SENATE COMMITTEE ON ENVIRONMENTAL QUALITY

April 15, 2015
9:00 am., State Capitol Room 3191

Testimony of Richard M. Frank

Professor of Environmental Practice &
Director, California Environmental Law & Policy Center
School of Law
University of California, Davis
rmfrank@ucdavis.edu

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to testify before you this morning on the history, key provisions and objectives of the California Environmental Quality Act (CEQA).

Introduction

I am employed as a Professor of Environmental Practice at the U.C. Davis School of Law, where I concurrently serve as the Director of the law school's California Environmental Law & Policy Center. Before joining the U.C. Davis Law School faculty in 2010, I served for four years on the faculty of the U.C. Berkeley School of Law. I have taught CEQA to law students at both U.C. law schools—as well as to attorneys, planners and citizens groups--for many years.

Before becoming a full-time law professor, and for some 30 years, I served in various legal capacities with the California Department of Justice—initially as a deputy attorney general and, immediately before my retirement from state service, as the Department's Chief Deputy Attorney General for Legal Affairs. Over the course of my legal career with the Department of Justice, I brought and defended numerous CEQA cases, both on behalf of numerous state agency clients and, in the Attorney General's independent capacity, representing the People of the State of California.

History & Evolution of CEQA

To understand the history of CEQA, one must first understand the federal statute on which CEQA was roughly modeled: the National Environmental Policy Act, or NEPA. The United States Congress enacted NEPA by overwhelming margins in 1969. President Richard Nixon signed NEPA into law on New Year's Day, 1970, the first of what was to become a veritable torrent of federal environmental legislation enacted in the 1970's.

Incentivized by the passage of NEPA and the infamous Unocal oil spill off the Santa Barbara coast in January 1969, leaders of the California Legislature in early 1970 created a special, interim committee to study and report to the full Legislature the committee's recommendations as to environmental legislation the committee believed should be enacted in California. (It is worth noting that the Legislature was controlled by Republican majorities in both the Assembly and Senate in 1970.) The special committee reported its findings a few months later. Of those many recommendations offered by the committee, most significant was its conclusion that California should enact a so-called "little NEPA" statute. The Legislature did so, passing the original version of CEQA in 1970 by wide, bipartisan margins. Then-California Governor Ronald Reagan signed the bill into law in the fall of 1970.

Like NEPA, CEQA was and is a "look before you leap" environmental law, intended to achieve two goals essentially identical to the federal law on which it was patterned:

- To inform state and local government decision-makers of the environmental consequences of projects they were considering; and
- To provide interested members of the public with the same information, so that they could participate in a meaningful and informed way in that process, armed with information about the potential environmental effects of a particular, proposed project.

Critically, however, CEQA from the outset had—and continues to have—one important, additional feature that is not contained in NEPA:

- CEQA requires state and local decision-makers to avoid or mitigate identified, adverse environmental effects of a proposed project to the extent it is feasible to do so.

This third objective of CEQA is what makes California's law unique: unlike NEPA (which is simply a procedural, environmental disclosure statute), CEQA has *substantive* effect as well.

Notably, a majority of other states in the U.S. have subsequently adopted "little NEPA" statutes of their own. So, too, have many other nations around the world, including China and India. Most of those "look before you leap" laws are, like NEPA, purely procedural measures. It is generally conceded that CEQA, by contrast, is the most powerful "little NEPA" statute in the world, due in large measure to its unique, substantive effect.

CEQA looks very different today, as compared to the original version of the law that the Legislature enacted in 1970. The latter was very short—only four pages in length (two of which consisted of legislative findings)! A key feature of CEQA's evolution is that the law has expanded in size geometrically in the intervening 45 years. Almost every year since 1970, the Legislature has seen fit to amend CEQA—usually by adding new and more detailed provisions. The current version of CEQA runs more than 135 pages. The implementing "CEQA Guidelines,"[1] which the Legislature delegated to the Natural Resources Agency and the Governor's Office of Planning and Research to adopt and maintain, now fill nearly 200 pages.

As initially adopted in 1970, CEQA was not particularly controversial. That changed dramatically in 1972, when the California Supreme Court issued its first decision interpreting CEQA: the landmark *Friends of Mammoth v. Board of Supervisors* case.[2] *Friends of Mammoth* held that CEQA's environmental disclosure requirements apply not only to public works projects carried out by state or local governments themselves, but also to proposed *private* projects which require government permits or similar approvals.

The *Friends of Mammoth* decision was very controversial, inasmuch as the law's application to private projects came as a surprise to some stakeholders and observers. The building industry and related groups quickly descended on Sacramento, urging the Legislature to reverse *Friends of Mammoth* or to repeal CEQA altogether. What emerged in the early 1970's was a classic political compromise: the Supreme Court's interpretation of CEQA was ultimately affirmed by the Legislature in clarifying statutory amendments. But CEQA's application to private projects was given purely prospective effect. Additionally, the Legislature adopted the shortest statutes of limitations (i.e., deadlines to file litigation challenges under CEQA) found in California law—in some cases, as short as 30 days after the challenged state or local government action. Those exceedingly short statutes of limitation remain in effect today.

