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On ENVIRONMENTAL LAW

Reform is in the air. Every major environmental statute was written before our newest bar members were born, and most were enacted several decades ago. And as they approach middle age, there is widespread agreement that our environmental statutes need to slim down, focus on the essentials, and maybe undergo a little nip and tuck.

But that is where the consensus ends, as shown by efforts to reform the two groundbreaking laws that have spurred the bulk of California environmental litigation: the 1970 California Environmental Quality Act (CEQA) and the 1986 Safe Drinking Water and Toxic Enforcement Act (Proposition 65). One person's "reform" is another's effort to undermine or expand the law.

CEQA requires any project requiring state or local government approval to undergo a review of its environmental impacts, including alternatives and mitigation. Almost anyone with a filing fee can delay the project by seeking court review of its environmental impacts. Proposition 65 allows anyone to sue any business by alleging that it exposes Californians, without a "clear and reasonable" warning, to any of over 800 chemicals, and the "bountyhunter" keeps 25% of the penalties. Litigation under both laws is made more attractive by the availability of attorneys fees for successful claimants. Code of Civil Procedure § 1021.5.

The business community has strongly criticized both laws because they enable claimants to achieve some of their goals simply by suing. Projects are delayed, publicity highlights claimed environmental or health effects, and the targeted businesses frequently settle. (Of more than 25,000 claims, only a handful of Proposition 65 cases have been tried.) CEQA has been used by both unions and competitors to block projects that affect their economic interests, rather than harming the environment. And Proposition 65 has been used to target small businesses that cannot afford to defend themselves.

It is not intuitive that business-minded reform would be on the agenda when all statewide elected officials and two-thirds of state legislators are Democrats. But moderate, pro-business Democrats hold the balance of power on many issues. And Governor Brown has been critical of both laws, owing in part to the CEQA challenges he encountered as Mayor of Oakland and to his lack of success in reining in Proposition 65 plaintiffs as Attorney General.

There are entrenched, powerful interests behind both statutes. Traditional environmental activists have strong allies with labor unions on CEQA and with the plaintiff's bar on Proposition 65 — a formidable political force. Indeed, this summer, when a U.S. Senate committee was considering a bill to reform the Toxic Substances Control Act, a federal law also widely considered in need of reform, this coalition prompted top state officials to oppose the reform on grounds it might preempt Proposition 65 and California's nascent Green Chemistry initiative.

Change is also unsettling for regulated businesses. Many businesses have made their peace with Proposition 65, simply posting general warnings or reformulating their products. But the state agency implementing the law has begun a process to revise the 25-year-old standard warnings, which could require changes by almost everyone offering goods or services in California. And under CEQA, experienced developers budget the time and resources necessary to withstand the law's challenges, enjoying less competition from developers who are not as well-heeled or as familiar with California.

But both laws may actually be operating contrary to their purposes. Most notably, CEQA discourages urban infill development that can reduce commuting, greenhouse gas emissions, and pressure to develop open space outside of urbanized areas. And safety advocates are concerned that the ubiquity of Proposition 65 warnings leads the public to ignore them. Fundamentally, in a trying economy, both laws give California a bad name in the national and international business community.

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On both CEQA and Proposition 65, there have been lengthy discussions in Sacramento involving trade associations, advocacy groups, administration officials, and legislative staff. Efforts on Proposition 65 were scuttled before the close of the legislative session in September, but may be revived next year. Furthermore, Assemblyman Mike Gatto achieved a relatively modest reform with AB 227, which limits penalties for one-time failures to post warning signs by operators of restaurants, bars, and parking garages. More comprehensive reform of Proposition 65, however, faces the special hurdle of requiring a two-thirds vote of both chambers.

And on CEQA, the most recent official analysis of the reform legislation (Senator Darrell Steinberg's SB 731) notes, "The author continues to meet and negotiate with numerous...interests to address concerns." Senator Steinberg is seeking what he calls "the elusive middle ground" and has nicknamed his bill "The How to Make No Friends Act." In the last days of the session, however, he did succeed in enacting several minor corrections and quick fixes in a separate, non-controversial bill (SB 743).

Some goals of reformers may be achievable outside of legislation through regulatory action, and discussions are sure to continue into 2014. Although prospects are dim for significantly reducing litigation, changes in these statutes will undoubtedly affect what we do as environmental litigators. And the overall climate of reform affects how judges view our arguments and our clients.

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