STRUCTURE OF THE LAW

OR,

BASIC LEGAL PRINCIPLES FOR LAWYERS AND NON-LAWYERS TO GET THEIR ENVIRONMENTAL ISSUES PROPERLY HEARD

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3 BRANCHES OF GOVERNMENT

(Yeah, I know, “duh!” . . . but it’s highly relevant)

1. LEGISLATIVE (Makes Laws)

2. ***EXECUTIVE*** (Executes & enforces laws)

3. JUDICIARY (Interprets Laws)

FOCUS TODAY: #2 & #3

LEGISLATURE

- PASSES LEGISLATION THAT BECOMES LAW

Executive Branch

1) The Executive & its Administrative Agencies that ***execute*** the law as enacted by Legislature, by issuing regulations, developing policies, implementing procedures on environmental issues to carry out the legislative intent (EPA, OSHA, F&W, Coastal Commission, etc.)

2) Enforcement arm – attorneys general and agency enforcers to ***enforce*** laws and regulations (AG's Offices, USAO, enforcement arms of resources agencies, etc.)

Judicial Branch

- JUDGES HAVE THE LAST WORD ON:

  a) WHAT THE LAW IS OR MEANS (Interpreting the Law)

  b) WHAT THE RESULT SHOULD BE IN A PARTICULAR CASE (Applying the Law)

JUDGES HAVE THE LAST WORD

SOURCES OF LAW

- 1. LEGISLATURE: STATUTES
- 2. EXECUTIVE: REGULATIONS; POLICIES; GUIDELINES
- 3. JUDICIARY: CASE LAW

KEY CONCEPTS IN ENVIRONMENTAL & LAND USE LITIGATION

I. STANDING

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIREMENT

III. THE ADMINISTRATIVE RECORD

IV. STANDARD OF REVIEW

V. STATUTES OF LIMITATIONS

VI. MISCELLANEOUS OTHER ISSUES

I. STANDING

ISSUE: Is the Petitioner one who is affected by the project and thus a proper party to bring a legal challenge?

BASIS: Article III of US Constitution "Case or controversy" requirement: courts must decide actual, concrete cases or controversies, and are not designed merely to render "advisory opinions"

TREND: In environmental law area, standing has been:

-- very broad

-- includes persons who allege aesthetic interests in the environment/ resource that is the subject of the lawsuit

HYPOTHETICAL #1: Person sees bears on visit to Yellowstone, goes home to NYC, and learns of proposed development that threatens bears. He alleges he enjoys Yellowstone and the presence of bears & that project will harm the bears. Result: He has standing.

HYPOTHETICAL #2: Person sees bears on television program and learns of plan that impacts them. Result: Remains to be litigated but probably has standing under liberal judicial rules.

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES

= PRINCIPLE OF ADMINISTRATIVE LAW REQUIRING PLAINTIFFS/PETITIONERS TO FIRST MAKE THEIR ARGUMENTS OR OBJECTIONS TO THE ADMINSITRATIVE AGENCY BEFORE COMING INTO COURT

BASES FOR DOCTRINE:

A) **FAIRNESS**: Give the agency a chance to hear and perhaps act on the concerns

B) **EXPERTISE**: Give the agency with the expertise a chance to address the issue before generalist Judge does.

C) **EFFICIENCY**: Encourage objections to be addressed and possibly resolved early in the process (avoid court)

D) **RECORD**: Allow a more complete administrative record for the Court's review, so Court has benefit of agency's responses, as it considers the issues

HOW DO YOU BECOME EXHAUSTED?

1. **WHERE TO OBJECT/COMMENT?**

   Lodge objections at every administrative level that considers the issue:
   e.g., Planning Commission, then the Board of Supervisors, then file lawsuit challenging Board decision

2. **SPECIFICITY OF OBJECTIONS?**

   Agency may argue in court that the Plaintiff/Petitioner did not raise the issue at the agency level

3. **WHO MUST OBJECT?**

   a) SPECIFIC PETITIONER must have appeared before the administrative body and objected to the project
   b) SOME COMMENTATOR must have raised the specific argument urged by petitioner in the litigation, even if petitioner did not (e.g, if petitioner objected to traffic impacts, and not noise, but some other commentator objected to noise, the issue may be deemed properly raised in a court challenge by petitioner)

   POINT: THE KEY ISSUES/OBJECTIONS MUST BE RAISED AT THE ADMINISTRATIVE AGENCY LEVEL- CASES ARE WON WON AND LOST THERE

III. THE ADMINISTRATIVE RECORD

FACTUAL BASIS FOR THE COURT'S REVIEW AN AGENCY'S ACTION IS KNOWN AS THE "ADMINISTRATIVE RECORD"

MEANS: Everything that was before the agency in deciding the issue (studies, reports, public comments, letters, scientific data, environmental analysis documents, etc.)

- IMPORT: If it is not in the administrative record, it does not exist as far as the court is concerned

- CONTENTS: of admin. Record are defined by statute either broadly or specifically:

  For example, CEQA, Pub. Res. Code Sec. 21167.6(e)

IMPORTANT POINTS RE ADMINISTRATIVE RECORD

1) NO *EXTRA*-RECORD EVIDENCE GENERALLY:

- Under prior case law, CEQA Petitioners and other writ petitioners could obtain and use evidence OUTSIDE the administrative record, through document requests, depositions, and expert testimony (traditional avenues of discovery in litigation).

-1995 CA Supreme Court Decision in Western States Petroleum Marketing Assn. v. Superior Ct., (1995) 9. Cal.4th 559, NO extra-record evidence allowed (with very limited exceptions)

2) EFFECT: Those who expect to file a CEQA challenge should ensure that the evidence supporting their position gets into the record. That includes EXPERT TESTIMONY. Good idea to consult legal counsel at administrative stage, to help ensure the record is complete.

