

## The California Supreme Court's Unprecedented Focus on Environmental Law | 1



The California Supreme Court, perhaps the most influential state supreme court in the nation, has of late become unusually and intensely focused on environmental law. More than ever before in its history, the California Supreme Court currently has before it a large docket of environmental cases that, individually and collectively, promise to alter the legal landscape of state environmental law.

Legal Planet colleague [Sean Hecht recently wrote](#) about the Supreme Court's acceptance of an important environmental enforcement case, *People v. Rinehart*, in which a miner criminally charged with violating California's current ban on suction dredge mining in state waterways is claiming that the state law is preempted by the federal Mining Law of 1872. But the *Rinehart* case is just the latest addition to the Supreme Court's already crowded environmental docket.

Los Angeles Daily Journal environmental reporter Fiona Smith first broke the story late last year that the California Supreme Court is poised to decide an unprecedented number of cases arising under California's single most important and heavily-litigated environmental statute, the California Environmental Quality Act ("CEQA"). Over CEQA's 45-year history, the Supreme Court justices have decided a number of important CEQA cases, but rarely had more than one or two CEQA cases been on the Court's docket at any one time. Currently, however, the Supreme Court has *nine* different CEQA cases pending before it—three times more than ever before. The Court's crowded current CEQA caseload raises some critically important issues, including the following:

- Whether CEQA's extensive set of statutory and regulatory exemptions should be narrowly or broadly interpreted by the courts (*Berkeley Hillside Preservation v. City of Berkeley*);
- Whether an environmental impact report prepared under CEQA must include an analysis of the potential effects of climate change (e.g., sea level rise) on a proposed project or, alternatively, if CEQA analysis is properly limited to the effect of the project upon the environment (*California Building Industry Assn. v. Bay Area Air Quality Management Dist.*); and
- Whether CEQA's application to proposed new or revised railroad projects in California is preempted by federal law—specifically, the Surface Transportation Act (*Friends of the Eel River v. North Coast Railroad Authority*).

But the California Supreme Court's current, extensive focus on CEQA is only part of the story. Also pending before the California justices are a number of *non*-CEQA environmental cases—many of them with similarly broad, potential consequences. Among the most important (along with the above-described *Rinehart* case) are:

- The California building industry's multifaceted, constitutional challenge to the City of San Jose's inclusionary housing ordinance, which is designed to preserve low and moderate housing opportunities in one of the nation's most expensive real estate markets (*California Building Assn. v. City of San Jose*); and
- A property rights challenge to the State of California's efforts to undertake geologic and environmental testing on privately-owned lands in the path of California's proposed, controversial Bay Delta Conservation Plan (a.k.a. "twin tunnels project"), which is designed to divert water around the Sacramento-San Joaquin Delta to thirsty urban and agricultural users south of the Delta (*Property Reserve v. Superior Court*).

All told, the California Supreme Court currently has before it **20** different environmental cases. I've been closely following the Supreme Court—and especially its environmental jurisprudence—for nearly 40 years. My research reveals that the Court has never before had anywhere near as many environmental cases before it at one time as it does now.

This trend is even more remarkable when one considers the California Supreme Court's limited bandwidth when it comes to civil litigation in general. That's because of the Court's crushing criminal law caseload, which include automatic appeals to the justices from all criminal convictions in California in which the death penalty is imposed. As a result, at any given time, fully two-thirds to three-quarters of the Supreme Court's overall docket consists of criminal appeals.

In short, it can be persuasively argued that environmental cases currently dominate the Supreme Court's civil caseload-again, for the first time in the Court's history.

These developments raise two important questions.

First, how are the justices likely to rule in this unprecedented number of pending environmental cases? Over the past 45 years-encompassing the modern environmental era-the California Supreme Court has for the most part proven to be a moderate, middle-of-the-road institution when it comes to most legal issues. But it's been relatively progressive in environmental cases in recent years-especially when it comes to CEQA.

That's unlikely to change anytime soon. To the contrary, recent changes in the Court's membership suggest that the justices as a group are likely to steer an even more liberal course than it has in the past. And that's likely true with respect to the Court's burgeoning environmental docket as well.

The reason is that Democratic Governor Jerry Brown has recently made three appointments to the seven-member Supreme Court: former law professors Goodwin Liu and Mariano-Florentino Cuellar (from Berkeley Law and Stanford Law School, respectively) and former U.S. Department of Justice senior official and advocate Leondra Kruger. (Governor Brown's successive appointment to the Supreme Court of three indisputably bright and talented individuals with no previous judicial experience has produced considerable grumbling from many of the state's sitting lower court judges, but that's another story.) While none of the new appointees have come to the Supreme Court with any discernible environmental record or philosophy, my sense is that all three are likely to be somewhat more progressive on environmental issues than the moderate justices they replaced.

The second, key question is: what's the reason for the Court's sudden love affair with environmental law? My only response is that your guess is as good as mine.

The one thing about which I'm certain is that the California Supreme Court's environmental decision-making in the near future promises to be both prodigious and consequential. It will be a judicial show well worth watching.