Reform of Environmental Law Needed for California to Move Forward

The California Environmental Quality Act (CEQA) is the state's premier environmental law. It provides a process for state agencies and local governments to evaluate and mitigate environmental effects that may occur as a result of new planning or development. While admirable in its purpose, the law's execution over its 40-year lifetime has been less than satisfactory and continues to prompt vigorous policy debates in every branch of California government. As straightforward as CEQA might sound, and indeed was intended to be, decades of litigation and subsequent case law has transformed a once-reasonable environmental protection statute into a morass of uncertainty for project proponents and agencies alike.

The controversy lies in the fact that the existing CEQA process facilitates the filing of lawsuits by plaintiffs who are motivated by reasons beyond the scope of environmental protection. The ease with which CEQA lawsuits can be filed and used to delay projects acts as a drain on the public and private sectors' limited economic resources, often without any correlating environmental benefit. The mere threat of being sued under CEQA makes compliance much more complicated and burdensome than it was ever intended to be. Project proponents go to extreme lengths, beyond what often is useful or reasonable, in hopes of avoiding litigation.

In addition, a number of unnecessary procedural complexities make navigating CEQA an intimidating endeavor for even the most seasoned developer. Fulfilling one's regulatory obligations, even in the absence of a lawsuit against the project, can take years and be tremendously expensive. Combined, the overall expense and uncertainty inherent today in CEQA presents a significant obstacle to California's ability to provide more affordable housing, better hospitals, more adequate infrastructure, improved educational facilities, and new jobs for its citizens.

Fortunately, the inefficiencies in CEQA are so evident that stakeholders on all sides of the issue are beginning to agree that reform is desirable and necessary. Of course, what reform can deliver the necessary changes will be a source of considerable debate. To better understand what reforms are needed, it is first necessary to understand the law's history and the effects of its implementation.

Background

The passage of CEQA by California's Legislature in 1970 was a consequence of a federal environmental protection law signed just nine months earlier by President Richard Nixon—the National Environmental Policy Act (NEPA). NEPA, like CEQA, stemmed from a growing desire for the government to take the environment more into account when making decisions on various activities, policies and projects. This new approach to environmentally minded governance inspired the adoption of similar laws across the country, including in California. Indeed, protection of the environment became a threshold issue for governmental agencies when making their decisions.

Fundamentally, CEQA is a law about public disclosure. The statute provides procedures for governmental agencies to disclose to the public the environmental impacts of projects they are considering for approval. This public disclosure was intended to allow decision makers and the public to make informed decisions regarding the project, including potential mitigation measures, at the time of the project's approval. By requiring such an open process, the public could hold decision makers accountable for their environmental decision making.

Evaluation and Mitigation

The basic CEQA process involves three steps in which agencies are required to analyze, evaluate and mitigate any significant environmental effects that a project might have before approving it.

- To begin, the agency must determine whether the proposed project should be governed by CEQA. If the agency concludes that there is no possibility for the project to have a significant effect on the environment, then no further review is required.
- Second, if there is a fair argument that a project could have an adverse impact on the environment, then the agency must complete an initial study to determine how significant those

potential environmental effects might be. If they are found to be insignificant, then the agency can issue a "negative declaration" stating that there will be no significant environmental effects from the project.

• Third, if the agency determines there is substantial evidence that the project may have a significant effect on the environment, then the agency must prepare an environmental impact report (EIR). Using information discovered in the report, the agency must then determine ways for mitigating any environmental effects to levels of insignificance before the project can move forward. If the agency determines that an effect cannot feasibly be mitigated, however, it can issue a "statement of overriding considerations" and allow the project to move forward in spite of the significant environmental effect.

Once an agency certifies an EIR—and absent any subsequent litigation over the project's approval—the project can move forward as having satisfied its obligations under CEQA.

Judicial Review and Development

The courts have played a very active role in shaping the development of CEQA over the years. As a result of ambiguous language in the original statute, important court decisions were handed down in the first decade following the law's adoption. These decisions changed the nature of CEQA significantly.

