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DIVINING THE ADMISSIBILITY OF EXTRA-RECORD EVIDENCE IN CEQA ACTIONS

by

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I. Introduction

Judicial review in actions brought for violations of the California Environmental Quality Act (CEQA) is generally limited to the administrative record for the underlying approval at issue in the case. The California Supreme Court made a broad proclamation regarding the inadmissibility of evidence outside the administrative record in the seminal case of *Western States Petroleum Assn. v. Superior Court* [(1995) 9 Cal.4th 559, 38 Cal. Rptr. 2d 139, 1995 CELR 88] ("*WSPA*"), but opened the door to a few possible exceptions to this hardline rule. Since it was decided over a decade ago, the meaning of *WSPA* has frequently been a ground for contention in mandamus cases. This article takes stock of the current state of the rules pertaining to the admissibility of extra-record evidence in administrative and traditional mandamus actions, and explores post-*WSPA* case law regarding exceptions to the general prohibition on extra record evidence, and how exceptions to the rule relate to CEQA actions.

II. Background on Administrative and Traditional Mandamus Actions

Litigation under the California Environmental Quality Act is ordinarily brought as a petition for writ of mandate, as a traditional mandamus action under Code Civ. Proc. § 1085 or as an administrative mandamus action under Code Civ. Proc. § 1094.5. These actions may challenge the decisions of public agencies such as cities, counties, and local and regional districts, and state boards and commissions, which are referred to as 'respondents' in these actions. While the procedural requirements pertaining to Code Civ. Proc. §§ 1085 and 1094.5 vary, both seek to compel the respondent to take a specific action. Actions for CEQA violations are brought pursuant to either

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Pub. Res. Code § 21168 or § 21168.5. The nature of the underlying project is used to determine which of these sections is applicable and whether the judicial action should proceed under Code Civ. Proc. §§ 1085 or 1094.5.

Administrative mandamus actions are reviewed under Code Civ. Proc. § 1094.5. Judicial review under this section is appropriate when the agency's decision at issue in the action was "[1] made as the result of a proceeding in which by law a hearing is required to be given, [2] evidence is required to be taken, and [3] discretion in the determination of facts is vested in the" agency [Code Civ. Proc. § 1094.5(a)]. All three of these factors must be met in order for an action to be considered administrative mandamus, although as discussed below, case law has somewhat broadly interpreted what constitutes a requirement that a hearing be given. The decisions reviewed in administrative mandamus actions are often referred to as adjudicatory or quasi-judicial decisions because the agency decision is made by applying existing laws, rules, or policies to the specific facts in the case *Friends of the Old Trees v. California Department of Forestry & Fire Protection* [(1997) 52 Cal. App. 4th 1383, 1389, 61 Cal. Rptr. 2d 297, 1997 CELR 96.] Administrative mandamus CEQA actions are brought pursuant to Pub. Res. Code § 21168.

Traditional mandamus (sometimes referred to as "ordinary mandamus") is appropriate for those mandamus actions that do not meet the requirements of Code Civ. Proc. § 1094.5. Ministerial, informal, and quasi-legislative agency decisions are reviewed by way of traditional mandamus under Code Civ. Proc. § 1085 [*WSPA*, 9 Cal.4th at 575]. Quasi-legislative decisions are those decisions by agencies enacting rules or regulations that will be generally applicable [*Friends of the Old Trees*, 52 Cal. App. 4th at 1389]. These quasi-legislative decisions are reviewed pursuant to section 1085 "even if the administrative agency was required by law to conduct a hearing and take evidence" [*WSPA*, 9 Cal.4th at 568]. When no hearing is required by law for the underlying project or the decision is quasi-legislative, a CEQA challenge should be brought pursuant to Pub. Res. Code § 21168.5 and traditional mandamus review applies.

Judicial review in administrative mandamus actions and quasi-legislative traditional mandamus actions is based on evidence contained in the administrative record or record of proceedings in the matter. This includes all documents and testimony presented to the public agency that approved the underlying project. Pub. Res. Code § 21167.6(e) lists the items that are to be included in the administrative record for CEQA actions. Extra-record evidence is evidence that was not presented to the public agency during its proceedings on the project, including

evidence that did not come into existence until after the agency's approval of the project. In mandamus actions, the inclusion of extra-record evidence is commonly sought by way of judicial notice, declarations or requests for discovery or depositions.

III. Extra-Record Evidence Generally Is Prohibited in Administrative and Quasi-Legislative Traditional Mandamus Actions

In administrative mandamus actions, judicial review is generally limited to the administrative record in the matter [Code Civ. Proc. § 1094.5]. Section 1094.5 was designed to give substantial deference to an agency's administrative orders and findings. This section "sets narrow limits on a party's ability to obtain a new administrative hearing, and part of those limits include narrow restrictions on discovery and augmenting the administrative record" [*Pomona Valley Hospital Medical Center v. Superior Court* [(1997) 55 Cal. App. 4th 93, 109, 63 Cal. Rptr. 2d 743]]. There are two codified exceptions to this general limitation on extra-record evidence in administrative mandamus actions: "relevant evidence that, in the exercise of reasonable diligence, could not have been produced *or* that was improperly excluded at the hearing before respondent" [Code Civ. Proc. § 1094.5(e) (emphasis added)].

