

4 Takeaways From Calif. High Court's Greenhouse Gas Ruling

By **Andrew McIntyre**

Law360, Minneapolis (December 1, 2015, 8:30 PM ET) -- The California Supreme Court's decision Monday to further stall a multifamily project north of Los Angeles in part based on concerns about greenhouse gas impacts could have wide-ranging implications for development throughout the Golden State, lawyers say.

In ruling to halt the Newhall Ranch development, a project that has been in the works now for more than a decade, the court in *Center for Biological Diversity v. California Department of Fish and Wildlife* ruled that certain aspects of the department's environmental impact report associated with the project were inadequate.

Among the issues the decision raised were whether project opponents will use greenhouse gases as another tool for litigation, what exactly developers need to do to satisfy the greenhouse gas question, and whether the Legislature may need to step in.

Here are four takeaways from the state **Supreme Court's decision**.

Developers Face Uncertainty

Overturning an appellate ruling Monday, the high court said the environmental impact report in connection with the Newhall Ranch development had not provided sufficient analysis as to the question of greenhouse gas emissions.

In short, lawyers say, the justices' decision was unclear as to how exactly a project can satisfy California's 2006 Global Warming Solutions Act of 2006, or A.B. 32, often called the "significance standard" that projects have to meet. Newhall Ranch's environmental impact report claimed that the project's 31 percent reduction of greenhouse gases below "business as usual" satisfied A.B. 32's overall goal of a 29 percent reduction below that mark statewide. But the high court disagreed.

"The takeaway: great uncertainty whether an environmental document satisfies the significance standard for greenhouse gas emissions," said Gregory N. Weiler of Palmieri Tyler Wiener Wilhelm & Waldron LLP.

"The Supreme Court spent pages speculating on how an environmental impact report might satisfy the analytical requirements it found necessary, but the court itself could only suggest an ad hoc, case-by-case approach," he said. "Welcome to the science of climate change."

Newhall Ranch has been in the works for 15 years, and although it's common for projects to be stalled by California Environmental Quality Act litigation, rarely has the question of greenhouse gases been so central to such a large project. The massive project on nearly 12,000 acres calls for 20,855 homes as well as various parks and retail.

Without adequate guidance from the high court, developers face a big unknown when trying to determine whether their project will gain approval, lawyers say.

"While it's true that we are in a new world of complicated policy of trying to reduce air emissions into the future, what the court could have done is set a clearer path," said Benjamin M. Reznik of Jeffer Mangels Butler & Mitchell LLP.

The Legislature May Step In

Developers for decades have been calling for an overhaul of CEQA, citing the difficulty and uncertainty the act places on them.

But little has been accomplished in changing the 1970 act, and lawyers say this latest case could renew interest in reform measures.

It's "an invitation to the Legislature to solve this problem," said Allan J. Abshez of Loeb & Loeb LLP. "Very little is accomplished by burdening CEQA analysis with this problem. ... It's something for the Legislature to step in and clean up."

Nicki Carlsen of Alston & Bird LLP wondered if the case is "a poster child for CEQA reform."

California Gov. Jerry Brown couldn't be immediately reached for comment Tuesday.

Greenhouse Gas Litigation May Increase

Just as developers are uncertain as to how to ensure their projects will gain approval, project opponents now seemingly have another means to file lawsuits, lawyers say.

"The court's ruling is bound to stimulate years of litigation about greenhouse gas analysis and confusion among agencies," Abshez said, referring to agencies like Fish and Wildlife that draft environmental impact reports in connection with such projects.

"Justice [Ming] Chin explains that agencies have just not been able to provide analysis of what would constitute less than significant impacts on greenhouse gases. ... The court's decision is an invitation to challenge greenhouse gas emissions," Abshez said.

And lawyers say developers now have another litigation concern to add to what's already a full basket of CEQA worries.

"When you send [an environmental impact report] back for more analysis, there will be more objections, more litigation, more delay," said Arthur F. Coon of Miller Starr Regalia. "At a certain point, you've got 'Bleak House.'"

Developers May Look to Other States

Lawyers say the latest decision could cause some developers to think twice about building in California, eyeing instead significantly easier and faster routes in, say, Nevada.

“Development is going to go elsewhere outside the state,” said Ryan M. Leaderman of Liner LLP. “They’re making it impossible to address our housing crisis here in the state. ... It’s a real black eye to the state.”

California faces a housing shortage as the time-consuming process of building multifamily properties struggles to keep pace with the population, and lawyers say the latest decision just makes it that much harder for developers in the state.

“It’s going to take some work for the industry ... to adjust to the standard that the court is articulating,” said Andrew B. Sabey of Cox Castle & Nicholson LLP.

Indeed, the court’s ruling suggests that developers in California will need to devote more time, energy and resources toward the question of greenhouse gas emissions.

“It’s going to really force them to confront those emissions and take a really hard look at means to reduce them, avoid them, further mitigate them,” said John T. Buse of the Center for Biological Diversity.

“It really reinforces the idea that the state has adopted some pretty ambitious goals,” Buse added.

--Additional reporting by Juan Carlos Rodriguez. Editing by Jeremy Barker and Edrienne Su.