For example, in *Friends of Mammoth v. Board of Supervisors* (1972), the California Supreme Court enlarged the scope of the law's application beyond just the public sector to include virtually all private sector activities as well. Thus, it was no longer simply government activities that would require an extensive environmental vetting under CEQA—private enterprise also was to be subject to the law's requirements going forward.

Another decision, *Environmental Defense Fund v. Coastside County Water District* (1972), established that courts were willing to engage in scientific fact-finding by analyzing specific projects and the adequacy of their EIRs. In *Coastside*, the court did just that—after analyzing the district's EIR, the court decided it was inadequate for failing to consider several potential environmental effects of the project.

As more decisions were handed down and project opponents saw the potential for courts to intervene in agency decision making, the precedent was set for the judiciary to play a much larger role in defining and enforcing CEQA.

Following these cases, several statutory changes were made that further expanded CEQA's scope and continued to increase the regulatory burden on the private sector. For example, one amendment of significance allowed agencies, at their discretion, to shift the responsibility for preparing an EIR over to the proponents of the project. This meant that the substantial work required to prepare a legally defensible EIR was now the job of the developer, adding a significant new layer of cost and red tape to the project approval process.

Another significant change was that public agencies were given the authority to charge fees to the developer to recover all costs incurred by the agency as part of the EIR development and approval process. This shielded public agencies from incurring any costs in the environmental review process, which in turn increased costs to private entities and removed a significant incentive for project approvals to be carried out efficiently.

Ease of Litigation

Further complicating the CEQA process is the ease with which project opponents can force delays by challenging a project approval in court. After an agency decides to certify a project's EIR or adopt a negative declaration, CEQA provides interested parties an opportunity to challenge the validity of those actions in a lawsuit. A plaintiff could argue, for example, that the agency should have required a full-blown EIR rather than adopting a negative or mitigated negative declaration. Or plaintiffs could argue that the project's EIR failed to account for some potential future environmental impact and so must be redone. Sometimes, these legal challenges are necessary to correct clear deficiencies in the environmental review of a project. Oftentimes, however, the challenges are filed simply to harass, stall or prevent a project from moving forward altogether.

Several aspects of CEQA make litigation an easy answer for project opponents. For example, in order to have standing in court, an interested party needs only to have made comments on the project during the official comment periods provided by the CEQA process. In other words, a plaintiff does not need to be directly or even indirectly affected by a project to challenge it in court. This creates an environment that is ripe for abusive litigation.

Low evidentiary standards also make judicial remedies more attractive to project opponents. When challenging a negative or mitigated negative declaration, for example, a plaintiff only needs to meet a "fair argument" standard in court to succeed.

