

CALIFORNIA LEGISLATURE

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INFORMATIONAL HEARING
THE SENATE COMMITTEE ON JUDICIARY
AND
THE SENATE COMMITTEE ON ENVIRONMENTAL QUALITY

Just the Facts: An Evidence-Based Look at CEQA Streamlining and CEQA's Role in Development

Tuesday, March 12, 2019
1:30 p.m.
State Capitol, Room 112

BACKGROUND PAPER

I. CEQA Overview

The California Environmental Quality Act (CEQA) is arguably California's most important environmental law. It embodies California's strong public policy of protecting the environment, bringing together public participation and considerations of air quality, water quality, hazardous materials, and other environmental impacts into one comprehensive law so that agencies may make informed decisions. Some stakeholders have argued that CEQA is the primary driver of delay in development. However, CEQA has been amended to include several tools to expedite or exempt entire projects, all while maintaining a quality environment for Californians. Recent academic and case studies show low litigation rates and that other factors, especially local land-use regulation, play a greater role in impeding development.

a. History

The impetus for CEQA traces back to the passage of the first federal environmental statute in 1969, the National Environmental Policy Act (NEPA). In response to this federal law, the California State Assembly created the Assembly Select Committee on

Environmental Quality to study the possibility of supplementing NEPA through state law. That legislative committee, in 1970, issued a report entitled *The Environmental Bill of Rights*, which called for a California counterpart to NEPA. Later the same year, acting on the recommendations of the select committee, the Legislature passed, and Governor Reagan signed, the CEQA statute. (Pub. Res. Code, § 21000 et seq.)¹

Over the years, CEQA has been amended many times, sometimes with fundamental changes occurring along the way. For example, a key modification occurred in 1972 when the Legislature enacted AB 889 (Knox), Chapter 1154, Statutes of 1972, codifying the holding in *Friends of Mammoth v. Board of Supervisors of Mono County* (1972) 8 Cal.3d 247, which concluded that CEQA applies not only to public projects but also to private activities requiring discretionary governmental approval. Another example is the incorporation of climate change into CEQA: SB 97 (Dutton), Chapter 185, Statutes of 2007, required the Office of Planning and Research (OPR) to amend the CEQA Guidelines² to assist public agencies in the mitigation of greenhouse gas (GHG) emissions or the effects of GHG emissions. This new mandate essentially confirmed that GHG emissions are a significant environmental effect subject to CEQA. Additionally, CEQA has been amended numerous times to include exemptions and administrative and judicial streamlining provisions. (See Section III for an overview of these provisions.) CEQA today is not the same body of law as it was four decades ago.

¹ All further statutory references are to the Public Resources Code, unless otherwise specified.

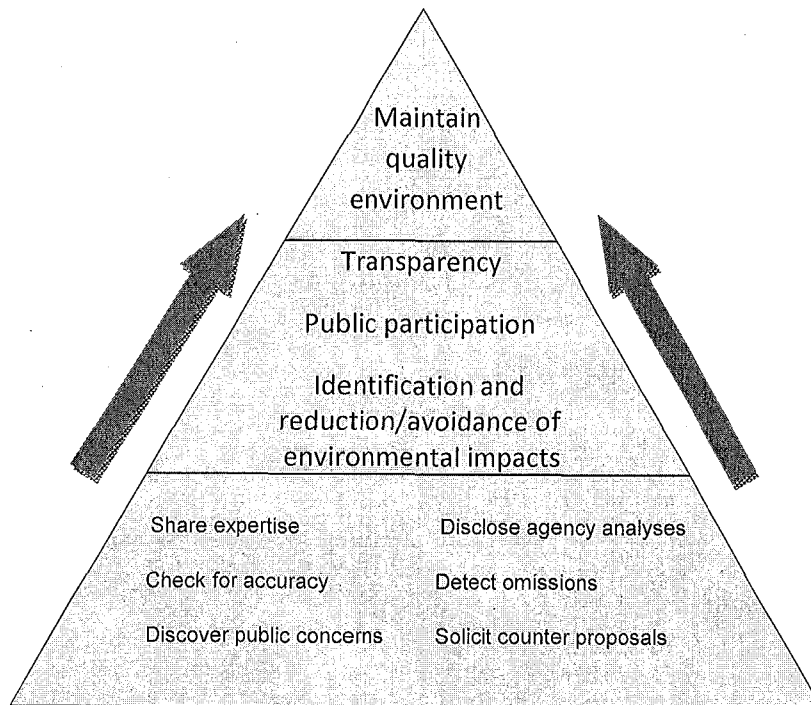
² The CEQA Guidelines, which are prepared by OPR and certified and adopted by the Secretary of the Natural Resources Agency, are contained in California Code of Regulations Title 14, § 15000 et seq.

