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LAND USE & NATURAL RESOURCES

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NINTH CIRCUIT ALLOWS PROJECT APPLICANTS TO DEFEND THEIR PROJECTS AGAINST NEPA LAWSUITS

At long last, the Ninth Circuit has recognized that project applicants and others who have an interest in federal actions subject to a NEPA challenge may fully participate in the NEPA litigation. In *Wilderness Society v. US Forest Service (Magic Valley Trail Machine Association as intervenor)* an *en banc* decision handed down on January 14, 2011, the Ninth Circuit finally rectified what many had considered to be a grave anomaly in the basic notions of due process protection for project applicants whose federal approvals come under attack for alleged NEPA violations.

Historically, the Ninth Circuit had held that only the approving federal agency was a proper defendant in the action. So not only was the plaintiff freed from any obligation to name the project applicant as a defendant, but if the project applicant sought to intervene in the action to protect its valuable approvals, the court doors were closed to the applicant. In California, this rule stood in stark contrast to CEQA litigation in state courts, in which the petitioners are legally obligated to name as real parties "any recipient of an approval that is the subject of an action." (Pub Res Code section 21167.6.5(a)). Indeed, a failure to timely name and serve a project applicant can lead to dismissal of a CEQA suit for failing to name indispensable parties in California state courts.

The Ninth Circuit's new ruling means that when project applicants seek to intervene as defendants, "courts need no longer apply a categorical prohibition on intervention on the merits, or liability phase, of NEPA actions." Under the new ruling, "to determine whether a putative intervenor demonstrates the 'significantly protectable' interest necessary for intervention of right in a NEPA action, the operative inquiry should be, as in all cases, whether 'the interest is protectable under some law,' and whether "there is a relationship between the legally protected interest and the claims at issue."

As the Ninth Circuit stated, an intervenor "will generally demonstrate a sufficient interest for intervention of right in a NEPA action, as in all cases, if it will suffer a practical impairment of its interests as a result of the pending litigation."

This is a welcome change for any project applicant who has been forced to stand on the sidelines and watch as a federal approval is set aside by a court. This new standard will also benefit the judiciary because project applicants who have an economic stake in the case before the court will often be able to contribute substantively to the quality of the legal analysis and advocacy before the court.

If you have any questions regarding this alert, please contact:

Andrew B. Sabey at 415.262.5103 or asabey@coxcastle.com
Michael H. Zischke at 415.262.5109 or mzischke@coxcastle.com
Kenneth B. Bley at 310.284.2231 or kbley@coxcastle.com
Scott B. Birkey at 415.262.5162 or sbirkey@coxcastle.com