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CEQA – The Litigation Myth

The California Environmental Quality Act (CEQA) has protected the rich natural resources of our state and the public health of its citizens for over 40 years. CEQA plays an important role in ensuring that public agencies consider and mitigate important environmental impacts that are not addressed adequately, or at all, by existing laws. It has repeatedly stepped in where there are gaps in other environmental laws, where special interests carved out exceptions for themselves, where industry delayed the adoption of new standards for years or even decades, and where the standards under other laws are too weak to protect public health.

CEQA is a living statute that has frequently been amended to adapt to current conditions. Since it was first signed in to law by Governor Reagan in 1970, CEQA has been updated continuously. At last count, 334 sections have been added, amended or repealed since 1990; 170 sections since 2002; and 83 sections since 2008. Some of these changes aim to improve the focus of litigation under CEQA.

CEQA works by requiring public agencies to consider the environmental effects of projects on the environment. Where a project may have a significant effect on the environment, an environmental impact report (EIR) is prepared. The EIR is a public document. There is an opportunity for citizens to comment on it and written responses to those comments must be prepared. CEQA requires agencies to avoid or reduce significant effects to the extent feasible. Alternatives to the proposed project must also be considered. Public agencies must also consider whether the effects of the project in combination with other projects have an effect that is significant. The end result of this process is typically a decision by the public agency to require a project to adopt various measures to reduce impacts and protect the environment and the public health.

Yet, there is no state bureaucracy that enforces CEQA. CEQA is typically only enforced by citizens going to court. These court challenges are important because they create the incentives for public agency compliance. Important though they are, court challenges under CEQA are exceedingly rare.

- The total number of CEQA cases is small, averaging only about 200 per year.
- As a percentage of total civil cases, CEQA cases are 00.02% of 1,100,000 civil cases filed annually in California.
- The number is also small as a percentage of projects subject to CEQA, around 1% or less.

CEQA critics have pointed out that published appellate CEQA decisions have ruled against public agencies and developers about half the time. In the critics' view that creates an unacceptable risk for project developers. This conclusion is based on the evaluation of a small number of atypical cases. Drawing these broad conclusions from such a small sample of relatively unusual cases has no statistical value. A review of these cases shows that the courts often rule in favor of environmental petitioners, such as project neighbors and community groups, finding there to be abuses by project applicants seeking to avoid environmental disclosure or mitigation. This is exactly how the system is supposed to work.

The California Environmental Quality Act Protects the Environment

There is no question that CEQA is powerful. Given the challenges facing California's environment, it has to be. Some examples:

- It has protected Californians from tons and tons of toxic air pollution and related health effects, such as childhood asthma
- It played a principal role in the electrification of the Port of Los Angeles, making it the cleanest port in the country, improving the working conditions for truckers and health of nearby communities
- It led to the creation of the Cornfield and Taylor Yards State Parks, in park-poor low income neighborhoods of Los Angeles.
- It has protected our coast and tourism based coastal economy from offshore oil drilling.
- It led to the preservation of the Santa Monica Mountains.
- It set the stage for the protection of ancient redwoods in the Headwaters forest.
- It has caused the improvement of hundreds of developments to fit in better with their communities.
- It has protected workers from construction sites contaminated with toxic chemicals.
- It has protected groundwater from over drafting.
- It has kept sewage out of the San Francisco Bay and Newport Bay.

CEQA is the primary state law that requires public officials to understand and consider the environmental consequences of their decisions before they make them. CEQA plays an important role in ensuring that public agencies consider and mitigate important environmental impacts that are not addressed adequately by existing laws. Yet, because of its power, it is also

controversial. Particularly controversial is the role of citizen enforcement of CEQA through the courts.

CEQA Litigation is Rare

A copy of all CEQA complaints is required to be filed with the office of the California Attorney General (AG). The Attorney General maintains a data base of the documents that she receives.¹ It is reasonable to presume that petitioners do actually serve the Attorney General because the statute prohibits parties from getting relief in court unless they have served the AG. Based on data from the Attorney General's records, the table below shows the number of CEQA cases filed each year over the last ten years.

2002	2003	2004	2005	2006
183	186	215	118	194
2007	2008	2009	2010	2011
234	247	205	199	218

Total Cases 2002-2011: 1999

As can be readily seen, the absolute number of cases is small, about 200 cases filed per year. The number of cases is also small as a percentage of the total civil litigation in California, which is about 1,100,00 cases per year. CEQA litigation is a tiny 00.02% of the total civil litigation.

CEQA judicial enforcement is also a very small percentage of the total projects considered under CEQA.

The Attorney General's office undertook a case study² of CEQA challenges in the City and County of San Francisco from July 2011 through December 2011. The Attorney General found that only 18 lawsuits were filed out of 5,203 projects considered under CEQA.