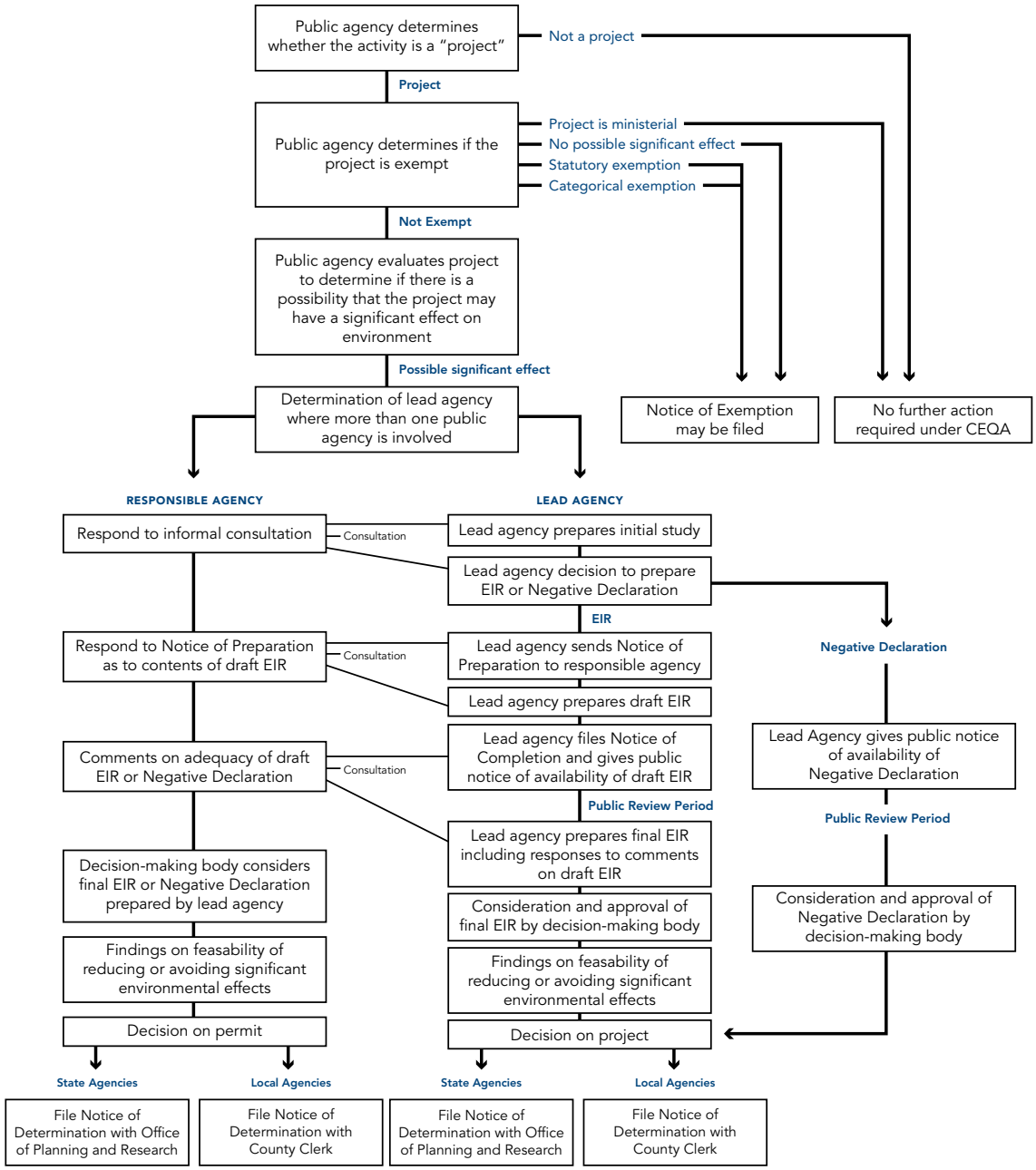
In other words, if the plaintiff can convince the court that a fair argument can be made that the project may have a significant impact on the environment, then the court will rule in the plaintiff's favor and likely require a full EIR to be prepared.

For a plaintiff challenging the sufficiency of an EIR, the standard is somewhat higher in requiring a showing of "substantial evidence" by the plaintiff. Nonetheless, the mere filing of litigation, whether or not it is successful, can add years of expensive delay to the project approval process.

The ability for plaintiffs to sue so easily can lead to perverse social outcomes. Take for example a city's attempted construction of a much-needed bridge. The EIR for the bridge might be sufficient in every respect and require robust mitigation measures that ensure the environment is protected throughout the process of building and operating the bridge.

An opponent of the bridge still could delay its construction indefinitely, however, by suing over the EIR's failure to account for a particular hypothetical environmental effect

CEQA Process Flow Chart



not addressed in the EIR. This means every other benefit to the community the bridge offers—including easing traffic congestion, reducing vehicular air pollution, creating construction jobs, generating local government tax revenues, etc.—is put on hold until and if the litigation can be resolved.

In other words, even an inconsequential environmental concern can take priority over all other societal considerations involved in the city's planning process. For CEQA to operate in a more reasonable manner, undesirable tradeoffs like these must be avoided.

The mere threat of litigation has had a huge impact on how the CEQA process looks today. Because project proponents fear the looming possibility of lawsuits, they tend to overproduce their EIRs so that no environmental stone is left unturned. Proponents of projects that logically should proceed with a negative or mitigated negative declaration often will prepare a full-blown EIR in hopes of minimizing the potential for a CEQA lawsuit.

