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EXPERTADVICE BY JOHN D. DARLING AND JENNIFER TUNG | SEPTEMBER 20, 2017

Send a Raven: More CEQA Litigation is Coming

The California Environmental Quality Act sometimes conflicts with federal law. And sometimes not.

Earlier this summer, the California Supreme Court issued a nearly 70-page opinion upholding the state's cornerstone environmental law, the California Environmental Quality Act ("CEQA," Cal. Pub. Res. Code §§ 21000, *et seq.*), and reinforcing the law's influence over our state's political, environmental, and legal landscape. See *Friends of the Eel River v. North Coast Railroad Authority*, 3 Cal.5th 677 (2017).

The court concluded that the federal Interstate Commerce Commission Termination Act of 1995 ("ICCTA" 49 U.S.C. §§10101, *et seq.*) does not categorically preempt CEQA, particularly when it comes to publically-owned railroad projects. See *Friends of the Eel River*, 3 Cal.5th at 740.

DIRECT IMPLICATIONS

The California Supreme Court recognized that the Surface Transportation Board ("STB") has "exclusive jurisdiction over transportation by rail carrier," acknowledging that "[the STB's] remedies are exclusive and expressly preempt state remedies 'with respect to regulation of rail transportation.'" *Friends of Eel River*, 3 Cal.5th at 711.

Even so, the court found that requiring a publically-owned rail project to comply with CEQA does not necessarily run afoul of the ICCTA. First, "the ICCTA does not broadly preempt all historic state police powers over health and safety or land use matters, to the extent state and local regulation and remedies with respect to these issues do not discriminate against rail transportation, do not purport to govern rail transportation directly, and do not prove unreasonably burdensome to rail transportation." 3 Cal.5th at 720. Second, in requiring

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a state-owned project to comply with CEQA, the state was not regulating a rail project—which would be prohibited—but, rather, was engaging in an act of self-governance. 3 Cal.5th at 723.

As such, the *Eel River* decision has direct implications for California's bullet train project, which will eventually link San Francisco to San Diego with over 800 miles of rail.

FEDERAL LITIGATION

Importantly, approximately two weeks after the *Eel River* case was decided, the Ninth Circuit declined to rule on the merits in a separate matter (*Kings County v. STB*, No. 15-71780 (9th Cir. 2017)), on the grounds that it lacked jurisdiction. The Ninth Circuit reasoned that a 2014 decision by the STB that the ICCTA categorically preempted CEQA with respect to the Fresno-Bakersfield segment of California's High Speed Rail line was "purely advisory" and, therefore, not binding.

LOOKING AHEAD

Since the Ninth Circuit declined to rule on the merits in *Kings County*, it is unlikely that the United States Supreme Court will review the *Eel River* decision. However, this does not mean the turf war between the ICCTA and CEQA is over. By offering a detailed, nuanced decision based in the specific facts of the case--rather than a bright-line test as to CEQA applicability--the *Eel River* ruling will likely lead to increased litigation (including more suits involving California's High Speed Rail) as stakeholders try to clarify the limits of the state supreme court's holding.

Additionally, future CEQA litigation may eventually attract interest from the United State Supreme Court, as happened with yet another case addressing whether federal law preempted California law. See *People v. Rinehart*, 1 Cal.5th 652 (2016) (involving question of whether the federal Mining Law of 1872, codified at 30 U.S.C. §§22, *et seq*. preempted California's moratorium on suction dredge mining, which is based on authority stemming from the state Fish & Game Code).

This past May, the nation's high court invited the Trump Administration to chime in on whether it should review the California Supreme Court's ruling that the federal statute did not preempt California's ban on suction dredging—a controversial mining technique used to extract precious metals (often gold) from rivers—on federal land. See 137 S.Ct. 2149 (2017).

(Fun fact: the United States Department of Justice, under the Obama Administration, filed an amicus curiae brief in state court contending that California's ban was not preempted).

In the end, the *Eel River* ruling all but guarantees increased CEQA litigation at the state court level. Moreover, the United States Supreme Court's request for the Acting Solicitor General's views in *Rinehart* indicates that it, too, may be open to reviewing CEQA's role in California, should the issue eventually make its way to our nation's highest court. Accordingly, while a showdown at the United States Supreme Court between CEQA and the ICCTA may have been averted for now, do not expect this uneasy truce to last.

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