Since all of these projects were located in San Francisco, they represent urban infill projects surrounded by neighbors. San Francisco has a reputation for vigorous environmental oversight whose citizens often exercise their rights through the public participation and legal system. Yet the litigation rate even for the San Francisco infill projects was only 00.3%.

¹ Service of the initial pleadings on the Attorney General is required by Code of Civil Procedure Sec. 388 and Public Resources Code Sec. 21167.7.

² <http://switchboard.nrdc.org/blogs/dpettit/AG%20Case%20Study%20Report%20re%20SF.pdf>

The Attorney General's case study also reveals other important data. Obviously, a study to determine the litigation rate must include all the projects that could be challenged under CEQA. This includes projects that are found to be exempt from CEQA, as well as projects subject to CEQA review, either through negative declarations or environmental impact reports.

CEQA critics argue that CEQA exemptions do not work, are too risky, and seldom used. Yet of the 5203 projects in the Attorney General's case study, the overwhelming majority, 5172 or 99%, were found to be exempt. Furthermore the Attorney General's case study found that only 5 of them, 0.1%, were subject to judicial challenges. Contrary to the narrative of CEQA critics, the striking conclusion from this data is that CEQA exemptions, already provided in current law, are being used overwhelmingly, successfully and securely for urban infill projects in this large and, by reputation, litigious urban jurisdiction.

In addition to the Attorney General's recent case study, there have been several efforts to assess how frequently projects are challenged under CEQA. In a paper published in 1995 by Robert Oshansky and John Landis, the authors surveyed planning departments to see how often project approvals under CEQA were challenged. They concluded that only 1 project was challenged out of every 354 that were considered.³ That means that litigation was filed in about 0.3% of the projects considered.

Similarly, NRDC examined the projects considered under CEQA by the City of Los Angeles. This case study⁴ examined projects from January 2011 through July 20, 2012. During this period 1,182 projects were considered and 18 cases were filed, representing a litigation rate of 1.5%.

This extremely low rate of CEQA litigation is indirectly corroborated by a 2012 survey⁵ of planning directors in California by the Governor's Office of Planning and Research. 87% of local governments responded to that survey, a very substantial sample. In that survey the planning directors were asked to identify the principal barriers to urban infill. The planning directors ranked CEQA 12th on a list of 16 barriers.

Finally, the legislature has taken effective action to deter frivolous litigation by enacting Section 21169.11 which authorizes a court to impose a \$10,000 penalty on a party raising a frivolous claim.

³ Robert Olshansky and John D. Landis *Fixing CEQA: Options and Opportunities for Reforming the California Environmental Quality Act* (1995) California Policy Seminar, University of California, Berkeley, pp. 83-90.

⁴ http://switchboard.nrdc.org/blogs/dp Pettit/ceqa_litigation_what_the_numbe.html

⁵ http://www.opr.ca.gov/docs/2012_APSR.pdf

Criticism of CEQA Appellate Decisions is Deeply Statistically Flawed

The Thomas Law Group has circulated an undated study⁶ entitled CEQA Litigation History. This study has been cited to claim that lead agencies and real parties in interest lose their cases roughly half the time. The argument has been made that this is an unacceptable risk to developers.

The Thomas Law Group study is limited to an analysis of only published appellate decisions, a very small universe of cases. According to the Thomas Law Group study, there were 104 reported appellate decisions during the same ten year period covered in the table above. These 104 decisions represent only 5% of the total litigation filed over that period.

Not only are these cases a small percentage of the total CEQA petitions filed, but, by definition, they are not typical. The courts of appeal only publish decisions in cases that are complex, where there is not settled law, or where there is significant public interest. These are not typical CEQA cases. A statistical claim based on such a small sample size, and a sample that is by definition a collection of unusual cases, is not statistically valid.

Holland & Knight also published a study⁷ based on a subset of the appellate decisions that were the subject of the Thomas Law Group presentation. In reliance on an even smaller group of atypical, unrepresentative decisions, Holland & Knight claims⁸ that CEQA is most often used to attack urban infill and public works projects. Putting aside the problem that public works projects especially are complex and often have very serious environmental effects, these claims suffer fatally from the same deficiencies that plague the Thomas Law Group effort.

However, the published appellate court CEQA decisions do tell a very important story, one overlooked by CEQA critics. While the critics are quick to highlight anecdotes where petitioners have allegedly misused the statute, they are silent on the abuses of CEQA by public or private developers. In contrast, these published cases show repeated instances of abuse or even gross abuse of CEQA by public or private developers.

In other words, the developers lost these cases because they failed to follow adequately the environmental disclosure requirements of the law, and they deserved to lose because of conduct that can sometimes be fairly described as blatant.