Again, a plaintiff needs only to prove a "fair argument" exists in order to successfully challenge a negative or mitigated negative declaration in court. This leads to the

regular production of EIRs that are frequently 1,000+ pages, making them essentially useless to agency decision makers who have the task of reviewing them. Thus, the focus becomes not what is essential to protect the environment, but rather what is required to avoid litigation.

The influence of litigation on the CEQA process is much more significant than the number of actual court cases on record would suggest. This is because the simple threat of litigation, rather than the actual adjudication of a lawsuit, often is all that is required to pressure proponents to make certain project-changing concessions. These concessions can be in the form of additional environmental mitigation measures, changes to the features of the project itself, or even the imposition of project-labor agreements. For this reason, many instances where litigation plays a key role go undocumented.

One thing is certain, however: the pervasive threat and filing of lawsuits is a serious cost driver to the already-expensive and complicated CEQA approval process.

Real-World Examples

Over the years, there have been plenty of examples of projects whose supporters learned the hard way that successfully navigating CEQA can be a challenging task. The list that follows is illustrative of how CEQA's good intentions can lead to unreasonable results:

- In order to build a **4,000-acre solar power plant**, a company was required to pay $25 million in environmental mitigation to relocate 25 endangered tortoises from the future plant site. The company was required to acquire, clean and protect roughly 12,000 acres of additional land for the tortoises to move to, and then had to set up an endowment that would protect the land in perpetuity. Fortunately, the solar company is one of the largest in the world so it could absorb the tremendous up-front costs of caring for these "million-dollar tortoises." Had it been a smaller solar business, the costs of environmental mitigation would likely have been far too severe to move forward with the project and California would have lost an opportunity to provide a new source of clean, renewable energy.
- A **low-income infill housing project** in Berkeley was sued by a neighborhood group that claimed the project did not comply with CEQA because the project's shadows produced a significant environmental impact.
- In order to provide seismic safety and better facilities for students at a university located on a major fault line, the university sponsored building a 142,000 square-foot **athletic center**. Before construction could begin, however, local residents and the City of Berkeley filed a lawsuit challenging the EIR. The litigation dragged on for two years and in the end the university won. All that the lawsuit accomplished was to expose students and employees to two additional years of seismic danger and add millions of dollars to the project's costs.
- A Sacramento project for the development of 300 new **townhouses** was sued by a group of neighbors through CEQA, claiming that the project minimized open space, had insufficient landscaping, contained too many houses, and presented aesthetic concerns. The project was litigated for more than five years.
- **Two large shopping center projects** in Bakersfield had their EIRs under CEQA voided on the basis that they failed to consider the projects might take business away from downtown shopping—in other words, failed to take into account the project's economic impacts.
- A widely respected **affordable housing** group proposed to build on a two-acre parcel of property transferred to it by the City of Los Angeles. The project would have provided for owner-occupied affordable housing, consisting of 13 duplexes, or a total of 26 residences. Three residents in the area used CEQA to challenge the city's adoption of a mitigated negative declaration for the housing project. The residents contended that the city was obligated to prepare a full-blown EIR. Although the Court of Appeal decided in favor of the defendants, the litigation ended six years after the project was proposed and 3.5 years after the CEQA document was completed.

Without delving into the details of any of the examples above, it is clear that litigation can be used to stall, discourage or add great expense to projects even when environmental protection is not the basis of the objection. Such examples are seen as a warning to those who are faced with CEQA compliance—no matter how thorough or exhaustive one might be when preparing an EIR or engaging in environmental mitigation, a project still might end up being dragged into court or related settlement negotiations. In many cases, this all occurs before a project can even break ground. This uncertainty in the CEQA process makes a compelling case that the law is in need of reform.

Ideas for Reform

If CEQA is ever to become a more practical environmental protection law, systematic changes to the process will be necessary. Several problematic areas of the law and ideas for reform are discussed below:

Streamline Preparation of EIRs

Presently, if there is "any fair argument" that a project could lead either directly or indirectly to a potentially significant impact on the environment, an EIR is required. The fair argument standard is interpreted so broadly by courts that if any information is introduced into a record that could support the potential for a significant impact, even if there is other better information to the contrary, an EIR is required.