The California Supreme Court extended the administrative mandamus limits on extra-record evidence to quasi-legislative traditional mandamus actions in *WSPA*. The action before the Court in *WSPA* was brought by an oil industry trade group alleging that the Air Resources Board's adoption of air quality regulations violated CEQA [*WSPA*, 9 Cal.4th at 565-566]. The Court first found that even though the Air Resources Board was required by law to conduct a hearing and take evidence as part of its decisionmaking process, the adoption of regulations is a quasi-legislative action and thus review of the action should be by traditional instead of administrative mandamus [*WSPA*, 9 Cal.4th at 567].

This seminal decision went on to dispel the notion set forth in dicta in *No Oil, Inc. v. City of Los Angeles* [(1974) 13 Cal.3d 68, 79 fn 6, 118 Cal. Rptr. 34] that judicial review in traditional mandamus actions is not limited to the administrative record [*WSPA*, 9 Cal.4th at 575-576]. In delineating what is allowable for review in a traditional mandamus action, the Court distinguished between two different types of traditional mandamus actions: "those challenging ministerial or informal administrative actions and those challenging quasi-legislative administrative decisions" [*WSPA*, 9 Cal.4th at 575]. Admission of extra-record evidence is allowable, and in fact necessary, in challenges to ministerial or informal administrative actions when the facts of the case are in dispute because there is often little to no administrative record in these cases [*WSPA*, 9 Cal.4th at 575-576].

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On the other hand, the Court found there is usually an adequate administrative record in quasi-legislative actions [*WSPA*, 9 Cal.4th at 576]. A record is often developed in quasi-legislative decisions, such as a city council's decision to approve an ordinance, because notice is often provided of an agency's intent to adopt a rule or a regulation. This allows the public an opportunity to submit evidence prior to agency approval thereby creating an administrative record for the decision.

A. Exceptions for the Admission of Extra-Record Evidence Set Forth in Section 1094.5

Code Civ. Proc. § 1094.5(e) sets out two instances when extra-record evidence may be allowed: if the evidence was improperly excluded from the record or "it was not possible in the exercise of reasonable diligence to present this evidence to the agency before the decision was made so that it could be considered and included in the administrative record." These exceptions have been extended to quasi-legislative traditional mandamus actions [*WSPA*, 9 Cal.4th at 578]. These are very narrow exceptions to the rule against allowing review of extra-record evidence and courts usually deny requests under these exceptions. It is the burden of the party seeking to admit extra-record evidence to demonstrate that the exception applies *Toyota of Visalia, Inc. v. New Motor Vehicle Bd.* [(1987) 188 Cal. App. 3d 872, 881, 233 Cal. Rptr. 708].

Evidence is rarely improperly excluded from the administrative record in CEQA actions because "public agencies ordinarily do not apply formal rules of evidence during administrative proceedings on a CEQA issue" that could be used to exclude evidence that is presented to the agency [Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2008) § 23.57, p. 1197]. [Courts have, however, frequently allowed augmentation of the administrative record in CEQA actions to include documents designated by Pub. Res. Code § 21167.6 as part of the administrative record but that were excluded from the administrative record that was prepared for judicial review. *County of Orange v. Superior Court* (2003) 113 Cal. App. 4th 1, 8, 6 Cal. Rptr. 3d 286, 2003 CELR 478; *Mejia v. City of Los Angeles* (2005) 130 Cal. App. 4th 322, 335, 29 Cal. Rptr. 3d 788. 2005 CELR 316. These documents should not be considered extra-record evidence because they were in fact part of the administrative record in the matter.] Courts have been reluctant to apply this exception without a clear showing the evidence was improperly excluded.

The real party in interest in *Porterville Citizens for Responsible Hillside Development v. City of Porterville* [(2007) 157 Cal. App. 4th 885, 69 Cal. Rptr. 3d 105, 2008 CELR 154] sought to include extra-record evidence that it claimed had been improperly excluded from the administrative hearing. In this case the petitioner brought an action to require preparation of an environmental impact report (EIR) instead of a mitigated negative declaration (MND) for real party in interest's proposed 219-home development [*Porterville*, 157 Cal. App. 4th at 889]. The real party in interest sought judicial notice of an EIR the city had prepared for a general plan amendment several years prior to the project [*Porterville*, 157 Cal. App. 4th at 889]. In an attempt to circumvent the rule against admission of extra-record evidence, the real party argued that the city had intended to tier the MND off of that EIR but had "accidentally failed to document this tiering" [*Porterville*, 157 Cal. App. 4th at 894]. The court, however, found that there was no evidence in the record to support real party's tiering theory and without any substantiation for the tiering theory, the EIR for the general plan amendment was inadmissible [*Porterville*, 157 Cal. App. 4th at 894-895]. The court did seem to leave open the door to the possibility that this type of evidence could be admissible if the city or the real party had provided a declaration by the community development director that he had relied on the general plan amendment EIR when preparing the MND or other evidence of the city's intent to rely upon the EIR [*Porterville*, 157 Cal. App. 4th at 895].

