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Fatal "Exhaustion": Fifth District Holds CEQA's Statute of Limitations Ran Out On Plaintiff's Claim While Plaintiff Thought It Was Still In Process Of Exhausting Administrative Remedies

By Matthew C. Henderson and Arthur F. Coon on January 10, 2023

As all CEQA practitioners know, a prospective petitioner in a writ proceeding challenging a CEQA determination must first exhaust available administrative remedies as a prerequisite to filing suit. But ***which*** remedies are subject to that requirement? That is the question presented in the recent case of *American Chemistry Council v. Dept. of Toxic Substances Control* (5th Dist. 2022) ___ Cal.App.5th ___, originally filed on November 18, 2022, and certified for publication on December 12, 2022.

The *American Chemistry Council* case deals with the interplay of CEQA with another statutory scheme, the so-called "Green Chemistry" law (Health & Safety Code, § 25251 et seq.) and its implementing Safer Consumer Products regulations (Cal. Code Regs., tit. 22, § 69501 et seq.), in the context of exhaustion of administrative remedies. The case illustrates the sometimes perilous position of a CEQA practitioner seeking to satisfy the exhaustion requirement while avoiding the running of the very short statutory limitations period within which a CEQA action must be commenced.

Legal Background

The Green Chemistry law and Safer Consumer Products regulations were enacted for the purpose of identifying, evaluating, and regulating potentially hazardous chemicals (or "Chemicals of Concern") in consumer products. Together, they provide for a detailed formal procedure by which such chemicals can be identified, prioritized, and studied with the aim of limiting exposure or reducing the level of hazard they present. Essentially the law presents a process by which (1) candidate chemicals that may have adverse health or environmental impacts are identified, (2) products containing those chemicals are identified and prioritized, (3) parties responsible for producing, importing, or selling the products either cease doing so or submit "alternatives analyses" showing how the chemicals function, potential alternatives to the chemicals, etc., and (4) the Department identifies and implements regulatory responses for products

containing the chemicals based on those reports. The law also provides administrative processes for affected parties to dispute the Department's determinations with respect to regulated chemicals. These include both an informal dispute procedure and a formal administrative appeal if the informal process does not resolve the issue.

Factual and Procedural Background

The *American Chemistry Council* case involved application of the Green Chemistry Law and Safer Consumer Products regulations to a set of chemicals known as unreacted methylene diphenyl diisocyanatos (MDI). MDI is used in spray foam insulation, but it also causes adverse human health effects, and, in particular, exacerbates asthma. Foam products with MDI were identified as potential priority products in 2014. The Department undertook its analysis and issued three documents in 2017 and 2018, including a technical analysis, economic impact statement, and notice of exemption under CEQA. The notice of exemption, which was never filed or posted with OPR or any other relevant governmental agency, was based on the Department's finding that there was no possibility that the listing was going to result in a significant environmental effect – i.e., CEQA's commonsense exemption.

The Department then listed spray foam products with MDI as priority products in March 2018. The petitioner in the case pursued the informal dispute resolution process to have the listing withdrawn, which was denied in December 2018. The petitioner then filed its formal administrative appeal, which was denied in February 2019.

The petitioner then filed suit in August of 2019 to set aside the listing. It included writ claims under the Green Chemistry Law and Administrative Procedure Act as well as CEQA. With respect to the CEQA claim, the petition was filed more than 180 days after the Office of Administrative Law's endorsement, approval and filing of the regulatory package sent to it by the Department, and the Department therefore argued that this claim was untimely. The trial court rejected the Department's demurrer on this point, as well as its renewed statute of limitations argument at the merits hearing. It ruled against the petitioner on the substantive claims, but in its favor on the CEQA claim, holding that it was not time-barred and that the challenged listing was not exempt. Petitioner appealed, and the Department cross-appealed.

The Court of Appeal's Opinion

The focus of the Court's analysis on the CEQA claim was the statute of limitations. Thus, the case does not delve into the substantive question as to whether the MDI listing was properly subject to the commonsense exemption.