b. Tenets of CEQA

However, what have stayed consistent are CEQA's tenets, which aim to satisfy the state's policy to develop and maintain a *quality environment*.

CEQA TENETS

CEQA's tenets build toward California's policy of developing and maintaining a quality environment.



CEQA establishes the policy of the state to “[d]evelop and maintain a high-quality environment now and in the future, and take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.” (§ 21001(a).) Among other policies stated in the act, CEQA also establishes state policy to “tak[e] all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise.” (§ 21001(b).) CEQA also recognizes the importance of “preventing environmental damage, while providing a decent home and satisfying living environment for every Californian” (§ 21000 (g)), and “that the long-term protection of the environment, consistent with the provision of a decent home and suitable living environment for every Californian, shall be the guiding criterion in public decisions” (§ 21001(d)). The statute rounds out these guiding principles by including the policy to “create and maintain conditions under which [people] and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations.” (§ 21001(e).)

Keeping these policies in mind, CEQA provides the following three main objectives:

- *inform* decision-makers and the public of potential adverse environmental impacts of proposed activities carried out or approved by them;
- provide for *public participation* in the environmental review process; and,
- identify, and require the implementation of, feasible alternatives or measures that would *mitigate* (reduce or avoid) a proposed project's adverse environmental impacts.

In order to realize these objectives, CEQA Guidelines section 15200 details the purposes of an environmental review – namely, to share expertise, disclose agency analyses, check for accuracy, detect omissions, discover public concerns, and solicit counter proposals.

CEQA's layers of tenets provide the overarching structure for this procedural statute, which is considered the backbone of California's environmental body of law.

II. The Environmental Review Process

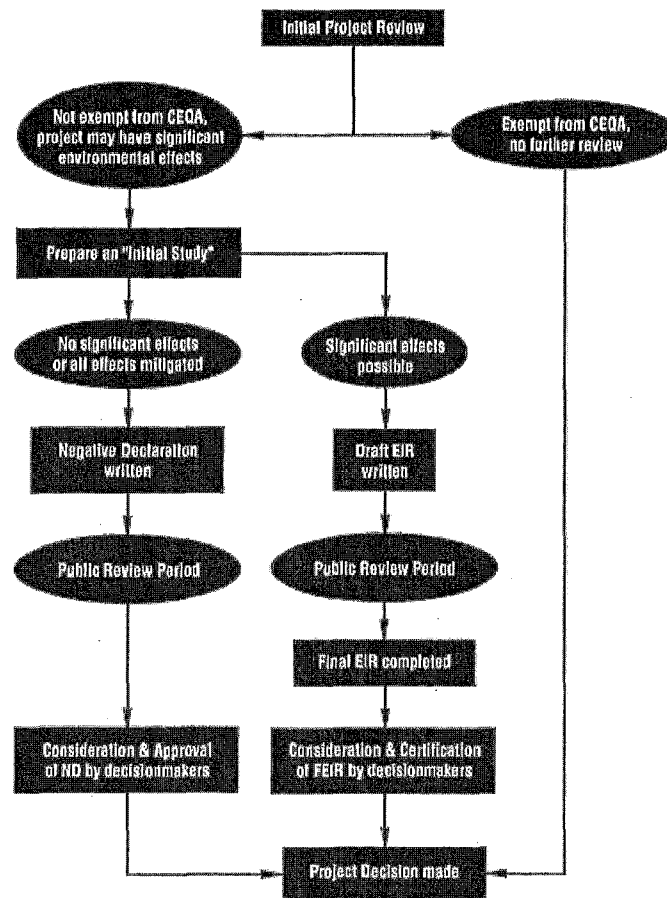
CEQA provides a process for evaluating the environmental effects of a project, and includes statutory exemptions as well as categorical exemptions in the CEQA Guidelines. When a project is not exempt from CEQA, the lead agency prepares an initial study to determine whether a project may have a significant effect on the environment. If the initial study shows that there would not be a significant effect on the environment, then the lead agency must prepare a negative declaration (ND). If the initial study shows potentially significant impacts, but the applicant revises the project plan to avoid or mitigate those impacts *before* the proposed ND and initial study are released for public review, then the lead agency must prepare a mitigated negative declaration (MND). If the initial study shows that the project may have a significant effect on the environment, then the lead agency must prepare an environmental impact report (EIR).