Extra-record evidence is also rarely allowed based on claims that "in the exercise of reasonable diligence, [it] could not have been produced" before the agency decision was made [Code Civ. Proc. § 1094.5(e)]. In the recent case of *San Joaquin Local Agency Formation Com'n v. Superior Court* [(2008) 162 Cal. App. 4th 159, 76 Cal. Rptr. 3d 93] ("*San Joaquin LAFCO*"), the petitioner attempted to use this exception to justify its desire to take depositions. The petitioner was an irrigation district that had submitted an application to the county's Local Agency Formation Commission ("LAFCO") to allow it to provide retail electric service. The county prepared an EIR for the project concluding there would be no significant environmental impacts [*San Joaquin LAFCO*, 162 Cal. App. 4th at 164]. Staff had recommended approval of the project, but the several commissioners expressed concerns about the project because they thought it might bring about the need for eminent domain in the future [*San Joaquin LAFCO*, 162 Cal. App. 4th at 165]. LAFCO held a formal hearing on the application where counsel advised them not to consider the eminent domain issues [*San Joaquin LAFCO*, 162 Cal. App. 4th at 165]. LAFCO voted down the project and a resolution was adopted stating the application was denied on the basis that the applicant did not provide adequate information regarding "administrative, technical, and financial capabilities to

provide retail electrical service" [*San Joaquin LAFCO*, 162 Cal. App. 4th at 165].

The irrigation district brought a petition for writ of mandate and gave notice to take the deposition of two of the LAFCO commissioners [*San Joaquin LAFCO*, 162 Cal. App. 4th at 166]. In these depositions the petitioner sought two categories of information: (1) what standard the commission applied to determine whether there was adequate information to approve the project as well as what additional information was needed to change the Commissioners minds; and (2) all information the Commissioners had received regarding the project [*San Joaquin LAFCO*, 162 Cal. App. 4th at 166-167].

With regard to the first category of information sought in the depositions, petitioner claimed that the discovery in this traditional mandamus quasi-legislative action fell with the exception permitted by *WSPA* because it had been held to a standard that it did not know existed [*San Joaquin LAFCO*, 162 Cal. App. 4th at 168]. Petitioner claimed that the commissioners required additional information, but did not inform it what that information was [*San Joaquin LAFCO*, 162 Cal. App. 4th at 168]. Petitioner had construed "the commissioners' remarks that they needed more information to approve the Application as invocation of a secret law or unwritten rules that were not disclosed" to it [*San Joaquin LAFCO*, 162 Cal. App. 4th at 168]. Petitioner claimed that disclosure of these secret laws or unwritten rules should be admissible extra-record evidence because petitioner could not with reasonable diligence have submitted the information required by these rules as part of the administrative record due to the fact that petitioner did not know the rules existed until the commission denied approval of the project [*San Joaquin LAFCO*, 162 Cal. App. 4th at 168]. If those secret laws or unwritten rules had been known to petitioner at the time of the hearing, it claims it would have submitted all the information they required.

In ruling against petitioner's request to take depositions, the court demonstrated that "reasonable diligence" is a difficult standard to overcome. The court found that there had been no showing that the petitioner had additional information that could have been submitted if there were some secret set of rules unknown to the petitioner and "if the District had a stronger case to make, reasonable diligence required the District to make that case at the hearing" [*San Joaquin LAFCO*, 162 Cal. App. 4th at 169]. [The deliberative process privilege would have prevented the petitioner from taking the deposition of the decisionmakers in this case even if the exception to *WSPA* had been applicable. *San Joaquin LAFCO*, 162 Cal. App. 4th at 170. Disclosure of information pertaining to the deliberative or mental process involved in decision making by a governmental entity is privileged. *State of California v. Superior Court (Veta)* (1974) 12 Cal.3d 237, 258, 115 Cal. Rptr. 497.]

As to the second category of information sought in the depositions, the petitioner claimed that LAFCO relied on information that was not in the record to make its decision and thus petitioner should be allowed to discover what information LAFCO used to base its decision [*San Joaquin LAFCO*, 162 Cal. App. 4th at 168]. The court held that if LAFCO had been relying on information not in the record to make its decision, then its decision would need to be overturned because it would not be supported by substantial evidence in the record [*San Joaquin LAFCO*, 162 Cal. App. 4th at 168]. Thus the extra-record exception was not applicable.