As an initial matter, since the Department's notice of exemption was never sent to the state Office of Planning and Research or otherwise filed, it did not trigger the short 35-day statute of limitations under Public Resources Code § 21167(d) and CEQA Guidelines § 15062(d), and the appropriate limitations period was therefore CEQA's maximum one: 180 days after the agency's decision to approve the project.

The relevant sequence of events relating to the running of the statutory period was the issuance of the notice of exemption in February 2018, followed by the filing of the regulatory package by the Office of Administrative Law on April 26, 2018, and the Department's issuance of an alert stating that MDI foam systems would be listed as priority products on May 1, 2018, with an effective date of July 1, 2018. In response to this sequence, the petitioner started the informal resolution process on May 30, 2018, followed by a formal appeal, all of which was not finally resolved until February 25, 2019. The petitioner then filed suit on August 9, 2019, more than 180 days after the filing of the regulatory package.

The key question in the case was thus whether the administrative remedies in the Green Chemistry Law had to be exhausted prior to filing suit under CEQA, in which case the petitioner's pursuit of those remedies would postpone the accrual of the 180-day statutory period. The Court of Appeal phrased the issue thus:

> [T]he case law shows full exhaustion of an agency's administrative appeals process is only required in a CEQA case when the agency has crafted administrative proceedings that include CEQA issues within their scope. If no such decision has been made, CEQA's core exhaustion requirements control and there is no obligation to administratively appeal an adverse determination. For this reason, the deadline for filing a CEQA action in this case turns on whether the administrative remedies covered by the Green Chemistry law regulations include review of CEQA issues or whether the standard CEQA exhaustion requirements are all that are needed to exhaust administrative remedies.

While the trial court found that the Green Chemistry Law procedures did in effect encompass CEQA, and thus that the CEQA claim was timely, the Court of Appeal disagreed and reversed. It reviewed the dispute resolution procedures under the Safer Consumer Products regulations and noted that CEQA issues were not included within the scope of those provisions. Rather, they focused on the merits of the listing and prioritization decisions and the resolution of disputes under the Green Chemistry Law, not environmental review under CEQA. Thus, the Court concluded, "Taken together, the court finds no basis to conclude that the regulations are intended to or do include provisions for resolving disputes arising under CEQA. Rather, the regulations provide a dispute resolution process for only a limited set of issues that can arise under the broader regulatory scheme, specifically those issues that are most likely to directly impact responsible entities."

Similarly, the Court ruled that the statute of limitations accrued *no later than* the date the MDI regulatory packet was approved and filed by the Office of Administrative Law. The further administrative proceedings to deal with the petitioner's appeal did not re-commence the statutory period to file a CEQA challenge. (Citing *Citizens for a Green San Mateo v. San Mateo County Community College Dist.* (2014) 226 Cal.App.4th 1572, 1594.) Thus, a lawsuit filed on August 9, 2019 could not be timely with respect to lead agency approval action deemed taken not later than April 26, 2018.

Conclusion and Implications

CEQA review never takes place in a legal vacuum. By definition, it always accompanies other discretionary legal action by a public agency, which is almost always subject to its own procedural standards. As this case makes clear, discerning which of those procedures must be followed to exhaust administrative remedies – a jurisdictional prerequisite to filing a CEQA action – is not always obvious to practitioners. Indeed, the trial judge and the Court of Appeal disagreed here on whether the dispute resolution and administrative appeal procedures provided in the Green Chemistry Law afforded a forum for CEQA claims. There is potentially a trap for the practitioner between waiting to file suit until fully exhausting administrative review procedures that turn out to be unnecessary to ripen the CEQA claim and thus do not put off the running of the short statute of limitations, as in this case, and failing to follow those administrative remedies that do need to be exhausted in order to make a CEQA claim ripe for review. While a CEQA practitioner might opt to take what he or she considers the more "conservative" approach of exhausting all possible remedies before filing suit, this case reveals the potential danger lurking in an uncritical embrace of that strategy. This case thus bears careful review by litigators asserting or confronting a CEQA claim in the context of other administrative procedural review and appeal procedures.

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