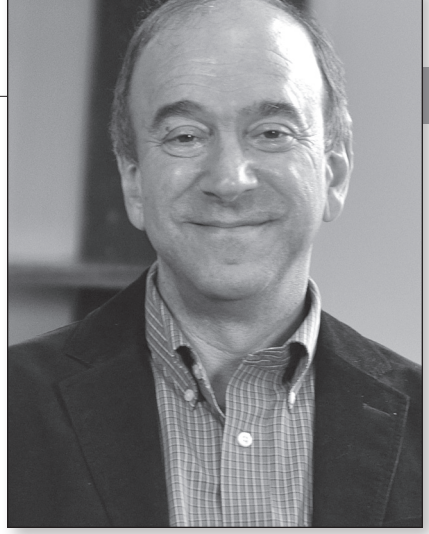

By Richard Lazarus

California Dreamin': Court Is the Leader

While the environmental law docket of the U.S. Supreme Court has been relatively quiet this year, the same cannot be said of the California Supreme Court. As chronicled best by U.C. Davis law school Professor Rick Frank, whose expertise in California environmental law is legendary, the state's high court currently has 21 environmental cases on its docket. The sheer number and breadth of the issues covered by those cases says a lot about environmental law's evolution and serves as a ready reminder of California's long-standing preeminence at environmental law's cutting edge.

Frank's list includes 10 cases arising under the California Environmental Quality Act. The most recent addition is *Cleveland National Forest v. San Diego Assn of Governments*, concerning the relationship of CEQA to California's Sustainable Communities and Climate Protection Act of 2008. CEQA is California's version of the federal National Environmental Policy Act, but, unlike NEPA, has substantive teeth.

NEPA requires federal agency consideration of the environmental impacts of any major federal action significantly affecting the quality of the human environment. However, NEPA, as the U.S. Supreme Court has stressed, is "essentially procedural" and does not itself require an agency to avoid those impacts. The same is not true under California's CEQA, and a state agency can approve a project lacking the necessary environmental mitigation only upon also detailing in writing the substantive justifications for doing so.

Much federal NEPA regulation, moreover, can be traced to CEQA, especially from those years in the Carter administration when the President's Council on Environmental Quality was dominated by Californians, such as Nicholas Yost, who championed the drafting of the first NEPA regulations. If past is at all prologue, the California court's CEQA rulings may find later expression in federal NEPA law.

The 10 CEQA cases just top the list. The California court's environmental docket includes, among others, a private property rights challenge to water conservation diversion plans (*Property Reserve v. Superior Court*), an industry lawsuit against inclusionary zoning (*California Building Assn v. City of San Jose*), and a claim that federal mining law preempts a state criminal prosecution for violating state mining law (*People v. Rinehart*).

Nor is the stunning number of cases on the docket a mere expression of the number of environmental law cases being litigated in that state's lower courts. The California Supreme Court, like the U.S. Supreme Court, enjoys discretionary jurisdiction. The state justices therefore get to pick and choose which of many cases are sufficiently important to warrant their plenary review. And, never before has that court applied that standard and decided to hear so many environmental cases.

No other state court has been as influential — a true pioneer in many areas of law

The California court's environmental docket's significance is three-fold. First, it confirms the extent to which the action in environmental law is increasingly occurring at the state rather than federal level. To most practitioners of environmental law, this is hardly headline news. But to law students, law professors, and those used to thinking about environmental law exclusively through the lens of Congress, EPA, and Interior, the California Supreme Court's docket makes clear that it is state and not federal environmental law where the rubber meets the road.

To be sure, in many instances, federal environmental law triggered the emergence of that state law in the first instance. But with the demise of significant congressional environmental lawmaking for more than two decades, state environmental law is frequently where the most exciting lawmaking innovations are occurring and where litigation naturally follows.

Second, California is not just any state for environmental law. No other state has served as such an important incubator of environmental lawmaking for the entire nation. Much of federal environmental law, including the Clean Air Act and the Resource Conservation and Recovery Act, finds its origins in California, as do the laws of many other states. Both President Obama's hugely important greenhouse gas emissions standards for new motor vehicles and his Clean Power Plan for regulation of existing power plants find inspiration and substance in California's innovative Global Warming Solutions Act of 2006.

Finally, the California Supreme Court is not just any state supreme court. No other state court has been as influential — a true pioneer in many areas of law. It is not surprising that according to a recent survey by LexisNexis, no other state court has had its rulings followed as frequently.

Governor Jerry Brown seems both well aware and very much wanting to embrace that tradition of judicial activism. He has appointed three of the Court's seven justices, none of which had any prior judicial experience and two of whom were law professors. Not a typical recipe for judicial restraint.

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