Generally, an EIR must accurately describe the proposed project, identify and analyze each significant environmental impact expected to result from the proposed project, identify mitigation measures to reduce those impacts to the extent feasible, and evaluate a range of reasonable alternatives to the proposed project. Before approving any project that has received an environmental review, an agency must make certain findings. If mitigation measures are required or incorporated into a project, the agency must adopt a reporting or monitoring program to ensure compliance with those measures. If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the proposed project, the effects of the mitigation measure must be discussed but in less detail than the significant effects of the proposed project.

One of the major objectives of CEQA is to make projects more environmentally sound through the preparation of EIRs. Thus, it is the very nature of CEQA that projects will be modified to protect the environment.

For an easier understanding of the CEQA process, below is an elementary flowchart of the environmental review process pursuant to CEQA.

SIMPLIFIED CEQA FLOW CHART



*Source: Governor's Office of Planning and Research, *The Planning Commissioner's Book: Part Three*

a. Issues Analyzed in an Environmental Review

Pursuant to CEQA, an environmental review analyzing the significant direct and indirect environmental impacts of a proposed project include:

- Aesthetics
- Agriculture
- Air Quality
- Archeological Resources
- Biological Resources
- Geology/Soils
- Greenhouse Gas Emissions
- Hazards & Hazardous Materials
- Hydrology/Water Quality
- Land Use/Planning
- Mineral Resources
- Noise
- Population/Housing
- Public Services
- Recreation
- Transportation/Traffic
- Tribal Cultural Resources
- Utilities/Service Systems

An environmental review provides a forum for all of these issue areas to be considered *together* rather than separately. It provides a comprehensive review of the project, considering all applicable environmental laws and how those laws interact with one another. For example, it would be prudent for a lead agency to know that a proposal to mitigate a significant impact (e.g., alleviate temporary traffic congestion, due to construction of a development project, by detouring traffic to an alternative route) may trigger a new significant impact (e.g., the detour may redirect the impact onto a sensitive resource, such as habitat of an endangered species). The environmental impact caused by the proposed mitigation measure should be evaluated as well. CEQA provides the opportunity to analyze a broad spectrum of a project's potential environmental impacts and how each impact may intertwine with one another.

b. CEQA's Interaction with Other Environmental Laws

Activities subject to CEQA must also comply with other environmental laws, both federal and state, including NEPA, the federal Endangered Species Act, the California Endangered Species Act, the federal Clean Water Act, the federal Clean Air Act, the California Air Resources Act, the Porter-Cologne Water Quality Control Act, the federal Land Policy and Management Act, the California Land Conservation Act, and the Comprehensive Environmental Response, Compensation and Liability Act. The number of federal and state environmental laws that exist is extensive. Depending on the activity, a project may be subject to several environmental laws. Regardless of whether a CEQA exemption applies, a project must still comply with other environmental laws and obtain the necessary permits and approvals from governmental agencies.

