CLARK HILL | Morris Polich & Purdy

Contact:
Christopher G. Foster
Of Counsel
213.417.5130
cfoster@clarkhill.com

Court Allows Direct Action under California Environmental Quality Act against Local Air Quality Management District

Since 1972, the County of Mendocino (County) had granted land use approvals for aggregate and asphalt production on the site at issue. In 2009, the County updated its General Plan, changing the land use designation of the site from Rangeland to Industrial. In connection with amending its General Plan, the County proceeded under the California Environmental Quality Act (CEQA) and prepared an Environmental Impact Report (EIR). The following year, the County, consistent with its updated General Plan, rezoned 61 parcels, including the site at issue, to conform to the updated use designations. In doing so, the County relied on its previously certified EIR. There was no judicial challenge to either the General Plan update or the rezoning.

The site at issue was acquired by Grist Creek Aggregaters, LLC (Grist Creek) who applied to the County for approval of its proposed continuation and resumption of aggregate and asphalt production at the site. The County's staff report stated that there had been little asphalt production, primarily due to market conditions. Grist Creek opted to proceed at that time only with an aggregate and concrete operation.

In March 2015, the County planning department declared that asphalt production at the site was neither a new or changed industrial use at the site. Having obtained approval for asphalt production from the County, Grist Creek applied to the Mendocino County Air Quality Management District (District) for an Authority to Construct, a necessary permit for such activity. Citing two previous site owners' uses for aggregate processing, a hot mix asphalt plant and concrete batch plant, and its conclusion that the proposed asphalt facility was part of a project for which another public agency had already acted as the lead agency in compliance with CEQA, the District determined no further environmental review was required and in June 2015 issued an Authority to Construct. A month after the District's approval of the Authority to Construct, Friends of Outlet Creek (Friends) filed an administrative appeal to the District's hearing board. The hearing board denied Friends' appeal in early September in a written decision, setting forth its findings and the evidence supporting them.

Friends then sought a writ of mandate against the District. The trial court upheld the District's demurrer on the ground that Friends could not sue the District directly under CEQA, but instead could only sue it under Health & Safety Code Section 40864, regarding judicial review of a hearing board decision.

In *Friends of Outlet Creek v. Mendocino Air Quality Management District,* 11 Cal.App.5th 1235 (2017), the court of appeal reversed the trial court's grant of a demurrer. The court of appeal cited numerous cases in which a local air district had been sued under CEQA in ordinary mandamus actions challenging adopted rules and regulations and in other actions challenging individual permit decisions, such as the Authority to Construct. The court of appeal, however, emphasized that a CEQA action against the District was limited in nature and scope, due to the District's limited role in approval of the asphalt project. Friends, therefore, could not obtain relief, if any, beyond setting aside the Authority to Construct, could not seek an injunction or declaration against use of the site for aggregate and asphalt production, and could not challenge any of the County's prior approvals of the adequacy of its prior related CEQA reviews.

The case thus reinforces the proposition that while a local air district is subject to a direct action under CEQA, the relief available to a party suing the agency will be limited to invalidating the particular entitlement granted by that agency.