The California Supreme Court likewise rejected the use of this extra-record evidence exception in *Sierra Club v. California Coastal Com'n* [(2005) 35 Cal.4th 839, 28 Cal. Rptr. 3d 316, 2005 CELR 289]. Petitioner in that case submitted a declaration from its attorney detailing a conversation the attorney had with a Coastal Commission staff member to show that the Coastal Commission had not reviewed and considered an EIR, as required by CEQA [*Sierra Club*, 35 Cal.4th at 862]. According to the attorney's declaration, the staff member had informed him that the Commission had not been provided copies of the EIR and therefore could not have reviewed the EIR prior to its decision to approve a coastal development permit for the proposed project [*Sierra Club*, 35 Cal.4th at 862-863]. The Court found, with little elaboration, that the petitioner had not shown that it could not have produced this evidence before the agency's decision in the exercise of reasonable diligence or that this evidence had been improperly excluded from the administrative hearing [*Sierra Club*, 35 Cal.4th at 863].

In addition to courts' reluctance to apply the extra-record evidence exceptions in CEQA actions, extra-record evidence is never admissible "merely to contradict" the evidence the administrative agency relied on in making its decision or to question whether the decision was appropriate [*WSPA*, 9 Cal.4th at 579; *see also Fort Mojave Indian Tribe v. California Department of Health Services* [(1995) 38 Cal. App. 4th 1574, 45 Cal. Rptr. 2d 822, 1995 CELR 323]. Therefore, the extra-record evidence exceptions set forth in Code Civ. Proc. § 1094.5 are rarely useful in overturning an agency's CEQA approval on a substantive basis.

B. Post Record Evidence May Be Allowed In Administrative Mandamus Actions

WSPA placed an additional limitation on the admissibility of extra-record in quasi-legislative traditional mandamus actions that is not applicable to actions brought pursuant to Code of Civil Procedure section 1094.5: the evidence in question must have existed before the agency made its decision [*WSPA*, 9 Cal.4th at 578]. In *Fort Mojave Indian Tribe v. California Department of Health Services* [(1995) 38 Cal. App. 4th 1574, 45 Cal. Rptr. 2d 822] the court of appeal held that administrative mandamus cases prior to the *WSPA* decision had allowed post-record evidence that fell within the exception set forth in Code Civ. Proc. § 1094.5(e) and *WSPA* did not explicitly overrule these cases. Therefore, the use of evidence that did not come into existence until after the administrative hearing or decision could be admissible in administrative mandamus actions [*Fort Mojave*, 38 Cal. App. 4th at 1594-1595].

While finding that post-record evidence may be admissible in some administrative mandamus actions, *Fort Mojave* also concluded that this evidence only should be sparingly allowed [*Fort Mojave*, 38 Cal. App. 4th at 1595]. In that case, petitioners had sought to overturn the Department of Health Services approval of an EIR and license for the construction and operation of a low-level radioactive waste disposal facility [*Fort Mojave*, 38 Cal. App. 4th at 1594]. During the administrative process, a group of scientists had submitted a memorandum regarding the project's environmental impacts [*Fort Mojave*, 38 Cal. App. 4th at 1595]. After the project was approved and after litigation had commenced, the same group of scientists prepared a report expanding upon the findings in their memorandum and responding to a critique of the memorandum that was part of the administrative record [*Fort Mojave*, 38 Cal. App. 4th at 1587]. Petitioners sought judicial notice of this report.

The court found that even though consideration of post-decision evidence is not prohibited by Code Civ. Proc. § 1094.5(e), the evidence presented by petitioners in this case was not allowable because it was not truly new evidence, just a restatement and elaboration of evidence already included in the record [*Fort Mojave*, 38 Cal. App. 4th at 1595-1596]. According to the court, to allow consideration of additional conflicting scientific evidence after the agency has made its decision would cause uncertainty in the finality of these decisions and could lead to repeated rounds of litigation, the same concerns the California Supreme Court set forth in *WSPA* [*Fort Mojave*, 38 Cal. App. 4th at 1595]. post-record evidence should thus be limited to "truly new evidence, of emergent facts" [*Fort Mojave*, 38 Cal. App. 4th at 1595]. The court found that this new evidence had been allowed in disciplinary or entitlement decisions, but should not be allowed in a proceeding that provides a "wide-ranging scientific inquiry" [*Fort Mojave*, 38 Cal. App. 4th at 1595]. Allowing new scientific evidence to be submitted in CEQA actions would result in "revolving rehearing, certain to undermine the prospect of a final decision of this matter so long as scientists are able to advance conflicting views" [*Fort Mojave*, 38 Cal. App. 4th at 1595].

Petitioners in *Fort Mojave* had attempted to get the new scientific report into the record to show that under Pub. Res. Code § 21166 a subsequent or supplemental EIR should be prepared [*Fort Mojave*, 38 Cal. App. 4th at 1596]. The court found that the scientific report was not relevant for this purpose because if new information regarding significant impacts of the project develops after a project has been approved, a subsequent EIR is only required in connection with the next discretionary approval, if any [*Fort Mojave*, 38 Cal. App. 4th at 1597].

