Cal. 4th at 222.

¹³ These generally track the GHG impact factors in CEQA Guidelines section 15064.4(b), discussed in Section I.C., above.

insignificance, or to the extent impacts remain significant, approve the project with a statement of overriding considerations. *Id.* at 228-29; Cal. Pub. Res. Code § 21081. Regarding option number (2), compliance with specific regulatory programs, the Court noted the Scoping Plan does not propose statewide regulation of land use planning, because land use planning is a local matter. 62 Cal. 4th at 229. For that reason, local governments bear the primary burden of evaluating a land use project's impact on GHG emissions. 62 Cal. 4th at 230. Here, too, the Court attempted to provide guidance. The Court noted GHG emission reduction plans for specific geographic areas such as general plans or climate action plans could be used in the evaluation of later project-specific CEQA analysis. 62 Cal. 4th at 230; CEQA Guidelines § 15183.5. Moreover, the GHG emissions relating to transportation may be able to be streamlined, if the project meets the sustainable communities strategy, as defined in CEQA Guidelines section 15183.3(f)(6). 62 Cal. 4th at 230; Cal. Pub. Res. Code § 21155; CEQA Guidelines § 15183.5(c).

In December 2015, the City Council adopted the 2015 Climate Action Plan (CAP). The CAP specifically provided that with future implementing actions, it is anticipated that the CAP will serve as a qualified GHG reduction plan for purposes of tiering under CEQA Guidelines section 15183.5. City staff is currently working to develop a checklist for future projects that would determine whether a project is consistent with the CAP. If a project is consistent with the CAP, it may be eligible to use the cumulative GHG analysis in the CAP and CAP certified Final Environmental Impact Report. In the meantime, while that is being developed, projects should analyze GHG emissions impacts in accordance with one of the three ways identified above.

CONCLUSION

The *Center for Biological Diversity v. California Department of Fish and Wildlife* case invalidated the GHG analysis for the Newhall Ranch Project because the Department of Fish and Game's conclusion that the GHG emission impacts had no significant impact was not supported by substantial evidence. In order to prepare defensible environmental documents, this Office is working with City staff to review the City's GHG analysis methods to ensure they are consistent with the principles in the *Center for Biological Diversity v. California Department of Fish and Wildlife* case.

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