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Client Alert

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A Case Study in Strategic Risk Management in Administrative Proceedings Under CEQA

In September 2012, the Court of Appeal in *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* affirmed the approval of a 15-MW biomass-fueled cogeneration plant in northern California.[1] This case is the first published state court opinion regarding a challenge to the approval of a biomass energy project in California.

At the core of the lawsuit was the California Environmental Quality Act (CEQA), with challenges to the adequacy of the Environmental Impact Report (EIR) and its analysis regarding alternatives, air quality, noise and water resource impacts, among others.[2] The case highlights the importance of managing risk throughout the administrative approval process, specifically in developing a thorough, well-documented EIR that allows for informed decision making. In doing so, project applicants may enjoy the protection of a relatively high degree of deference in judicial review, even where the EIR has some errors (as CEQA does not require perfection, but rather informed decision making), and can thereby help control the likelihood of surviving a challenge in court.

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The Importance of Developing the Administrative Record

One of the most important events in this case, as in any project subject to CEQA, was what happened at the beginning of the administrative process — the decision to prepare an EIR. The reason is that an EIR is subject to a more deferential standard review as compared to a Negative Declaration or a categorical or statutory exemption. Here, the applicant, Roseburg Forest Products Co., initially received a conditional use permit from the Siskiyou County Planning Commission in late 2006, based on a categorical exemption from CEQA.[3] The County Air Pollution Control District, however, previously disagreed with the determination that the project's oversized boiler was categorically exempt, even though this boiler had previously been approved in 1994 based on a categorical exemption.[4] Project opponents immediately filed an appeal of the 2006 approval to the County Board of Supervisors. Rather than continue with the administrative process in the face of this opposition, the applicant resubmitted its application with a more detailed environmental review.[5] The County subsequently elected to prepare an EIR for the project.[6]

Full environmental review under CEQA can be time-consuming, expensive and onerous, but in certain circumstances, it may be the most expeditious path for the project in terms of surviving a project challenge. An EIR will have more robust analysis upon which the approval decision can be supported. By contrast, defending a project approval that invokes a categorical exemption is relatively difficult to defend.[7] Categorical exemptions are interpreted narrowly by courts,[8] and there are several significant exceptions to the exemptions.[9] In addition, the standard of review for an exemption challenge may favor the challenger. A project opponent only needs to demonstrate that "substantial evidence show[s] a reasonable possibility of adverse environmental impact sufficient to remove the project from the categorically exempt class."[10] When a court reviews the appropriateness of the exemption, it might not accord the agency approval with some measure of deference.[11]

In *Mount Shasta*, the decision to prepare an EIR extended the project approval process by almost one year.[12] Had the applicant in this case chosen to rely on its original categorical exemption for the project, it was certain that the approval would have been challenged before the County Board of Supervisors,[13] and if approved, almost certainly would have been challenged in court. The EIR, supported by a robust administrative record, improved the chances of prevailing against the litigation challenge. In this respect, the decision to prepare an EIR avoided the real risk of a less deferential standard of review on a challenge to a categorical exemption (as well as a potential negative outcome in that action) and the prospect of having to repeat the administrative process with a more extensive environmental review. Here, for each CEQA challenge, the court looked to the EIR and the administrative record for support for the agency's action and cited to it extensively when applying the deferential standard of review and denying the claims, as discussed below.

Deference to the Developed Administrative Record

In reviewing an agency decision, the court will uphold the decision if there is "substantial evidence" to support the agency's choice. This does not mean that contrary evidence cannot exist in the record or even that a contrary conclusion would have been more reasonable. The application of this relatively deferential standard of review is highlighted in *Mount Shasta*, which was only applied because of the use of an EIR.

The Court of Appeal repeatedly rejected the plaintiffs' arguments based on their failure to satisfy their "burden to demonstrate the inadequacy of the EIR."[14]

- Regarding the challenge to the alternatives analysis, the court stated that a plaintiff "may not simply claim the agency failed to present an adequate range of alternatives and then sit back and force the agency to prove it wrong."[15] Notably, the court also held that an EIR is not per se inadequate because "all alternatives considered by the agency during the scoping phase are determined not to be potentially feasible. . . . There is no rule specifying a particular number of alternatives that must be included."[16]
- Regarding the challenge to the analysis of air quality impacts, the court approved of the use of an approximation method to establish the baseline air emissions against which the project's emissions would be compared.[17] In addition, the court rejected other arguments because the plaintiffs had not preserved them in the administrative record by submitting them in a timely manner.[18]

- Regarding the challenge to the analysis of noise impacts, the court cited several times the plaintiffs' failure to show that "substantial evidence is lacking for" various points in the EIR's analysis.[19] The court dismissed evidence in the record that supported, for example, a greater noise increase than concluded by the EIR, because the plaintiffs could not show that substantial evidence was lacking for the conclusion made.[20]

Regarding the challenge to the analysis of water resource impacts, the court again rejected the plaintiffs' challenges as mere differences in opinion. The court stated that it "will not set aside an agency's approval of an EIR on the ground that a different conclusion would have been equally or even more reasonable."[21] The court rejected the challenge to the EIR's Project Description on similar grounds.[22]

When properly managed, the administrative record can become a robust shield against project opponent attacks on the agency's approval. The key issue is not whether there is evidence that supports a contrary agency decision, but whether there is evidence to support the decision made. As long as substantial evidence exists in the administrative record, an agency approval should withstand challenge.

