CA SUPREME COURT FINDS CEQA APPLICABLE TO PUBLICALLY OWNED RAIL PROJECTS

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On July 27, 2017, the California Supreme Court issued a nearly 70-page opinion in a hotly watched lawsuit involving the state's cornerstone environmental law, the California Environmental Quality Act (CEQA). In *Friends of the Eel River v. North Coast Railroad Authority, et al.* (Case No. S222472), the California Supreme Court concluded that the federal Interstate Commerce Commission Termination Act of 1995 (ICCTA) does not categorically trump CEQA, particularly when it comes to publically owned railroad projects.[1] This decision has direct implications for California's bullet train project, which will eventually link San Francisco to San Diego with more than 800 miles of rail.

In *Friends of the Eel River*, the North Coast Railroad Authority (NCRA), a state agency, planned to rehabilitate and resume service on a portion of a rail line it owned in Northern California. The NCRA contracted with the Northwestern Pacific Railroad Company (NWPCo), a private corporation, to operate the railway.

Between 2001 and 2006, the NCRA voluntarily committed to CEQA compliance. In 2011, however, two citizen groups sued the NCRA for allegedly failing to comply. They sought to halt the project, pending full CEQA compliance.

In its decision, the California Supreme Court recognized that the Surface Transportation Board (STB), through the ICCTA, "has exclusive jurisdiction over transportation by rail carrier" and that "[the STB's] remedies are exclusive and expressly preempt state remedies 'with respect to regulation of rail transportation.'" Specifically, California cannot require a private rail carrier to comply with CEQA as a precondition to operating a rail line. This, the Court acknowledged, would constitute impermissible state regulation of rail transportation.

Even so, the California Supreme 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."

Second, in requiring 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. Importantly, the Court acknowledged that its ruling would likely impact NWPCo's operations of the railway; however, it concluded that such an impact "is merely derivative of the state's efforts at self-governance…"

As a result of its findings, the California Supreme Court reversed the Court of Appeal's decision that CEQA was categorically preempted by the ICCTA, and sent the matter back to the lower court for further proceedings consistent with its ruling.

In providing a detailed, nuanced decision based in the specific facts of the case, rather than issuing a bright-line test as to CEQA applicability, *Friends of the Eel River* will likely lead to increased litigation (including more suits involving California's High Speed Rail) as stakeholders try to clarify the limits of this decision and test its boundaries. For example, while the California Supreme Court has now held that the ICCTA does not categorically preempt CEQA, important questions remain: when does a state's exercise of its police powers become "unreasonably burdensome" to rail transportation? At what point does a "merely derivative" impact upon a private company contracted to run a publically owned rail project become the kind of direct regulation by the state that is prohibited by the ICCTA[2]? Only time (and further litigation) will tell.

This ruling, however, does not necessarily mean that progress on California's rail projects will be stalled or prohibited, pending the outcome of the litigation: notably, the Court declined to issue an injunction stopping progress on, or operation of, the NCRA's rail line while the Court of Appeal revisits the case. As such, CEQA litigation may not be the silver bullet to prevent progress on California's railways.

In the end, *Friends of the Eel River* likely raises more questions than it answers, and both property owners and rail operators should stay abreast of how future courts apply this landmark ruling. ■

[1] On August 2, 2017, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") concluded that it lacked jurisdiction to rule on the merits of a 2014 STB decision, which found that the ICCTA categorically preempted CEQA with respect to the Fresno-Bakersfield segment of California's High Speed Rail line. The Ninth Circuit reasoned that the 2014 STB decision was "purely advisory" and, therefore, not binding. This means that the California Supreme Court's decision in *Friends of the Eel River* remains the law of the land in California with respect to the ICCTA and CEQA. In other words, winter is not coming for CEQA (at least for now).

[2] Given that many rail projects are public-private partnerships, this is likely to become an increasingly thorny issue.

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