Two New Decisions Address the Adequacy of Environmental Impact Reports

California courts at all levels have been faced with an increasing myriad of lawsuits and appeals relating to the California Environmental Quality Act (CEQA). Two courts of appeal recently considered issues relating to the adequacy of environmental impact reports (EIRs), with mixed results. CEQA requires an EIR to be prepared in certain circumstances when an agency finds that a non-exempt project may have a significant effect on the environment. When required, the EIR must identify and analyze potential significant impacts, and must propose and describe mitigation measures to minimize those impacts. Also, an EIR must describe a reasonable range of project alternatives.

One of the decisions reaffirmed several principles which are helpful to public agencies conducting environmental review of their projects. In particular, many public agencies have experienced substantial evidentiary submissions challenging a project at the eleventh hour, when an agency is on the brink of making a determination whether to approve the project and/or certify an EIR. This case may provide a basis to limit the impact of these late submissions through a policy or ordinance establishing time limits for submission of evidence. Also, the case lends support to the fact that, in some circumstances, an EIR may be adequate even if the only alternative to the project that is analyzed is the "no project" alternative.

In *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) __ Cal.App.4th ___ (2012 WL 4378593), the Third District Court of Appeal considered an EIR prepared in connection with a project to expand an existing manufacturing facility. Project opponents challenged the EIR on multiple grounds, and the court's opinion includes a detailed analysis of issues relating to air quality, noise, and water quality impacts. In each area, the court found in favor of the public agency, holding that the EIR was adequate. Although somewhat dense with technical detail, the case is generally deferential to public agencies and their environmental analysis.

In the *Mount Shasta* case, the project opponents based certain of their arguments on a letter submitted to the Board of Supervisors the *day before* an appeal hearing regarding the project. This violated a County resolution that required all documentary evidence to be submitted at least *five days before* the hearing. The opponents argued that comments submitted after the close of the comment period for the EIR, but before the approval of the project, are timely. The court rejected this argument based on the County resolution. In light of this decision, it may be prudent for public agencies to adopt ordinances or board policies requiring submission of evidence by a certain date in advance of CEQA hearings. Although this may not prevent late submissions from becoming part of the administrative record, it may provide support for the position that an agency is not required to provide a response to or possibly even consider those submissions. Since this case was decided on the specific facts before the court, based on this decision, public agencies may wish to consult with legal counsel to review their ordinances and policies and determine how they might be updated to benefit the agency.

Also, the project opponents in this case contended that the EIR was inadequate because the only alternative it considered in depth was the "no project" alternative. The court emphasized that there is no rule specifying a particular number of alternatives that must be included. Further, CEQA only requires the analysis of feasible alternatives, and the other alternatives considered by the agency during a prior scoping phase were determined not to be potentially feasible. Therefore, the court held that, absent a showing that the EIR failed to include a particular alternative that was potentially feasible or that including only the no project alternative did not amount to a reasonable range of alternatives, the alternatives analyzed in the EIR were adequate.

The EIR at issue in the second case did not fare as well. The Fourth District Court of Appeal found an EIR for a development project inadequate because it improperly deferred mitigation for the project's potential significant impacts on an endangered species of butterfly. (*Preserve Wild Santee v. City of Santee* (2012) __ Cal.App.4th __ (2012 WL 5077156).) CEQA prohibits an EIR from deferring the formulation of mitigation measures to a future time. However, for circumstances where mitigation of impacts is known to be feasible, but practical considerations prohibit devising those measures early in the planning process, the agency can commit itself to devising measures later that will satisfy specific performance criteria articulated at the time of project approval. The court found that the EIR did not describe any measures for active management of the butterfly within the habitat, including any performance standards or other guidelines. The City's anticipated plan for management contained nonspecific actions, leaving the timing and other specifics subject to the discretion of the habitat preserve manager on prevailing environmental conditions. Further, the EIR did not indicate that it was in any way impractical or infeasible to specify standards or guidelines. Therefore, the court found that the City violated CEQA. Based on this holding, agencies are reminded that an EIR is required at a minimum to set forth performance standards for future mitigation measures, unless there are specific reasons why it is infeasible to do so, in which case the agency should specifically state the reasons for the infeasibility.

These are just two of the many CEQA decisions which have been published this year, along with many challenges in the superior courts which have not reached the appellate level. Due to the complicated and evolving state of this law, and the fact that it is a highly litigious area, public agencies are encouraged to consult with their legal counsel throughout the CEQA process. For assistance in preparing policies or ordinances like the one mentioned in the *Mount Shasta* case, please feel free to contact Lozano Smith. School districts may also consult Lozano Smith's "CEQA Checklist for School Districts", which can be obtained here.

If you have any questions regarding this Client News Brief or CEQA in general, please feel free to contact one of our eight offices located statewide. You can also visit our website, follow us on Facebook, or download our Client News Brief App.

Written by:

Harold M. Freiman
Shareholder
Walnut Creek Office
hfreiman@lozanosmith.com

Kelly M. Rem
Associate
Walnut Creek Office
krem@lozanosmith.com