For example, in *CBE v. South Coast Air Quality Management District*, 48 Cal.4th 310 (2010) and *Woodward Park Homeowners Association v. City of Fresno*, 150 Cal.App.4th 683 (5th Dist. 2007), the lead agencies were using artificial baselines that were obviously manipulated to hide real

⁶ <http://switchboard.nrdc.org/blogs/dp Pettit/Thomas%20Law%20Group%20CEQA%20study.pdf>

⁷ <http://switchboard.nrdc.org/blogs/dp Pettit/CEQA%20Study%20JH%20DG%202012.pdf>

⁸ <http://switchboard.nrdc.org/blogs/dp Pettit/130108%20CEQA%20Working%20Group%20Press%20Release.pdf>

increases in air pollution. Despite the California Supreme Court's clear warning against baseline manipulation, the practice has re-occurred and was most recently condemned by the Superior Court in the Newhall Ranch decision.⁹

In *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners of the City of Oakland*, 91 Cal.App.4th 1344 (1st Dist. 2001), the Port of Oakland was caught trying to rely on outdated material from the California Air Resources Board and quoting Board staff in ways that the court described as "misleading." The misleading statements were being made to avoid reducing emissions of harmful toxic air contaminants such as acrolein, benzene, chlorobenzene, formaldehyde and xylenes, in a neighborhood already suffering from pollution related health impacts.

In *CBE v. City of Richmond*, 184 Cal.App.4th 70 (1st Dist. 2010), the Court of Appeal found that Chevron described its project one way in the environmental impact report it filed in California and in a very different way in a filing with the federal Securities and Exchange Commission. Referring to court decisions condemning conduct that was "misleading" and "evasive," the court found the EIR violated CEQA.

In *Center for Biological Diversity v. County of San Bernardino*, 185 Cal.App.4th 866 (4th Dist. 2010), the largest sewage sludge/open-air human waste composting facility in the U.S. was attempting to locate near a small, rural community, Hinkley, with residences located as close as one mile from the facility. Inexplicably, the lead agency and the real party refused to consider an alternative consisting of treating the waste in an enclosed building. The court of appeal, not surprisingly, found that to be a violation of CEQA.

In *Gray v. County of Madera*, 167 Cal.App.4th 1099 (5th Dist. 2008), Madera County approved a large rock quarry that would have reduced available water in adjacent wells relied upon by dozens of neighboring residents for their water supply. To compensate for the loss of their water source, the County proposed to supply the impacted community with a combination of non-potable water and an unspecified amount of bottled water. The court found it "defies common sense for the County to conclude that providing bottled water is an effective mitigation measure" to compensate for the loss of the citizens' water supply.

Californians for Alternatives to Toxics v. Department of Food and Agriculture, 136 Cal.App.4th 1 (1st Dist. 2005) is particularly interesting in the context of the current debate. CEQA critics are now arguing strenuously that CEQA review should not be permitted where a project meets existing environmental standards. That proposition was specifically rejected in this case by the

⁹ http://www.biologicaldiversity.org/programs/urban/pdfs/Newhall_Statement_of_Decision.pdf

court of appeal which stated “[c]ompliance with the law is not enough to support a finding of no significant impact under the CEQA.”(emphasis added).¹⁰

Nor was this failure a mere academic matter. The court of appeal found the lead agency’s approach failed to consider the

“impact from exposure to pesticides on people in nonagricultural areas—including individuals who are susceptible to health complications because of health or developmental status... and in distinctive locations such as schools, parks, hospitals, nursing homes; agricultural and nursery workers, ...pesticide applicators and agricultural workers...”¹¹

Finally, in *Natural Resources Defense Council v. City of Los Angeles*, 103 Cal.App.4th 268 (2002), the Court of Appeal found that the Port of Los Angeles improperly attempted to tier a new project from an outdated previous EIR. The holding is important, but the results of this case are far more important not just to the environment, but to the economy of Southern California. This decision led to a settlement in which the Port avoided producing toxic air contaminants by switching to electrified industrial equipment. This case set in motion a series of events that have led to the modernization of the port with a heavy reliance on electrification so that the Port itself is more efficient and more competitive and the impacts on adjacent environmental justice communities have been greatly reduced.

What the record of CEQA litigation repeatedly demonstrates is the critical importance of citizens’ right to exercise their legal rights under CEQA. Time and again, the courts have decided that public and private developers have failed, sometimes in blatant disregard of the statute, to take actions to protect the public health and environment of California citizens. The record of these published decisions is not a reason to weaken CEQA – it is a reason to preserve and strengthen it to make it more effective.

Tom Adams, CLCV Board Member
Oakland, CA 94612
thradams@gmail.com

David Pettit, Senior Attorney, NRDC
Santa Monica, CA 90401
dpettit@nrdc.org

¹⁰ 136 Cal.App.4th at 17.

¹¹ *Id.* at 20.