The new information could not be used to reopen an existing approval and thus it was irrelevant to the CEQA action at hand [*Fort Mojave*, 38 Cal. App. 4th at 1597; *see also Santa Teresa Citizens Action Group v. City of San Jose* (2003) 114 Cal. App. 4th 689, 706, 7 Cal. Rptr. 3d 868, 2004 CELR 44]. Therefore, while in theory allowable, post-record evidence has little relevance in administrative mandamus CEQA actions and is thus mainly inadmissible.

C. Extra-Record Evidence is Admissible in Mandamus Actions Regarding Ministerial and Informal Agency Decisions

Extra-record evidence is admissible in traditional mandamus actions that pertain to ministerial or informal agency decisions, as opposed to quasi-legislative decisions [*WSPA*, 9 Cal.4th at 575]. The California Supreme Court held that this extra-record evidence is often necessary in traditional mandamus actions regarding ministerial and informal agency decisions "because there is often little or no administrative record in such cases" and should be admitted if the facts are in dispute [*WSPA*, 9 Cal.4th at 575]. Several CEQA cases since *WSPA* have rejected claims by parties that the approval at issue in the litigation was ministerial or an informal agency decision, finding that if there was an opportunity for public comment, the decision was not informal.

In *Friends of the Old Trees, above*, the plaintiff sought a writ of mandamus in opposition to the California Department of Forestry's (CDF's) decision to approve a modified timber harvest plan (THP), which is the functional

equivalent of an EIR [*Friends of the Old Trees*, 52 Cal. App. 4th at 1387]. Plaintiff claimed that no hearing was required by law on the THP approval so the agency's decision should be reviewed under traditional mandamus, and because the ruling on the THP was an informal agency decision, extra-record evidence, including declarations regarding the project's negative impacts on water supplies should be admissible [*Friends of the Old Trees*, 52 Cal. App. 4th at 1389].

The court disagreed and held that the case should have been reviewed under administrative mandamus instead of traditional mandamus because the decision to approve the THP applied a rule to a specific set of existing facts and thus it was quasi judicial [*Friends of the Old Trees*, 52 Cal. App. 4th at 1389]. The court also held that the CDF's approval of the THP was not an informal agency decision even though it was made as the result of a proceeding that did not require the taking of evidence [*Friends of the Old Trees*, 52 Cal. App. 4th at 1391]. Although a public hearing was not required by law to be held on the approval of the THP, there were numerous opportunities for public input and CDF "is under an obligation to respond in writing to environmental concerns" [*Friends of the Old Trees*, 52 Cal. App. 4th at 1392]. This obligation was found to satisfy the hearing requirements of Code Civ. Proc. § 1094.5(a) and Pub. Res. Code § 21168 [*Friends of the Old Trees*, 52 Cal. App. 4th at 1392]. The decision was not an informal agency decision because it was "not made in a bureaucratic vacuum leaving an inadequate paper trail, as the 600-plus page administrative record demonstrates" [*Friends of the Old Trees*, 52 Cal. App. 4th at 1391]. The court held there had been plenty of opportunity for public participation in the CDF's review process, which had resulted in the compilation of an adequate administrative record.

The standard set forth for administrative mandamus actions in *Friends of the Old Trees* was extended to traditional mandamus actions in *Carrancho v. California Air Resources Bd.* [(2003) 111 Cal. App. 4th 1255, 4 Cal. Rptr. 3d 536, 2003 CELR 439]. There, plaintiff rice growers brought a petition for writ of mandate objecting to the state agencies' development of a diversion plan and progress report under a statue regulating the burning of rice straw [*Carrancho*, 111 Cal. App. 4th at 1262-1263]. As part of the action, plaintiffs sought to depose staff at the Air Resources Board and California Department of Food and Agriculture. Plaintiffs claimed that this extra-record evidence should be allowed because the agencies' preparation of the diversion plan and progress report were mandatory duties under the statute regulating rice straw burning, and the performance of such mandatory duties was an informal agency action [*Carrancho*, 111 Cal. App. 4th at 1269]. The court disagreed with this claim and found that "investigation and information gathering in aid of, or as a basis for, prospective legislation" is a quasi-legislative activity [*Carrancho*, 111 Cal. App. 4th at 1266]. That there had not been a formal hearing on the diversion plan and progress report did not necessarily qualify these actions as informal agency actions. There were public meetings, workshops, and ample opportunity for input for the public, which resulted in a 5,000 plus page administrative record, therefore the actions were not informal and the admission of extra-record evidence was not necessary [*Carrancho*, 111 Cal. App. 4th at 1270].