Consequently, flimsy, attenuated evidence often drives the preparation of expensive EIRs even though it is unlikely the decision-making body will gain any greater insight as a result of its preparation. This is because, ultimately, the "fair argument standard" is hard to navigate and results in "safety EIRs" by lead agencies fearful of lawsuits.

One possible solution would be to require an agency to do an EIR if there was no substantial evidence to support the use of a lesser document, such as a negative or mitigated negative declaration. This new standard would lead to greater flexibility because, so long as reasonable evidence supported a finding of "less than significant impact," an agency would be permitted to avoid an EIR. Such a change could increase efficiency and significantly reduce costs.

Reduce Time Spent Litigating EIR Certifications

Currently, a CEQA plaintiff can elect to prepare, or request the lead agency prepare, the administrative record. The administrative record becomes the basis for future challenges and must contain every document or piece of information that was relied upon by the lead agency to make its determination regarding the project.

Under either scenario, however, the lead agency must certify the record. If the plaintiff includes documents that are not, in the lead agency's opinion, part of the record, a court battle ensues relative to what should be included. The court fight occurs before any briefing on the actual merits of the case or the trial.

To fix this issue, one solution would be to make preparation of the administrative record the lead agency's sole responsibility. This would make CEQA more efficient and less time-consuming. This change would not prevent the plaintiff from challenging the lead agency's certifications. Rather, it merely would designate the lead agency as the proper party for purpose of record preparation so that the litigation is not stalled by an individual's inability to complete the initial administrative record in a timely manner.

Provide Greater Judicial Certainty

When a court issues a writ setting aside a CEQA project approval, it has no power to demand the lead agency take any particular course of action because this would interfere with fundamental separation of powers designated in the agency. Thus, the court often requires the decision maker to comply with CEQA.

One of two scenarios generally is present:

- The project has not been started, and the decision renders it politically infeasible to proceed; or
- The project is fully or partially completed, and post-hoc review is neither helpful nor likely to lead to a different conclusion relative to project completion, although it may result in some additional mitigation.

The uncertainty as to what a court will find often acts as a *de facto* injunction. Lead agencies will delay development even if a court has not ordered them to because they are not sure what will be required later and what the political consequences may be.

A solution to this would be to give courts the ability to consider the whole EIR and weigh its overall merit against a claim when considering what remedy to impose, and give courts the discretion to allow for partial project commencement.

This reform would give greater deference to the lead agency's policy decision relative to the project's importance at the time of the approval, while giving a court some latitude to craft an appropriate remedy in light of all factors before it.

Thus, agencies would not be fearful of proceeding or finding themselves mired in delay merely because a lawsuit is filed. Rather, they could take some harbor in a well-written and thorough document, and petitioners would be on notice that their lawsuit would not result in a project defeat or overhaul, but merely more information.

Clarify Greenhouse Gas Analysis

SB 97 (Chapter 185, Statutes of 2007) imposes requirements on lead agencies to analyze the significance of greenhouse gas impacts resulting from a proposed project before they approve it. This requires that agencies determine what amount of greenhouse gas can be emitted before it produces significant impact, particularly in a cumulative analysis where all other existing and proposed projects are considered along with the proposed project itself.

Typically, a lead agency would consider the existing environmental baseline and determine a threshold wherein if it kept emissions under that threshold, impacts could be deemed "less than significant."

With greenhouse gases, however, California is pursuing a goal of reducing statewide emissions to 1990 levels by 2020. This leads to arguments from environmentalists that all projects should have a "zero threshold" limit. This would result in very costly mitigation or stop good projects altogether. Meanwhile, the economic benefits of new development are being postponed while agencies try to figure out how to deal with greenhouse gas analysis under CEQA.

One of the keys to ensuring that future CEQA regulations requiring climate change analysis are successful will be appropriately determining what levels of greenhouse gas emissions would qualify as significant, thus requiring mitigation from a project. The global nature of greenhouse gas emissions suggests that a statewide threshold of significance for greenhouse gas emissions is a superior approach to creating project-specific thresholds.