Prompt legislative action in 1972 resolved the immediate controversy over the *Friends of Mammoth* decision. But that Supreme Court decision established three essential characteristics of CEQA that remain true today, some four decades later:

[1] While not officially denominated CEQA's implementing regulations, the CEQA Guidelines serve that purpose.
[2] 8 Cal.3d 247.

- CEQA is California's most important and all-encompassing environmental law. That's because--unlike other environmental statutes that relate specifically to air pollution, toxic wastes, water quality, etc.—CEQA is "cross-cutting"; it can and does arise in connection with a wide array of "projects" including land use decisions, government funding actions, public works projects, and adoption of major government regulatory programs. The California Supreme Court's confirmation in *Friends of Mammoth* that CEQA applies to privately-proposed as well as public works projects further expands the scope of matters otherwise subject to environmental review under CEQA.
- The Legislature continues to tinker with CEQA via statutory amendments on a rather constant basis. In some cases, the Legislature enacts exemptions from CEQA for certain favored projects. (One of the earliest and most famous CEQA exemptions allowed the City of Los Angeles to prepare for and hold the 1984 Summer Olympics without preparing environmental impact analysis under CEQA.) Others have provided expedited environmental analysis under CEQA for specified, "favored" projects. (In 2009 and again in 2013, for example, the Legislature adopted CEQA amendments designed to facilitate "infill development" in urban areas.) Nevertheless, the history of the Legislature's post-1972 CEQA amendments has been one of modest and incremental change. By contrast, the Legislature has rather consistently resisted entreaties by stakeholders from both the right and left for more sweeping and fundamental changes to CEQA. That dynamic seems unlikely to change in the foreseeable future.
- CEQA is—far and away--the most heavily litigated environmental law in California. To be sure, most government decisions involving environmental review under CEQA are not controversial, and do not generate lawsuits. But those that do generate considerable work for California courts—including the appellate courts. For example, the California Supreme Court currently has 10 pending CEQA cases on its docket—more than ever before in the Court's history.

In sum, all three branches of California state government play important roles under CEQA. The Legislature originally enacted CEQA and, as noted above, regularly revisits and amends the statute. The California judiciary resolves ambiguities in CEQA and fills in gaps left by the Legislature when courts interpret and apply the statute in lawsuits challenging state and local government actions under CEQA. (It's important to note that CEQA cases are brought by conservation and development interests alike.) At the state level, the principal obligation of complying with CEQA falls on the executive branch of state government: boards, agencies, departments and commissions that carry out public works projects or are asked to approve privately-proposed projects. As noted above, two state agencies, the Governor Office of Planning and Research and the Natural Resources Agency--are jointly responsible for maintaining the CEQA Guidelines that implement the statute. Numerically, far more CEQA matters come before local government agencies—planning commissions, city councils, special districts, etc.—than state agencies. Similarly, most CEQA litigation is brought against local governments in California, rather than state agencies.

How CEQA Works in Conjunction With Other Environmental Laws

Generally, CEQA operates in conjunction with and parallel to other environmental, land use and energy laws. Unless it is apparent that a particular project will not have a significant effect on (i.e., cause a substantial, adverse change to) the environment, or a particular statutory or CEQA Guideline exemption from CEQA is applicable, state and local agencies must comply with CEQA's

requirements at the same time that they formulate their substantive decision to approve or reject a particular project.

In certain cases, CEQA permits government agencies whose substantive decision-making processes parallel CEQA's to undertake an environmental review process that is the "functional equivalent" of CEQA. Such agencies, if their processes are approved by the Secretary of Natural Resources as a "certified regulatory program," can complete those processes without preparing standalone documents that would otherwise be required under CEQA. (Two examples of such "functional equivalent" processes approved by the Secretary are the California Coastal Commission's review and approval of local coastal plans under the Coastal Act; and the California Energy Commission's "one-stop" siting process for large, thermally-powered electrical generating plants.) This is one way in which the Legislature has seen fit to relieve agencies from the arguably redundant need to prepare CEQA documents while ensuring that the underlying policy goals of CEQA are still achieved.

Nevertheless, some CEQA critics argue that CEQA compliance is unnecessary, costly and unduly time consuming when independent environmental laws applicable to a project apply specific, numerical standards. In such cases, critics argue, CEQA is duplicative and unnecessary. To date, such arguments for CEQA "reform" have not prevailed. Defenders of the CEQA status quo have so far prevailed in their view that CEQA's environmental disclosure and public information functions have independent value that should be preserved, even where quantitative environmental standards are applicable under other federal or state laws.

Thank you for the opportunity to testify before you today. I would be pleased to answer any questions that the Committee may have.

#