Claims that an approval of a water credit transfer based upon a categorical exemption to CEQA was an informal agency action were also rejected because a public hearing, although not required, had been held on the project and the public was given an opportunity to comment [*Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal. App. 4th 677, 699, 46 Cal. Rptr. 3d 387, 2006 CELR 427]. The declaration of a city planner that supported the city's conclusion that the project was exempt from CEQA was found to be inadmissible extra-record evidence [*Save Our Carmel River*, 141 Cal. App. 4th at 699].

Since *WSPA* established that in ministerial and informal agency decisions extra-record evidence is allowable, courts have consistently found that if an agency provides notice of a decision and allows the public an opportunity for comment, the decision is not an informal agency action and extra-record evidence is inadmissible. As public notice is always given when an approval under CEQA is based upon a negative declaration or EIR, these approvals should not be considered an informal agency action. Public notice is not, however, required when an agency decides to approve a project based upon a categorical or statutory exemption, or the agency decides the action is not a project subject to CEQA. If there is no public notice or opportunity for public comment, these decisions may be considered informal agency actions that may require extra-record evidence for judicial review. [In an unpublished case, *Coffee Lane Alliance v. County of Sonoma* (1st. App. Dist., Div. 4, January 25, 2007) 2007 Cal. App. Unpub. LEXIS 603, 2007 WL 185478, the issuance of ministerial permits was held to not be an informal agency decision because there had been ample opportunity for public opposition and numerous people signed a petition opposing the project.]

Prior to the *WSPA* decision, the court in *City of Pasadena v. State* [(1993) 14 Cal. App. 4th 810, 17 Cal. Rptr. 2d 766] allowed extra-record evidence in a case where a categorical exemption was adopted for a project and there was no hearing or solicitation of public comments on the use of the categorical exemption [*City of Pasadena*, 14 Cal. App.

4th at 817]. *WSPA* specifically overruled the statement in *City of Pasadena* that the court could generally receive evidence outside the record in traditional mandamus actions [*WSPA*, 9 Cal.4th at 570, fn 2]. However, the Supreme Court did not determine whether the approval at issue in *City of Pasadena* should be considered an informal agency action and the commentators in Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2008) § 23.56, p. 1196 use this case as an example of a situation where an agency action should be considered an informal agency decision. [The opinion of the commentators in Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 1993) with respect to the issue of the admissibility of evidence should be given significant weight as the California Supreme Court relied heavily on their analysis in establishing the limitations on extra-record evidence it set out in *WSPA* [*WSPA*, 9 Cal.4th at 575].]

In *City of Pasadena*, the state was attempting to determine an appropriate location for a parole office in Pasadena [*City of Pasadena*, 14 Cal. App. 4th at 815–816]. The state allowed significant opportunities for the public to participate in the site selection process; even forming a group consisting of public official and homeowners to prepare recommendations on potential sites [*City of Pasadena*, 14 Cal. App. 4th at 816]. The use of a categorical exemption for the parole office site was not made public until the state filed a notice of exemption [*City of Pasadena*, 14 Cal. App. 4th at 817]. Because the public had no opportunity to comment upon the use a categorical exemption, this decision would likely be considered an informal agency decision necessitating the admission of extra-record evidence. "It would be paradoxical to construe CEQA to require Pasadena to present a complete explication of its objections to the claimed exemption before the State filed its determination that the project is exempt" [*City of Pasadena*, 14 Cal. App. 4th at 821].

D. Other Limited Exceptions to the General Rule of Inadmissibility

In addition to the exceptions to extra-record evidence inadmissibility set out in Code Civ. Proc. § 1094.5(e) (and extended to traditional mandamus actions in *WSPA*) and the admissibility of such evidence in ministerial and informal agency decisions, extra-record evidence may be admissible "under unusual circumstances or for very limited purposes" [*WSPA*, 9 Cal.4th at 579]. *WSPA* cited to federal case law for the premise that extra-record evidence may be allowed for "background information" [*WSPA*, 9 Cal.4th at 579]. Additionally, the California Supreme Court noted in dicta that commentators had proposed other potential exceptions for allowing such evidence: "(1) issues other than the validity of the agency's quasi-legislative decision, such as the petitioner's standing and capacity to sue, (2) affirmative defenses such as laches, estoppel and res judicata, (3) the accuracy of the administrative record, (4) procedural unfairness, and (5) agency misconduct [[*WSPA*, 9 Cal.4th at 575, fn. 5, citation to Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 1993) § 23.44, pp. 956-957]. The court did not expressly endorse the use of these exceptions, but left open the possibility they could be applicable. The following sections review post-*WSPA* administrative and traditional mandamus actions that consider use of these exceptions.