The advantage of a developed administrative record extends to protecting against minor errors or omissions in the environmental review. The EIR at issue in this case was not perfect; yet CEQA does not require technical perfection. For example, the EIR's baseline approximation for steam emissions was 7 percent too high.[23] The consultant who analyzed impacts to water resources erroneously identified groundwater as the source of water in a communication to one of the applicant's representatives.[24] But the court found these errors to be of no consequence, because they did not "preclude[] informed decisionmaking and informed public participation."[25] In reference to the errors regarding emissions, the court "[could not] see on this record how a difference of 7 percent between actual and approximate emissions would have precluded informed decisionmaking or informed public participation."[26] In reference to the errors regarding the source of water, the court concluded that the error had been discovered, disclosed and resolved during the administrative proceedings.[27] Accordingly, there was no *prejudicial* error that warranted vacating the agency's approval of the project. All of these conclusions reflect the court's application of the deferential standard of review afforded an agency when it undertakes the preparation of an EIR.

Conclusion

The court of Appeal in *Mount Shasta* highlights the importance of properly managing the administrative approval process, specifically in considering the appropriate type and thoroughness of environmental review. Relying on what happened in the past may not fit with the circumstances on the ground, and, depending on the circumstances, taking a seemingly longer route initially may ultimately be the most expeditious choice, as it may have a better chance of avoiding the consequences of a successful court challenge. A careful and strategic approach to the administrative process and environmental review, even when it does not immediately appear that the approval determination will be challenged, will yield significant and substantial protection in the long-run.

Endnotes

[1] No. C064930 (Cal. Ct. App. Sept. 26, 2012) (ordered published Oct. 18, 2012).

[2] In the Superior Court, the petitioners also challenged the analysis regarding other environmental impacts, including climate change, aesthetic and visual resources, traffic, and geology and soils. Memorandum of Decision, Mount Shasta Bioregional Ecology Ctr. v. County of Siskiyou, No. SC CV PT 08 8144 (Cal. Super. Ct. Feb. 22, 2010). The Superior Court's judgment on these claims was not a part of the appeal. *See* Appellants' Opening Brief, Mount Shasta Bioregional Ecology Ctr. v. County of Siskiyou, No. C064930 (Cal. Ct. App. Oct. 18, 2010). In a related lawsuit, petitioners challenged the Siskiyou County Air Pollution Control District's determination of best available control technology for the project and brought other claims based on alleged violations of procedural due process. Verified Petition for Writ of Mandate, Mount Shasta Bioregional Ecology Ctr. v. Siskiyou County Air Pollution Control Dist., No. SC CV PT 09 0933 (Cal. Super. Ct. July 6, 2009). The Superior Court also rejected this challenge, and the Court of Appeal affirmed the Superior Court's judgment in an unpublished opinion. Mount Shasta Bioregional Ecology Ctr. v. Siskiyou County Air Pollution Control Dist., No. SC CV PT 09 0933 (Cal. Super. Ct. May 4, 2010), *aff'd*, No. C065668 (Cal. Ct. App. Sept. 26, 2012).

[3] *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (*Mount Shasta*), No. C064930, at 3–4 (Cal. Ct. App. Sept. 26, 2012).

[4] Petitioners' Opening Brief in Support of Petition for Writ of Mandate, Mount Shasta Bioregional Ecology Ctr. v. County of Siskiyou, No. SC CV PT 08 8144, at 2 (Cal. Super. Ct. Sept. 4, 2009).

[5] Joint Opposition to Petition for Writ of Mandate Pursuant to the California Environmental Quality Act, *Mount Shasta Bioregional Ecology Ctr. v. County of Siskiyou*, No. SC CV PT 08 8144, at 3–4 (Cal. Super. Ct. Oct. 6, 2009).

[6] *Id.* at 4.

[7] *See, e.g.*, Chris Garrett, James Arnone & Heather Crossner, *New Decision Limits CEQA Categorical Exemptions* (Feb. 24, 2012), *available at* http://www.lw.com/thoughtLeadership/california-court-of-appeal-limits-ceqa-categorical-exemptions.

