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PLANNING DEPARTMENT

Lillian MacLeod
Principal Planner
El Dorado County Community Development Agency
Planning Services Division
2850 Fairlane Court
Placerville, CA 95667

Re: Dixon Ranch Residential Project – Legal opinion regarding new
CBD v. DFW decision

Dear Ms. MacLeod:

I am writing on behalf of the project applicant for the Dixon Ranch Residential Project (the “Project”). As you are likely aware, on November 30, 2015, the California Supreme Court issued its decision in *Center for Biological Diversity v. California Department of Fish and Wildlife* (“*CBD v. DFW*”), which, among other issues, addresses the respondent state agency’s approach to assessing the significance of greenhouse gas (GHG) impacts caused by a major land use plan in Southern California.¹ As explained below, nothing in that decision casts doubt on the validity of the approach taken by El Dorado County (the “County”) in the environmental impact report (EIR) prepared pursuant to the California Environmental Quality Act (CEQA) (Pub. Resources Code, §§ 21000 et seq.) for the Project. To the contrary, the decision indicates that the County has fully complied with CEQA with respect to the EIR’s GHG analysis and conclusions.

In *CBD v. DFW*, the Supreme Court found a problem with the manner in which the California Department of Fish and Wildlife (DFW) had analyzed the GHG-related impacts of the project at issue, concluding that DFW’s administrative record did not contain substantial evidence supporting the finding that GHG emissions would be less than significant under the significance threshold used by DFW. More specifically, the court held that, although the EIR “employs a legally permissible criterion of significance” (i.e., “whether the project was consistent with meeting statewide emission reduction

¹ The decision is available at:
<http://www.courts.ca.gov/opinions/documents/S217763.PDF>

goals”), the EIR’s “finding that the project’s emissions would not be significant under that criterion is not supported by a reasoned explanation based on substantial evidence.” (Slip Opinion, p. 2.) The court determined that DFW erred in assuming that, because the “Scoping Plan” prepared by the California Air Resources Board (ARB) pursuant to the Global Warming Solutions Act of 2006 (AB 32) concluded that the State of California, as a whole, had to reduce its GHG emissions by 29 percent compared with a hypothetical “business as usual” scenario (in which no regulatory actions were taken to address climate change), the project at issue in that case would not have significant GHG-related impacts if the project itself also reduced its own GHG emissions by 29 percent compared with what would have occurred under a business as usual scenario. As the court explained:

[T]he EIR’s deficiency stems from taking a quantitative comparison method developed by the Scoping Plan as a measure of the greenhouse gas emissions reduction effort required by the state as a whole, and attempting to use that method, without consideration of any changes or adjustments, for a purpose very different from its original design: To measure the efficiency and conservation measures incorporated in a specific land use development proposed for a specific location. The EIR simply assumes that the level of effort required in one context, a 29 percent reduction from business as usual statewide, will suffice in the other, a specific land use development. From the information in the administrative record, we cannot say that conclusion is wrong, but neither can we discern the contours of a logical argument that it is right.

(*Id.*, at p. 22.)

Although the court found DFW’s record to be inadequate to support the conclusion that GHG-related impacts were less-than-significant, the court did provide guidance regarding potential alternative approaches to GHG impact assessment that other agencies around the state might follow in the future.² One such suggested approach is one that the County followed in the Dixon Ranch EIR. The court stated that “a lead agency may rely on existing numerical thresholds of significance for greenhouse gas emissions.” (Slip Opinion, p. 27, citing CEQA Guidelines § 15064.4, subd. (b)(2) and citing as an example, the Bay Area Air Quality Management District’s GHG significance thresholds[.]) In this regard, the court noted that for a large land use project, such as the project at issue in that *CBD v. DFW*, “using a numerical threshold may result in a determination of significant greenhouse gas emission impacts. In that circumstance, the

² Notably, the Court’s suggested approaches are not intended to be an exclusive list, but merely an illustrative one. (See Slip Opinion, p. 24 [“We briefly address *some of the potential options* for DFW on remand”; “what follows is merely a description of *potential pathways* to compliance, depending on the circumstances of a given project”], italics added.)

lead agency must adopt feasible mitigation measures or project alternatives to reduce the effect to insignificance; to the extent significant impacts remain after mitigation, the agency may still approve the project with a statement of overriding considerations.” (Slip Opinion, p. 28, citing Pub. Resources Code, §§ 21002, 21002.1, subd. (b), 21081, CEQA Guidelines, §§ 15091, 15093, 15126.6.)

The Dixon Ranch EIR uses this approach and is consistent with the Supreme Court’s direction. Specifically, as its first threshold of significance, the EIR asks whether the Project would generate “annual greenhouse gas emissions either directly or indirectly in excess of 1,150” metric tons of carbon dioxide equivalent (MTCO_{2e}). (Dixon Ranch Draft EIR, p. 193.) This significance criterion is based on the El Dorado County Air Quality Management District’s (AQMD’s) GHG policies. As explained in the Draft EIR:

The El Dorado County AQMD and El Dorado County Planning have unofficially adopted the GHG thresholds established by the San Luis Obispo Air Pollution Control District (SLOAPCD). El Dorado County AQMD describes that the SLOAPCD thresholds would be applicable under their jurisdiction for the following reasons: (1) the California Emissions Estimator Model (CalEEMod) was used to develop the threshold; (2) SLOAPCD had completed a CEQA review of the threshold which has not been challenged in court; and (3) because of similarities in size and population between the two counties, and topographical and infrastructure similarities (e.g., only one major highway through each county). SLOAPCD’s annual GHG threshold is 1,150 MT/CO_{2e}.