1. Background Information

"Background information" generally refers to evidence such as legislative history and municipal code sections that may be sought through judicial notice [Evid. Code §§ 451–452; *Hahn v. State Bd. of Equalization* [(1999) 73 Cal. App. 4th 985, 993, 87 Cal. Rptr. 2d 282]; *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal. App. 4th 1214, 1220, 66 Cal. Rptr. 3d 645, 2007 CELR 399]. The trial court in *Porterville Citizens for Responsible Hillside Development v. City of Porterville* [(2007) 157 Cal. App. 4th 885, 69 Cal. Rptr. 3d 105, 2008 CELR 154] required the preparation of a focused EIR and the developer began preparing this focused EIR was the appeal was pending. The court of appeal allowed judicial notice of the notice of preparation of this EIR as well as a draft residential hillside ordinance for the town "for the limited purpose of providing background information" [*Porterville Citizens for Responsible Hillside Development*, 157 Cal. App. 4th at 893, fn 7, citation to *WSPA*, 9 Cal.4th at 578-579]. The court did not use this information in its ruling, just as a statement in the factual background.

2. Agency Misconduct

In *Cadiz Land Co. v. Rail Cycle, L.P.* [(2000) 83 Cal. App. 4th 74,99 Cal. Rptr. 2d 378], the petitioner sought discovery in order to show agency misconduct in an action challenging the county's certification of an EIR for a landfill project [*Cadiz Land Co.*, 83 Cal. App. 4th at 121]. Here, the real party in interest, a consultant hired by the real party (Joseph Lauricella), and a county planning department employee were indicted for conspiring to destroy the petitioner's business [*Cadiz Land Co.*, 83 Cal. App. 4th at 116]. Petitioner sought to take the deposition of Lauricella regarding his illicit activities leading to county's approval of the landfill [*Cadiz Land Co.*, 83 Cal. App. 4th at 121]. To support the petitioner's motion to take Lauricella's deposition, petitioner's attorney provided a

declaration detailing a conversation he had with Lauricella in which they discussed real party in interest's illegal financial contributions to government officials to win approval of the project [*Cadiz Land Co.*, 83 Cal. App. 4th at 121]. The declaration of petitioner's attorney stated that at least one official that voted for the project was on the payroll of the real party in interest and that there were other relevant criminal matters still under investigation that could be disclosed to the court in-camera [*Cadiz Land Co.*, 83 Cal. App. 4th at 121].

While claims of bribery in a case where the real party and an agency employee already have been indicted for crimes relating to the project approval sounds like a poster case for allowing extra-record evidence to show agency misconduct, the court found that petitioner had not met the burden of showing that admissible evidence of fraud or corruption would be found in the deposition of Lauricella [*Cadiz Land Co.*, 83 Cal. App. 4th at 122]. The court held that petitioner's attorney's declaration was too ambiguous in its description of agency misconduct that might be revealed [*Cadiz Land Co.*, 83 Cal. App. 4th at 122]. If petitioner had submitted a declaration from Lauricella instead of a declaration from its attorney detailing a conversation with Lauricella, perhaps petitioner would have been able to clear the hurdle of establishing the deposition would lead to admissible evidence of agency misconduct.

Cadiz set the bar high for whether evidence of agency misconduct should be allowed. The petitioner in *San Joaquin LAFCO*, *above*, claimed that the exception for extra-record evidence of agency misconduct should apply to its request to take the deposition of LAFCO commissioners because petitioner contended that LAFCO was improperly influenced to vote against the project based on their bias against eminent domain [*San Joaquin LAFCO*, 162 Cal. App. 4th at 168]. The court compared petitioner's request to that in the *Cadiz* case: "The District has made a lesser showing of misconduct here" then in *Cadiz* [*San Joaquin LAFCO*, 162 Cal. App. 4th at 170].

3. Procedural Fairness

An exception to the extra-record evidence rule to show a lack of procedural fairness has been clearly validated in post-*WSPA* cases. "Where the challenge involves one of procedural fairness, including the potential bias of a [decisionmaker], we are not necessarily limited to the evidence that was before the [agency]" [*Clark v. City of Hermosa Beach* [(1997) 48 Cal. App. 4th 1152, 1170 fn 17, 56 Cal. Rptr. 2d 223]]. In *Nightlife Partners v. City of Beverly Hills* [(2003) 108 Cal. App. 4th 81, 133 Cal. Rptr. 2d 234], the plaintiffs claimed that the proceedings before a hearing officer for an administrative appeal of the city's denial of their permit renewal were procedurally unfair because the hearing officer had been advised during the proceedings by the city representative that had initial denied plaintiffs' permit renewal application [*Nightlife Partners*, 108 Cal. App. 4th at 85]. The hearing officer submitted a declaration in opposition to plaintiffs' mandamus petition, denying that he was biased or that there had been any procedural unfairness, but failing to respond to plaintiffs' claim that he was advised during the appeal proceedings by the city's representative [[*Nightlife Partners*, 108 Cal. App. 4th at 85-86, 88]. The trial court had refused to admit the hearing officer's declaration in the matter, but the court of appeal found that the declaration was relevant and admissible because it related to whether the appeal proceedings were fair [[*Nightlife Partners*, 108 Cal. App. 4th at 89-90]. The court also found that the fact that the hearing officer's declaration completely failed to address the claim that the hearing officer was advised by the city representative created an inference that this representative had advised him [[*Nightlife Partners*, 108 Cal. App. 4th at 88].