[8] *See, e.g.*, *Dunn-Edwards Corp. v. Bay Area Air Quality Mgmt. Dist.*, 9 Cal. App. 4th 644, 655 (1992) ("Stated another way, a project is only exempt from CEQA '[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.'") (citation omitted) (disapproved on other grounds by *W. States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 570 n.2 (1995)).

[9] *E.g.*, *Banker's Hill, Hillcrest, Park W. Cmty. Preservation Group v. City of San Diego*, 139 Cal. App. 4th 249, 278 (2006) (unusual circumstances exception); *Santa Monica Chamber of Commerce v. City of Santa Monica*, 101 Cal. App. 4th 786, 798 (2002) (cumulative impacts exception); *Valley Advocates v. City of Fresno*, 160 Cal. App. 4th 1039, 1073–74 (2008) (historical resources exception). *See also* James Arnone & Holly Williams, *California Legislature Approves Two "CEQA Reform" Bills* (Sept. 20, 2011) (describing new exception for rooftop solar energy systems), *available at* http://www.lw.com/thoughtLeadership/california-approves-ceqa-reform-bills.

[10] *Davidon Homes v. City of San Jose*, 54 Cal. App. 4th 106, 115 (1997).

[11] Courts are split as to whether judicial review of the application of a categorical exemption is under the deferential substantial evidence test or under a de novo standard of review. *See, e.g.*, *Santa Monica Chamber of Commerce*, 101 Cal. App. 4th at 796 (noting the split in authority regarding "the appropriate standard of judicial review for the agency's decision that no Guidelines section 15300.2 exception to a categorical exemption is applicable"). The general scope of an exemption is determined by the court's independent judgment, with no deference to the agency's interpretation of the statutory language. *E.g.*, *San Lorenzo Valley Cmty. v. Advocates for Responsible Educ.*, 139 Cal. App. 4th 1356, 1382 (2006).

[12] *See* Joint Opposition to Petition for Writ of Mandate Pursuant to the California Environmental Quality Act, *Mount Shasta Bioregional Ecology Ctr. v. County of Siskiyou*, No. SC CV PT 08 8144, at 3–5 (Cal. Super. Ct. Oct. 6, 2009).

[13] *Id.*

[14] *Mount Shasta*, No. C064930, at 18.

[15] *Id.* at 19.

[16] *Id.* at 18. Accordingly, a "reasonable range of alternatives" under CEQA may, under the proper circumstances, comprise only the project and the no-project alternative. *Id.* at 19. Also of note, the court held that alternatives rejected during the scoping phase cannot be counted in the determination of whether the EIR considered an analyzed a reasonable range of alternatives. *Id.* at 17–18.

[17] *Id.* at 24.

[18] An encouraging development in *Mount Shasta* was the implicit approval of procedural rules guarding against last minute comments, data dumps, and other relatively unfair 11th-hour tactics. Siskiyou County rules required that comments be submitted at least five days before a hearing. The project opponents submitted a letter the day before the hearing on the appeal of the approval of the project by the planning commission. The *Mount Shasta* court held that such comments need not be considered by the legislative body or a court, even if part of the administrative record. *Id.* at 22–23. This follows prior cases taking a hard line on unfair, last-minute letters and data dumps on the eve of a hearing. *See, e.g.*, *Citizens for Responsible Equitable Envtl. Development v. City of San Diego*, 196 Cal. App. 4th 515, 530–31 (2011).

But last-minute comments are not necessarily categorically barred. CEQA allows commenters to challenge an approval based on comments made to the agency or body making the final determination on the project as long as those comments were made "prior to the close of the public hearing on the project before the issuance of the notice of determination." Public Resources Code § 21177(a). In this respect, the *Mount Shasta* court may have mischaracterized the challengers' letter as untimely because it was not submitted before the Planning Commission's approval of the project. *See Mount Shasta*, No. C064930, at 23. Rather, the letter was timely but the submission did not satisfy the challengers' burden to exhaust their administrative remedies because it was not "fairly presented" to the Board. *See Citizens for Responsible Equitable Envtl. Development*, 196 Cal. App. 4th at 528.

[19] *See, e.g.*, *Mount Shasta*, No. C064930, at 35.

[20] *Id.* at 45.

[21] *Id.* at 65.

[22] *Id.* at 69.

[23] *Id.* at 25.

[24] *Id.* at 68.

[25] *Id.* at 25.

[26] *Id.*

[27] *See id.* at 67–69.

If you have any questions about this *Client Alert*, please contact one of the authors listed below or the Latham attorney with whom you normally consult:

Damon P. Mamalakis
+1.213.891.8399
damon.mamalakis@lw.com
Los Angeles

Taiga Takahashi
+1.619.238.2890
taiga.takahashi@lw.com
San Diego