COMPILING THE ADMINISTRATIVE RECORD

1) **RESPONSIBILITY FOR RECORD**: Under CEQA, Petitioners are responsible for the costs of the administrative record, <u>including costs of agency staff time</u>
   → can be EXCESSIVE and BURDENSOME, especially on citizens groups of Modest means

2) **POTENTIAL ABUSE**: Sometimes this is used to economically burden and intimidate CEQA Petitioners

3) **METHODS OF COMPILING RECORD**:

- a) Pub. Res. Code Sec. 21167.6(a): within 10 days after filing petition, petitioner must serve request for admin record and agency must prepare (usually the real party developer prepares, as agency may delegate)

- b) Alternatively, under Pub. Res. Code Sec. 21167.6(b)(2) Petitioners may prepare the record themselves or the parties may agree to "an alternative method of preparation"

- c) Savvy petitioners now elect to prepare record themselves or to agree to alternative method and specifically reserve right to see an estimate before committing to have agency prepare record

IV. STANDARD OF REVIEW

- STANDARD OF REVIEW = "scope" or "lens" of court's review of agency decision

  EXAMPLE 1: CHALLENGES TO FAILURE TO PREPARE EIR: Standard is whether substantial evidence supports a FAIR ARGUMENT that the project *MAY cause substantial impacts to the environment*

  a) it is a LEGAL standard and the court reviews the issue DE NOVO
  b) it is a VERY LOW THRESHHOLD
  c) it is BIASED toward preparation of EIRs

  EXAMPLE 2: CHALLENGES TO ADEQUACY OF EIR: Standard is whether agency's analysis and conclusions are SUPPORTED BY SUBSTANTIAL EVIDENCE

  a) standard is VERY DEFERENTIAL TO AGENCY
  b) limited review, fact based, not de novo
  c) court will only overturn agency decision if no reasonable basis in record to support decision
  d) even if there is substantial evidence to support an opposing analysis or conclusion

V. STATUTES OF LIMITATIONS ("SOL")

- WHAT IS IT? = SPECIFIC TIME LIMIT FOR FILING A LAWSUIT
- DICTATED BY SPECIFIC STATUTES
- ENVIRONMENTAL LAWS ARE UNUSUAL FOR SHORT STATUTES OF LIMITATION
- DRACONIAN RESULTS: IF YOU MISS A SOL, YOU ARE "SOL"

CEQA'S STRICT TIMELINES/PITFALLS

Because of potential great impact on important projects that effect the public and on decisions of public agencies, CEQA has very strict timelines and procedural requirements to ensure that cases are moved quickly to a writ hearing

a) 30-day statute of limitations (for most challenges) - case dismissed if deadline missed

----> compare minimum one yr SOL for other types civil lawsuits

b) must serve writ petition within 10 days of filing - case subject to dismissal if not served

----> compare minimum 60 days in most courts

c) must request administrative record within 10 days - subject to dismissal if not

-----> no such requirement in other cases

d) must serve Attorney General with copy of writ petition within 10 days - No C.C.P. 1021.5 attorneys fees if not served on AG

OTHER TIMING ISSUES
(Constitutional Issues)

- RIPENESS – Is the dispute ready to be heard?

- MOOTNESS – Is there still an actual dispute?

EFFECT OF FILING SUIT ON PROJECT

1. Mere filing of lawsuit DOES NOTHING to stop project

2. But project proponent proceeds at own risk, if project is later struck down by court

3. If project going forward and any later-ordered additional environmental analysis would be moot, petitioner may seek temporary emergency remedies:

- a) Petitioner may seek a temporary restraining order (TRO) under Code of Civil Procedure Section 526, upon a showing of probable success on the merits of the case, and that the harm to petitioner from proceeding outweighs the harm to developer of a TRO
- b) Petitioner may seek a stay under the general writ of mandate provisions of CA law (Code of Civ. Procedure Sec. 1094.5(g)), upon a showing that a stay is in the public interest

$$ ATTORNEYS FEES $$

1. **“AMERICAN RULE”** = each side pays its own legal fees, regardless of who wins case

2. **EXCEPTION:** statutory fee shifting provisions for so-called private attorney general cases

3. **Code of Civil Procedure Sec. 1021.5** applies to CEQA cases:

   Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities . . . .

4. **CONTINGENCY MULTIPLIERS**: In addition to the actual hourly fees earned, per case law, so-called multipliers are allowed at the discretion of judge, to compensate petitioners’ counsel for the risk of handling case on contingency basis, skill in handling case, difficulty and novelty of legal issues, difficulty of client in obtaining counsel.

CONCLUDING POINTS

1) Modern environmental law is largely ADMINISTRATIVE LAW (law governing administrative agencies)

2) ENVIRONMENTAL/LAND USE LAW IS LARGELY ***PROCEDURAL***

I. RESULT of successful challenge is not a decision that a project is good or bad, but only that the analysis of impacts was not done or was not adequate

II. REMEDY is an order to perform (or re-do) the analysis so that it is legally adequate and discloses full impacts to the public and agency decision makers

III. PETITIONERS' GOALS:

a) Hope that the correct analysis leads to a revised and improved project, or a conclusion by agency to deny the project; and/or

b) Hope that the court's order results in delay and abandonment of project

3) PROCEDURE IS CRITICAL:

House Energy and Commerce Committee Chairman John Dingell of Michigan: "If you let me write the procedure, and I let you write the substance, I'll (beat) you every time."

YOU CAN'T REACH POLICY OR RESOURCE ISSUES WITHOUT PROPERLY GETTING BEFORE THE AGENCY OR COURT

PROCEDURAL RULES = TICKET TO THE GAME

KNOW THE RULES, GET IN THE GAME