4. Accuracy of the Record

There are no published cases that deal with the exception for extra-record evidence relating to accuracy of the administrative record, but the unpublished decision in *Wagner Farms, Inc. v. Modesto Irr. Dist.* [(No. F049311, 5th App. Dist.) 2006 Cal. App. Unpub. LEXIS 8097, 2006 WL 2615166] did allow extra-record evidence for the purpose of showing the administrative record could be inaccurate. A declaration by one of the plaintiffs was submitted to support plaintiffs' claim that respondent had known what easements it would propose for the project, but had kept this information secret until after the EIR for the project was approved, thereby misrepresenting aspects of the project. The court admitted this evidence, but found it did not form a sufficient basis to infer that the respondent had withheld information from the public, and thus did not cause the administrative record to be inaccurate.

IV. Conclusion

Based on the narrow exceptions for extra-record evidence in mandamus actions set out in Code Civ. Proc. § 1094.5(e), *WSPA* and the subsequent cases following this ruling, the instances where extra-record evidence in CEQA actions could be admissible is rare. Admission of extra-record evidence on substantive matters in CEQA actions is likely confined to cases where there was no notice of the agency's decision and no opportunity for public to comment on the agency's CEQA compliance. extra-record evidence may also be available to support claims of procedural violations. These limits on

extra-record evidence seem to reflect a balancing between fostering public participation in environmental review decisions and providing for finality of agency decisions.

WATER QUALITY CONTROL

Regulatory Activity

State Water Board Decision on Reimbursement of UST Costs Not an Underground Regulation.

State Water Board Decision on Reimbursement of UST Costs Not an Underground Regulation. A petition was submitted to the Office of Administrative Law asking for a determination as to whether Order WQ-2004-0015-UST, *In the Matter of the Petition of Murray Kelsoe* (Kelsoe Decision), issued by the State Water Resources Control Board on October 21, 2004, was an underground regulation. The Kelsoe Decision dealt with the Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 which authorized the Board to administer a program to reimburse underground storage tank (UST) owners and operators for eligible costs incurred as a result of contamination from leaking petroleum USTs. The holding in the Kelsoe Decision turned on the meaning of the phrase "has complied" in Health & Safety Code § 25299.57 (permitting the Board to pay for the costs of a corrective action that exceed the level of financial responsibility required to be obtained pursuant to Health & Safety Code § 25299.32, if it makes a determination that, among other things, the claimant has complied with permit requirements). The Petitioner contended that although the Kelsoe Decision had been superseded by legislation in 2007, the Board continued to apply it to UST cases arising before the change in the statute and that the application of the Kelsoe Decision to those cases constituted an underground regulation.

In a summary disposition letter, OAL noted that pursuant to Gov. Code § 11425.60, the State Board, in State Board Order WR 961 issued in 1996, designated "all decisions and orders it adopts at public meetings to be precedent decisions, except to the extent that a decision or order indicates otherwise, or is superseded by later enacted statutes, judicial opinions, or actions of the State Board." OAL stated that the Kelsoe Decision, therefore, was a precedent decision exempt from the rulemaking requirements of the APA, and therefore was not an underground regulation.

AIR QUALITY CONTROL

Cases

District Court Lacked Jurisdiction in CAA Citizen Suit Challenging Baseline Determination for SIP

El Comite para el Bienestar de Earlimart v. Warmerdam
No. 06-16000, 9th Cir.
2008 U.S. App. LEXIS 17706
August 20, 2008

In a citizen suit brought under section 304 of the Clean Air Act challenging the adoption and implementation of California's State Implementation Plan, the district court lacked jurisdiction to review the data and methodology used by California in calculating the baseline for emissions standards, because baselines do not constitute "an enforceable emission standard or limitation" reviewable under the CAA. The state's failure to adopt regulations to reduce VOC emissions pesticides by June 1997 was not in violation of the SIP.

Facts and Procedure. A coalition of community organizations brought this Clean Air Act citizen suit [42 U.S.C. § 7604(a)] against California state officials responsible for designing and implementing the state air quality implementation plan (SIP) under the CAA.

The CAA requires the EPA to establish National Ambient Air Quality Standards for certain air pollutants [42 U.S.C. § 7409]. The Act requires states to submit SIPs that show how the states will attain the standards for major air pollutants [42 U.S.C. § 7410]. Before a SIP becomes effective, the EPA must determine that it meets statutory CAA requirements [42 U.S.C. § 7410(k)(3)]. Once the EPA approves a SIP, it becomes federal law [*Safe Air for Everyone v. EPA* (9th Cir. 2007) 488 F.3d 1088; *Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n* (9th Cir. 2004) 366 F.3d 692].

Each state is required to designate the areas within its boundaries where the air quality meets the NAAQS ("attainment areas") and those where the air quality fails