

Client Alert

April 1, 2014

Take That! Second District Court of Appeal Clears Major Hurdles for Newhall Ranch Project, Provides Guidance on California's "Fully Protected Species"

By Miriam Vogel and Chris Carr

California's Second District Court of Appeal, Division Five, issued a decision on March 20 in *Center for Biological Diversity v. Department of Fish & Wildlife* (Case No. BS131347), overturning the trial court's decision setting aside the 5,828-page environmental impact report (EIR) and related approvals for the Newhall Ranch project, a large-scale residential project that has been in the planning process for 20 years. The Court of Appeal concluded that the EIR adequately analyzed the project's potential impacts to fish, wildlife and plants, and that the related approvals were lawful, clearing a major hurdle for the project. Morrison & Foerster was one of four firms representing The Newhall Land and Farming Company in the Court of Appeal.

CALIFORNIA ENDANGERED SPECIES ACT

The primary issue on appeal was whether the EIR adequately analyzed the impact of the Department of Fish and Wildlife's (DFW) approval of a resource management plan, conservation plan, master streambed alteration agreement and two incidental take permits (ITPs) issued under the California Endangered Species Act (CESA).

The Center for Biological Diversity and other petitioners (collectively CBD) claimed that the project would result in, among other things, the unlawful "take" of the Unarmored Threespine Stickleback, a state and federally protected fish species, and that the EIR failed to fully analyze such impacts. CBD also challenged issuance of the ITP for the CESA-listed San Fernando Valley spineflower as not supported by substantial evidence in the record and as an abuse of discretion under the ITP issuance criteria of Fish and Game Code section 2081. The trial court agreed and set aside certification of the EIR and the related DFW approvals.

Reversing the trial court's judgment, the Court of Appeal engaged in a detailed analysis of CESA. In doing so, the Court explained that the definition of "take" under state law (as used in CESA and Fish and Game Code provisions regarding "fully protected" species)—"hunt, pursue, catch, capture, or kill," or "attempt" to do any of those things—does not always entail mortality of the species. CBD had challenged conservation measures which provided for the stickleback, if need be for its own safety, to be trapped and transplanted to another stream reach, as authorizing take.

Although not novel, the Court of Appeal's discussion of "take" provided a useful clarification of the relationship of conservation measures to the state's fully protected species statutes, in holding that the extraordinary precautionary measures specified for protection of the stickleback did not constitute an unlawful take or possession proscribed by the fully protected fish statute, Fish and Game Code section 5515. Noting the state's policy, and DFW's mission, to conserve protected species, the Court explained that the provisions of CESA and

Client Alert

the Fish and Game Code had to, and could, be read in harmony so that the specified protective measures would not be considered unlawful take or possession. Specifically, the Court looked to Fish and Game Code section 2061's definition of "conservation," which lists live trapping and transplantation as a conservation method to protect species. This common sense interpretation, the Court noted, is also supported by the sequence in which the different statutory provisions were enacted, as well as their legislative histories.

With respect to the spineflower (a CESA-listed plant species), the Court found substantial evidence in the voluminous record to support DFW's scientific strategies for protection and conservation, and mitigation findings, for the ITP. It also found, applying the traditional deferential abuse of discretion standard afforded to expert administrative agencies in such contexts, that DFW's analysis and findings with respect to satisfaction of the ITP issuance criteria under Fish and Game Code section 2081 were lawful. Both holdings are firmly grounded in the sustained and comprehensive analysis conducted by DFW for the spineflower.

GREENHOUSE GAS EMISSIONS

Although not a published part of the opinion (meaning it cannot be cited as precedent in future cases), the Court's analysis of greenhouse gas emissions presents yet another judicial confirmation of a common approach for reviewing climate change impacts. Consistent with common practice throughout the state, the EIR set a threshold of significance based on whether the project would impede the state's compliance with greenhouse gas emission reductions mandated by the Global Warming Solutions Act of 2006, commonly referred to as AB 32. The Air Resources Board has determined that meeting AB 32's mandates requires a 29 percent reduction in emissions when compared to the "business as usual" scenario, meaning the scenario in which no further efforts to reduce emissions were made beyond what was required at the time of AB 32's enactment. The EIR found the project's emissions to be 31 percent less than the "business as usual" scenario, supporting a less than significant finding. Stressing the discretion lead agencies have to make significance determinations, the Court upheld the EIR's framework and analysis as supported by substantial evidence. This holding is consistent with that of other courts of appeal that have considered the issue. (*Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 841; *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 336.) The Court also rejected CBD's claim that the EIR's "business as usual" analysis was illusory or hypothetical, pointing out that the EIR analyzed the project as if no action was taken to further reduce greenhouse gas emissions beyond what was required when AB 32 was enacted. As such, the project, as originally conceived and approved prior to AB 32, "was not hypothetical."

WHAT NEXT?

The Court provided guidance on actions to conserve fully protected species. Given the stringent conditions imposed by DFW (and affirmed by the Court) on the live trapping and transplantation of the fish species involved, the decision heralds anything but an "open season" to relocate pesky fully protected species from the path of development. Rather, the decision illustrates proper judicial scrutiny of the unique scientific expertise of DFW in such circumstances. The Court's CEQA discussion, as noted, also confirmed the approach taken in prior published appellate decisions on GHG analysis under CEQA. The Court's decision does not become final until April 19, after which CBD will have 10 days within which to seek review in the California Supreme Court.

Client Alert

* * *

It takes an experienced team to navigate the entitlement and development labyrinth, no matter how big or small the project. Morrison & Foerster—with experience in California and beyond—is consistently recognized as a leader in the land use and development field. We have broad experience with CEQA, the National Environmental Policy Act, planning and zoning laws, development agreements, natural resource permits, subdivision approvals, infrastructure finance and development, and other laws affecting the use and development of real property. To learn more about our practice, [click here](#).

Contact:

Miriam Vogel

(213) 892-5929

mvogel@mofo.com

Chris Carr

(415) 268-7246

ccarr@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 10 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.