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CEQA Fireworks

Law360, New York (September 08, 2011) -- The California Environmental Quality Act (CEQA) generally requires the execution of an often onerous environmental impact study, with associated comments, objections and litigation, before a public agency carries out or approves a "project," meaning an "activity which may cause direct" or "reasonably foreseeable indirect physical change in the environment."

Given the pervasive requirements for government permits, licenses and certificates, for everything from marriage to little league field use, CEQA would be suffocating without a broadly applicable exception that imports a rule of reason into the law's application. One such exception under CEQA excludes "ministerial," as opposed to "discretionary," approvals from regulation.

However, the recently appealed trial court decision in Coastal Envtl. Rights Found. Inc. v. City of San Diego, No. 37-2010-00095062, (San Diego Sup. Ct. May 27, 2011) interprets discretionary approval so broadly as to practically eliminate the ministerial exception. In addition to being legally incorrect, the decision violates an implicit precept that keeps the peace between the environmental regulatory community on the one hand and the general public on the other: the strictures of the "rule of reason."

By "environmental regulatory community," we mean those who impose through state power environmental concepts on others. They might include agency officials, "bounty hunters" under various environmental statutes, environmental litigants, or even the courts deciding environmental cases. The general public, by contrast, are those not ordinarily subjected to the environmental regulatory community. The rule of reason, while rarely referred to expressly in case law, is a useful concept in assessing the viability of environmental rules and can be thought of as follows: Whatever it may do to itself, the environmental regulatory community cannot inflict silly environmental rules on the general public.

While any area of law has the capacity to spawn unreasonable uses, environmental laws are more susceptible than most. They are by design broad in scope and potential applicability. Theoretically anyone can be liable for the emission of a hazardous air pollutant or hazardous substance. Yet the only humans who do not, in the normal course of biological functioning, give off the hazardous substance urea or the new hazardous air pollutant carbon dioxide, are the deceased. Turning to the exogenous, up until the Superfund Amendments and Reauthorization Act amendments to the Comprehensive Environmental Response, Compensation and Liability Act, every household that disposed of AA or 9-volt nickel cadmium battery was theoretically a "potentially responsible party."

While the concept of needing a Title V permit to exhale carbon dioxide is not a serious one, there have been times when the environmental regulatory community sought to press onerous environmental rules on the general public. Pre-reform Proposition 65 and absolute hazardous substance removal provisions are two that come to mind. In the first years of the new millennium, California small businesses experienced a hailstorm of special notice letters and complaints alleging their failure to warn their patrons of exposure to substances "known to the State of California to cause cancer and birth defects or other reproductive harm." Like French fries (acrylamide) and organic apples (caffeic acid).

An exchange between a Prop 65 plaintiff and the Fourth District California Court of Appeal encapsulated the essence of the dilemma: The plaintiff proudly proclaimed that he was a "bounty hunter" and that "[t]he statute was created for me." Consumer Defense Group v. Rental Hous. Indus. Members, 137 Cal. App. 4th 1185, 1189 n.1 (2006).

The court of appeal disagreed, responding, "Proposition 65 was created to protect the people." Id. at 1206. The "people['s]" outcry brought not only significant restrictions and merit checks on Prop 65 citizen suits, but even attorney general action against the more visible citizen suit antagonists. Conceptually similar in substance and result was the contention that the relatively ubiquitous hazardous substance removal provisions in commercial leases required absolute removal of any hazardous substance regardless of rational need for removal.

This environmental concept, which could have had a significant impact on lessees throughout California, failed for the obvious reason that digging up all hazardous substances (such as silver) in the name of environmental remediation is irrational:

"It would be ludicrous to hold that, say, a buried bag of silver coins constituted a "hazardous substance." Obviously, a rule of reason must be used in explicating what is hazardous." SDC/Pullman v. Tolo Inc., 60 Cal. App. 4th 37, 47 (1997). The court concluded, "If federal courts have insisted on reading a federal law without any reference to reason or common sense, that is their business." Id. at 50.