(Dixon Ranch Draft EIR, p. 192.)

Using the CalEEMod model, the EIR quantifies the Project’s direct emissions from construction and operation (including vehicle use), and indirect emissions from energy use, solid waste disposal, vegetation planting and/or removal, and water use. (Dixon Ranch Draft EIR, p., 1393.) The EIR concludes that the Project would generate 9,094.6 MTCO_{2e} per year, which exceeds the El Dorado County AQMD’s numeric threshold of 1,150 MTCO_{2e}. (Draft EIR, pp. 195–196.)

Accordingly, the Draft EIR concludes the Project’s GHG impact is significant and recommends a host of mitigation measures to reduce this impact. (Draft EIR, pp. 195–196.) The Draft EIR then quantifies the effectiveness of the recommended mitigation measures and concludes that the mitigation measures would reduce project emissions to 7,660.4 MTCO_{2e}, which still exceeds the El Dorado County AQMD’s significance thresholds. Therefore, the EIR concludes the Project would have a cumulatively considerable impact with respect to GHG emissions. (*Ibid.*)

This result is consistent with the court’s ruling in *CBD v. DFW*, which, as noted, stated that if a project’s emissions exceeds an applicable numeric threshold, then the lead agency must adopt feasible mitigation measures to reduce the impact, and if the impact

remains significant and unavoidable, the lead agency must adopt a statement of overriding considerations in order to approve the project. (Slip Opinion, p. 28.) In determining whether to approve the Project, the Board of Supervisors will weigh the Project's benefits against the Project's significant and unavoidable GHG-impacts.

As a second threshold of significance, the Dixon Ranch EIR considers whether the Project would "conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emissions of GHGs," including ARB's Scoping Plan. (Dixon Ranch Draft EIR, pp. 192, 197–196; see also CEQA Guidelines, § 15164.4, subd. (b)(3).) In this regard, unlike the EIR at issue in *CBD v. DFW*, the Dixon Ranch EIR does not use a "business as usual" comparison (i.e., a comparison under which no regulations or other efforts are taken to reduce carbon emissions with a comparison of the project as designed). Rather, the EIR compares the Project's emissions with the Project's emissions after implementation of the mitigation measures recommended in the EIR. (*Id.* at pp. 194–195, 198; see also *id.* at Appendix C.)

Moreover, unlike the EIR at issue in *CBD v. DFW*, which found that the very large project at issue would not have a significant impact on climate change, the Dixon Ranch EIR concludes that the Project would have a significant impact on GHG planning efforts. Specifically, the EIR concludes that the Project would conflict with the State's goal of reducing emissions by 30 percent by 2020 because the Project's proposed mitigation measures would only reduce the Project's GHG emissions by 19 percent over and above the reductions already incorporated into the Project. The EIR concludes that this is a significant and unavoidable impact of the Project.

Finally, unlike the EIR in *CBD v. DFW*, which seemed to suggest that the Scoping Plan may have accounted for local land use decisions, at least for the purposes of meeting the State's GHG reduction goals (see Slip Opinion, pp. 22–23), the Dixon Ranch EIR acknowledges:

ARB has not yet determined what amount of GHG reductions it recommends from local government operations; however, the Scoping Plan states that land use planning and urban growth decisions will play an important role in the State's GHG reductions because local governments have primary authority to plan, zone, approve, and permit how land is developed to accommodate population growth and the changing needs of their jurisdictions (meanwhile, ARB is also developing an additional protocol for community emissions). ARB further acknowledges that decisions on how land is used will have large impacts on the GHG emissions that will result from the transportation, housing, industry, forestry, water, agriculture, electricity, and natural gas emission sectors. The Scoping Plan states that the ultimate GHG reduction assignment to local government operations is to be determined. With regard to land use planning, the Scoping Plan expects an approximately 5.0 MMT CO₂e reduction due to implementation of SB 375[.]

Lillian MacLeod
December 7, 2015
Page 5 of 5

(Dixon Ranch EIR, p. 190.)

For these reasons, nothing in the California Supreme Court's recent decision in *CBD v. DWF* suggests that the Dixon Ranch EIR's GHG analysis is legally inadequate in any way. Rather, the decision strongly indicates that the County's analysis complies with CEQA in that the EIR follows an approach that the Supreme Court has essentially blessed in conceptual terms and the EIR discloses to the public and decisionmakers that the Project will have significant and unavoidable GHG-related impacts, even with implementation of the comprehensive mitigation measures set forth in the EIR.

Very truly yours,



Laura M. Harris

cc: Todd Chambers