An EIR must include a list of all permits and other approvals necessary to carry out the project, as well as related environmental review and consultation requirements

required by federal, state, or local laws, regulations, or policies. A CEQA environmental review comprehensively lays out a project's regulatory compliance obligations, which helps inform both decision-makers and the public.

c. CEQA Enforcement

CEQA is a self-executing statute. Enforcement of CEQA is primarily through a civil lawsuit challenging a project's environmental review. Plaintiffs may include private individuals, organizations, and public agencies.

The California Attorney General also has the authority to bring a suit for the purpose of enforcing compliance with CEQA and plays a role in other aspects of CEQA, including filing public comment letters alerting local agencies to potential violations of CEQA, filing and intervening in lawsuits, entering into settlements, and submitting amicus ("friends of the court") briefs in appellate cases.

Examples of CEQA litigation issues include: whether an activity is considered a "project" subject to environmental review; whether an exemption applies to a project; the type of environmental review that should be required; whether a "fair argument" can be made that a project has potential significant impacts, which would then trigger an EIR as opposed to an ND or MND; the adequacy of an EIR, such as inadequate analysis of an issue area or cumulative impacts; and procedural compliance, such as the failure to consult with a responsible agency.

CEQA provides specified litigation requirements and procedures for actions against a public agency as grounds of noncompliance with the act. For example, CEQA contains pretrial procedural mandates that must be followed in order to pursue a CEQA lawsuit such as notification requirements and furnishing a copy of the pleading to the California Attorney General. Also, CEQA provides for special litigation considerations including pretrial settlement procedures, optional mediation procedures, and preference of CEQA actions over other civil actions in a court.

In general terms, there are a few remedies available when a court finds a CEQA violation. Specifically, the court may order the defendant agency to comply with CEQA; the court may void the agency action, or portions thereof; or the court may suspend all agency and pertinent project actions that could have an environmental impact until CEQA compliance is completed.

III. CEQA Streamlining Provisions

CEQA has been amended over the years to provide several tools to expedite the review of, or altogether exempt from CEQA, various types of projects.

a. Projects Eligible for Exemptions

Numerous types of projects may be eligible for an exemption from CEQA review pursuant to either a statutory exemption or a “categorical” exemption in the CEQA Guidelines. Categorical exemptions are projects determined by the Secretary of the Natural Resources Agency to not have a significant effect on the environment (§ 21084). In general, if a project meets certain specified criteria, it is not subject to CEQA review. Some common exemptions include:

- ministerial actions (§ 21080(b)(1));
- repairs to damaged facilities (§§ 21080(b)(3), § 21060.3);
- mitigation of an emergency (§ 21080(b)(4); Guidelines, § 15269(c));
- existing facilities, replacement, or reconstruction (Guidelines, §§ 15301, 15302);
- small development and construction projects (Guidelines, §§ 15303, 15304, 15311); and
- protection of natural resources (Guidelines, §§ 15307, 15308, 15313, 15316-15318, 15325).

Additionally, there are numerous categories of infill projects that, subject to specified criteria and exceptions, are eligible for exemptions:

- residential projects (Gov. Code, § 65457; Guidelines, § 15182);
- agricultural housing projects (§ 21159.22; Guidelines, § 15193);
- affordable housing projects (§ 21159.23; Guidelines, § 15194);
- urban residential projects (§ 21159.24; Guidelines, § 15195);
- urban residential or mixed-use housing projects in unincorporated counties (§ 21159.25);³
- urban infill projects (Guidelines, § 15332);
- residential, employment center, or mixed-use development project in a transit priority-area (§ 21155.4);⁴ and
- transit-priority and residential projects (§ 21155.1).⁵

b. Streamlined Administrative Review

CEQA provides for streamlined processes for preparing EIRs and other CEQA documents that enable public agencies to “use various special types of EIR’s to simplify preparation and avoid duplication.” (*Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 Cal.App.4th 1, 22, fn. 10.) These various documents

³ AB 1804 (Berman), Ch. 670, Stats. 2018.

⁴ SB 743 (Steinberg), Ch. 386, Stats. 2013.