So it is surprising then to find one of California's courts, particularly one sitting in the jurisdiction that headquarters the United States Pacific Fleet, holding that Californians cannot have a fireworks show on the Fourth of July unless they first undertake a potentially costly and arduous environmental review under CEQA. For, if the power to tax is the power to destroy an activity, then certainly the power to CEQA is at least the power to seriously stymie it. Extreme as the holding of the trial court in Coastal Environmental Rights Foundation Inc. v. City of San Diego may seem in and of itself, the implications are many times more so, particularly when applied to private actors not otherwise compelled to endure the environmental regulatory community.

Under its holding, CEQA now applies to the thousands of park-use permits issued by the city of San Diego each year. Coastal Envtl. Rights Found. Inc. v. City of San Diego, No. 37-2010-00095062, (San Diego Sup. Ct. May 27, 2011) (tentative ruling confirmed at hearing). Environmental review under CEQA only applies to "discretionary" actions taken by state or local agencies and not "ministerial" actions. The Coastal Environmental Rights Foundation decision greatly expanded the definition of a discretionary action, holding that the city's park-use permitting system is discretionary because the city retains authority, limited as it may be, to deny the issuance of such permits. Id. at 2.

Using that test, practically anything that requires a permit must satisfy CEQA. Parades, neighborhood barbecues and childhood birthday parties at public parks could require analysis of potential impact on historical resources, endangered species and cumulative worldwide greenhouse gas impact. See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172 (9th Cir. 2008) (holding that the NHTSA must assess the incremental impact its operations will have on global warming).

And pity those would-be permittees with Scrooge-like neighbors disapproving of family gatherings or celebrating birthdays outdoors. For CEQA is a notorious vehicle for environmental challenges borne of non-environmental motives. See, e.g., Mann v. Cmty. Redevelopment Agency, 233 Cal. App. 3d 1143 (1991) (case involving disgruntled developer seeking to set aside a rival developer's proposed project under CEQA).

As is evidenced by the facially absurd era of CEQA that it would usher in, the Coastal Environmental Rights Foundation case is wrongly decided and will likely be corrected when it comes before the California Court of Appeal. That the city of San Diego can, under very limited circumstances, deny the issuance of park-use permits does not render the city's permitting system "discretionary" under CEQA.

If any permitting system allowing for denial is considered "discretionary", the governing state or city agency would be left with two choices: (1) the unrealistic and hugely expensive choice of reviewing each and every permit for CEQA compliance, or (2) the even more ridiculous choice of scrapping permitting systems altogether and letting park-goers fend for themselves.

Barring legal correction, the decision is unlikely to stand. This is so because it violates the rule of reason. It is cut from the same cloth as the pre-reform Prop 65 and absolute removal concepts in that it has the capacity to offensively burden the general public with puerile compliance. History teaches that such crossover environmental concepts are singled out for scrutiny. As a case in point, the United States Supreme Court recently granted cert in Sackett v. EPA. There, the U.S. Environmental Protection Agency issued what it maintained was a non-reviewable administrative order barring a couple of modest means from building their retirement home on pain of a $30,000-per-day penalty. Sackett v. EPA, 622 F.3d 1139 (9th Cir. 2010), cert. granted, --- S. Ct. ----, No. 10-1062, 2011 (June 28, 2011).

The Supreme Court did so despite having recently denied what could be considered a conceptually identical petition for review by an industrial petitioner. Gen. Elec. Co. v. Jackson, 610 F.3d 110 (D.C. Cir. 2010), cert. denied, --- S. Ct. ----, No. 10-871, 2011 (June 6, 2011).

That the San Diego Superior Court allowed this year's fireworks show to proceed by staying its decision for 90 days is encouraging, but the court reiterated the city's obligation to comply with CEQA "in connection with the City's issuance of Park Use Permits." Coastal Envtl. Rights Found. Inc. v. City of San Diego, No. 37-2010-00095062, (San Diego Sup. Ct. June 3, 2011) (order granting temporary stay). When this case is heard by the California Court of Appeal, whether explicitly acknowledged or not, in the background will be the rule of reason.

The Coastal Environmental Rights Foundation decision should fall, at least in part because the environmental regulatory community has no business telling Californians they cannot gather on taxpayer parks without an environmental impact study. If not, for fear of being "CEQAed," you may have to celebrate your kid's birthday at Chuck E. Cheese's instead.

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