Accordingly, in determining whether a proposed project's greenhouse gas emissions may have a significant impact on climate change, CEQA lead agencies should consider whether, among other factors, the project complies with emissions standards promulgated by the state Air Resources Board under AB 32 [see Climate Change article], the air districts or by other state agencies or commissions applicable to new and existing GHG emissions sources.

If a project does meet applicable standards promulgated by ARB, the air district or other state agencies/commissions, then it should be determined that the project does not have a significant impact on climate change. Such an approach will provide much-needed certainty to project proponents and will encourage consistency and uniformity in the CEQA analysis of greenhouse gas emissions throughout the state.

Timely Public Comments

While existing CEQA law designates a time period for

public comments, courts have permitted litigants to rely on comments submitted late, so long as they are submitted before actual approval of the project.

In controversial cases, late comments are problematic because opponents will strategically wait to present comments until the last possible moment. If staff has recommended adoption of a project, and opponents actually submit their comments at the adoption hearing, the lead agency has to make a hasty decision as to whether to proceed or to do more analysis. This can result in nearly continual backlog and delay, or decisions that are difficult to defend.

One solution would be to properly place the burden on project opponents to exercise their right to comment during the period in which comments are being accepted and heard by the lead agency. This also would dissuade sophisticated opponents from tactically delaying a project by intentionally presenting their comments late.

Reasonable Timeframes for Cumulative Impact Analysis

Currently, a lead agency can use a list of potential future projects or projections based on its general planning documents when establishing the baseline environmental conditions for cumulative analysis. Since environmental review can, in some cases, take years, these lists or projections can become larger and more burdensome over time impacting the cumulative analysis of the proposed project.

A possible solution to this would be to limit the timeframe for cumulative analysis by law to some period before the close of a public comment period on the first circulated Draft EIR for the proposed project under review. This would have the effect of requiring the party to consider the present baseline plus future projects that are reasonably foreseeable when analyzing a cumulative impact.

Incentivize Better Local Planning

Under SB 375 (Chapter 728, Statutes of 2008), residential developers get relief from certain environmental reviews under CEQA if they build projects consistent with the new sustainable communities strategy (SCS). In the bill-signing message, Governor Arnold Schwarzenegger expressed his desire to expand the bill's streamlining provisions to apply to other types of projects that are consistent with an SCS, such as "all projects related to transportation, infrastructure, services and employment that are consistent with the regional plan."

A positive reform would be to adopt changes consistent with Governor Schwarzenegger's vision for SB 375, so that planning is more fully aligned with CEQA incentives.

Limit Attorney Fees

Currently, courts can and do award attorney fees to successful plaintiffs in CEQA cases. This creates a huge incentive for private attorneys to take and pursue CEQA challenges, even in light of weak cases. Limiting a court's discretion to award fees for only those issues that were successfully litigated—rather than for every issue raised—may create a disincentive for frivolous lawsuits.

CalChamber Position

The California Chamber of Commerce agrees with the basic goals of CEQA. Requiring consideration of the environment in the planning process not only makes sense, it is key to ensuring that California grows in an environmentally responsible manner.

At some point in its 40-year history, however, CEQA's finer characteristics became overshadowed by the development of more negative features that are present in the law today. Plainly stated, the ability of any party to delay or kill any project over any environmental issue through litigation is unacceptable and an outcome unlike anything that CEQA originally was intended to inspire.

For California to move forward and provide its citizens with public and private projects that are critical to the state's environmental, economic and social well-being, reform of CEQA will be critically necessary.

Reasons for Position

- CEQA reform is necessary if California is going to be able to move forward grow in an economically and environmentally sound manner.
- Unnecessary CEQA litigation can delay or prevent the delivery of critical projects that California needs to properly provide for its citizens, including infrastructure projects, schools, hospitals, affordable housing, and more.
- The admirable goals of CEQA have become obscured through the law's less-than-satisfactory execution.
- The pervasive threat of lawsuits is a serious cost driver to the already-expensive and complicated CEQA approval process.

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