⁵ SB 375 (Steinberg), Ch. 728, Stats. 2008.

include “program” EIRs for a series of related actions that can be collectively characterized as a single project, “staged” EIRs for sequential projects, and “master” EIRs for community-level projects. Additionally, CEQA Guidelines section 15183(a) provides that “CEQA mandates that projects which are consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified shall not require additional environmental review, except as might be necessary to examine whether there are project-specific significant effects which are peculiar to the project or its site. This streamlines the review of such projects and reduces the need to prepare repetitive studies.” CEQA also provides for “tiering” – the process of analyzing general projects in a broad EIR, followed by focused review of subsequent environmental projects that are narrower in scope, thereby “allow[ing] an agency to defer analysis of certain details of later phases of long-term linked or complex projects until those phases are up for approval.” (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431.) Finally, CEQA specifically provides for limited-scope environmental review for certain residential, infill, transit-priority projects, and approvals consistent with community-scale environmental planning documents.

c. Streamlined Judicial Review

Several provisions streamline judicial review of challenges to projects under CEQA, including:

- amendments to provisions governing litigation and mediation;
- discovery is generally not allowed, as CEQA cases are generally restricted to review of the record;⁶
- concurrent preparation of the record of proceedings to enable judicial review to occur sooner;⁷
- counties with a population of over 200,000 must designate one or more judges to develop expertise on CEQA and hear CEQA cases (§ 21167.1 (b));
- both the Superior Court and the Court of Appeal must give CEQA lawsuits preference over all other civil actions (§ 21167.1(a));
- if feasible, the Court of Appeal must hear a CEQA appeal within one year of filing (§ 21167.1(a)); and
- if feasible, a 270-day judicial review period for environmental leadership projects,⁸ as well as for specified stadium projects.⁹

Many of these changes have created efficiencies in the environmental review process overall and have expedited the process for the types of projects encouraged by the state.

⁶ See *Cadiz Land Co. v. Rail Cycle, LP* (2000) 83 Cal.App.4th 74, 122.

⁷ SB 122 (Jackson, 2015), Ch. 476, Stats. 2016.

⁸ AB 900 (Buchanan, 2011), Ch. 354, Stats. 2011.

⁹ SB 292 (Padilla, 2011), Ch. 353, Stats. 2011; SB 743 (Steinberg, 2013), Ch. 386, Stats. 2013 (see *Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 855-856); AB 734 (Bonta, 2018), Ch. 959, Stats. 2018; AB 987 (Kamlager-Dove, 2018), Ch. 961, Stats. 2018.

CEQA has not stayed stagnant since its enactment, but rather has evolved over close to half a century.

IV. CEQA and Development

A pair of studies from the firm of Holland & Knight reviewed CEQA lawsuits filed between 2010–2012 and 2013–2015, respectively.¹⁰ The studies conclude that CEQA litigation is disproportionately directed toward the types of projects that the state encourages, such as infill.

However, overall litigation rates regarding CEQA are low. In 2016, BAE Urban Economics did a quantitative analysis of the effects of CEQA on California's economy generally, including the specific effects on housing development.¹¹ The report found "no evidence" to support the argument that CEQA represents a major barrier to development. To the contrary, the report found that only 0.7 percent of all CEQA projects undergoing environmental review were involved in litigation. The report indicated that California's affordable housing production ranked ninth among the 50 states. In fact, the report concluded that "[t]he CEQA process also helped ensure that affordable housing is develop[ed] in a way that does not compromise the health and safety of an already vulnerable population."

In October 2017, the Senate Environmental Quality Committee published the results of a survey it had conducted of state agencies regarding CEQA to gain a better understanding of CEQA compliance and litigation.¹² The survey, covering Fiscal Years 2011/12 to 2015/16, showed over 90 percent of projects lead by state agencies were exempt from CEQA; and only one percent required an EIR. Further, out of a total of 15,783 projects, only 207 CEQA cases were brought against the state agencies within those five years. With multiple cases brought against some of the same projects, it is estimated that less than one percent of projects were litigated. The survey results suggest that CEQA litigation is not a significant burden on projects where the state agency is the lead agency.

Two recent studies conducted by faculty at UC Berkeley illustrate how aspects of the project approval process that are independent of CEQA drive project approval timelines.¹³ As noted above, CEQA requires project applicants to secure all applicable permits and approvals necessary to carry out the project, as well as to comply with any

¹⁰ See Hernandez, Jennifer *California Environmental Quality Act Lawsuits and California's Housing Crisis* (2018) 24 *Hastings Env'tl. L.J.* 21 (2018); Jennifer Hernandez, David Friedman & Stephanie Deherrera, *In the Name of the Environment*, Holland & Knight (2015).

¹¹ BAE Urban Economics, *CEQA in the 21st Century* (August 2016) <<https://rosefdn.org/wp-content/uploads/2016/08/CEQA-in-the-21st-Century.pdf>> (as of Apr. 30, 2018).

¹² Available at https://senv.senate.ca.gov/sites/senv.senate.ca.gov/files/ceqa_survey_full_report_-_final_12-5-17.pdf (as of March 1, 2019).

¹³ *Getting it Right: Examining the Local Land Use Entitlement Process to Inform Policy and Process* (2018), available at https://www.law.berkeley.edu/wp-content/uploads/2018/02/Getting_It_Right.pdf (as of March 1, 2019); *Examining the Local Land Use Entitlement Process to Inform Policy and Process* (2019), available at <https://www.law.berkeley.edu/wp-content/uploads/2019/02/Examining-the-Local-Land-Use-Entitlement-Process-in-California.pdf> (as of March 1, 2019).

other environmental review required under applicable federal, state, local laws, regulations, or policies. These requirements apply independently of CEQA, but are also incorporated into the CEQA process. The results of the first study, done in residential development projects in five Bay Area cities, led to the conclusion that, among other factors, "*what drives whether and how environmental review occurs for residential projects is local land-use law.*" (Emphasis added.) The second study, which focused on the building permit process in four Los Angeles area cities, found that different cities chose to apply CEQA differently with regard to residential development and that overall relatively few projects within the study area required a full EIR.

Finally, the Association of Environmental Professionals recently surveyed 46 cities and counties throughout the state to determine CEQA's impact on housing production.¹⁴ The survey found that under six percent of the housing projects in those jurisdictions were required to undergo a full EIR, which took 15 months on average to complete. Instead, the survey found that cities and counties are successfully using alternatives to EIRs that expedite housing projects: 35.9 percent of projects were reviewed by MNDs, which took just eight months to complete, while 42.3 percent were reviewed under streamlining provisions or exemptions for affordable housing, infill, and transit priority projects, which took just six months to complete. Another 9.3 percent were determined to be eligible for other exemptions. The survey found that cities and counties were not fully utilizing the affordable housing exemption, often opting for a full EIR for projects that were eligible for the exemption. The survey respondents also indicated that, among the barriers to increased housing production in California, CEQA is not a major cause. The costs of building, lack of available sites, and lack of financing for affordable housing were all cited as primary barriers to housing production.

V. Conclusion

CEQA is a complex procedural statute that compels public agencies, with public participation, to consider projects with full knowledge about the environmental conditions and consequences of their actions. A CEQA environmental review document, which is the result of a meticulous and methodical process, compiles all of the necessary facts in one place, enabling the potential impacts of proposed projects to be evaluated in a thoughtful and transparent manner that identifies reasonably foreseeable environmental impacts, which may be lasting and harmful, as well as feasible ways of minimizing those impacts.

In response to the perception that CEQA is one of the primary barriers to development, the Legislature has amended CEQA in several ways to promote development by streamlining the CEQA process, exempting various types of projects from CEQA, and expediting administrative and judicial review. Moreover, this perception of CEQA does not appear to square with available evidence. After all, less than one percent of CEQA projects are litigated, and studies show that the primary barrier to development is local land-use regulation enacted at the city or county level, rather than CEQA itself. If this is the case, then additional changes to CEQA might do less to promote development and

¹⁴ CEQA's Impact on Housing Production: 2018 Survey of California's Cities and Counties.

more to undermine the law that helps ensure that development is undertaken responsibly. As stated in the first provision of CEQA, maintaining the quality of the environment is a matter of statewide concern, both now and in the future. (§ 21000(a).)