CEQA Modernization Reforms
Questions & Answers

www.CEQAWorkingGroup.com

Do we need CEQA reform - and what do the reforms being pursued by the CEQA Working Group do?

CEQA was adopted in 1970, at a time when it was *the* environmental law for our state: there was no federal or state Clean Air Act, Clean Water Act, Endangered Species Act, National Historic Preservation Act, hazardous waste laws, or any of the other environmental laws (and thousands of federal and state regulations), or dozens of federal, state, regional and local agencies that now administer these laws to protect our environment and the health and safety of our communities.

After 40 years and the enactment of thousands of new environmental protection laws and regulations, it's time to update CEQA to better integrate our environmental standards and policy priorities, without diminishing environmental protection or informed public participation in the decision to consider or approve plans and projects. That's what the reforms do:

- CEQA will continue to serve as *the* state environmental law for environmental impacts that are not regulated by standards set in other environmental and planning laws adopted since 1970.
- CEQA will continue to mandate comprehensive environmental disclosure and informed public debate for all environmental impacts, including those covered by standards set in other environmental and planning laws.
- An agency's authority to reject projects, or to condition project approvals on requirements that are more stringent than applicable standards, are preserved based on the legal authority - other than CEQA - vested in public agencies (e.g., constitutional police powers and other statutory authority conferred on cities and counties).
- Duplicative CEQA lawsuits are eliminated for projects that comply with plans for which an Environmental Impact Report (EIR) has already prepared.
- CEQA's public disclosure principles are enhanced by requiring an annual report of project compliance with required mitigation measures made electronically available to the public as part of the existing Mitigation Monitoring and Reporting Plan process.
- With limited exceptions, CEQA lawsuits may still be filed for failure to comply with CEQA's procedural and substantive requirements (e.g., adequate notice, adequate disclosure, adequate mitigation of environmental effects not regulated by other environmental or planning law, adequate consideration of alternatives to avoid unmitigated significant adverse impacts, etc.).
- To resolve conflicting judicial interpretations, CEQA is also clarified to assure that changes to private views and aesthetics are not appropriately considered as "impacts" for CEQA purposes.
- No changes to "standing" (the right of a party to file a CEQA lawsuit) are proposed, nor do the reforms pursued by the CEQA Working Group) change the opportunity of a prevailing party to recovery attorneys' fees. CEQA will continue to be subject to private enforcement lawsuits.

How do the reforms integrate environmental standards with CEQA?

California is a national leader in environmental protection, and as a state we are committed to protecting the environment, human health and safety. CEQA's 1970 vintage predates our 40-year history of passing thousands of stringent new environmental standards and CEQA represents a different paradigm for environmental protection. CEQA requires costly, often multi-year consultant studies of all potential environmental impacts, a project-specific determination by consultants, staff and agency decisionmakers as to whether each impact is "significant" even if it complies with other environmental standards, and a project-specific mandate to adopt "all feasible" measures - including mitigation measures, alternate project designs, and even alternate project locations - to avoid or further reduce significant impacts. As a result, even if a project complies with all of California's stringent environmental standards, CEQA lawsuits can be filed and a judge can overturn project approvals and require more study.

The reforms pursued by the CEQA Working Group would create a level playing field for California state law by excluding from the scope of CEQA litigation impacts for which there are adopted environmental standards for which the EIR mandates compliance.

How do the reforms protect the environment and public health while eliminating duplicative CEQA review?

CEQA review is required not just for projects, but also for plans or programs adopted by a public agency. CEQA also requires environmental impacts to be considered at the earliest phase of public agency decisionmaking to assure that environmental and public health issues are considered early - before an agency is committed to a particular course of action.

Before a 1987 court decision, duplicative CEQA review was not required for projects that complied with land use plans like General Plans and zoning designations. Since then, new rounds of CEQA review have been required every time a project receives a "discretionary approval" from any state or local agency, even if the project complies with both environmental standards and applicable plans. Each discretionary approval creates a new CEQA litigation opportunity.

While the bill continues to require lead agency conduct project level environmental review even for projects that are consistent with applicable plans, it would end duplicative CEQA litigation for land use projects that comply with the land use type, density and intensity designations in a land use plan that has been adopted based on an EIR, and for projects included in other types of plans that have under gone CEQA review, provided that:

- Such projects are required to comply with applicable mitigation measures from the Plan EIR; and

- Annual reports are filed electronically, and made available to the public on a public website, describing the project's compliance with applicable mitigation measures to allow for public monitoring and auditing of plan implementation activities.

While plans may have "program-level" or "programmatic" EIRs, such EIRs must still address all CEQA environmental and public health impacts, and must still assess the environmental significance of plan approval and implementation, and require feasible mitigation measures to reduce or avoid adverse impacts.

Less than 2% of CEQA decisions are challenged in litigation - there is no CEQA litigation abuse.

CEQA abuse occurs not only through meritless lawsuits, but also by the *threat* of litigation. Considering that the outcome of CEQA litigation is only 50-50 at best (even when a full EIR has been undertaken) the mere threat of litigation is enough to cause uncertainty and stall or prevent projects from going forward.

We recently passed a number of CEQA reforms. Shouldn't we give these time to work?

Recent CEQA legislative reform efforts have focused on providing "exemptions" from CEQA for projects that meet a complicated matrix of qualifying criteria, or of offering very limited reductions in either the scope or schedule required to comply with the CEQA process. These efforts have failed. Special exemptions for a minor handful of projects have not benefited California.

In 2011, two "reform" statutes were enacted that purported to streamline the CEQA compliance process.

- AB 900 eliminated superior court review for qualifying employment and renewable energy projects, and established an elaborate enrollment process whereby both Governor's approval and further legislative review was required for projects seeking this status. SB 900 was challenged as unconstitutional in a recent lawsuit filed by the Planning and Conservation League, and only one project has completed the enrollment process. Further, AB 900 expires in two years.
- SB 226 was enacted to create an exemption for solar PV rooftop installations, which were already commonly approved throughout California through categorical exemptions and Negative Declarations. AB 226 also attempts to create CEQA streamlining for qualified infill projects that comply with land use plans including "performance standards" established to avoid or minimize impacts. The regulations needed to implement this part of AB 226 are not scheduled to become effective until December 2012, and litigation has again been threatened over the issue of whether streamlined CEQA documents required under AB 226 for infill projects are subject to a "fair argument" standard of review or the "substantial evidence" standard of review. If the fair argument test is ultimately determined, through litigation, to apply to AB 226 streamlining, it is highly unlikely that project sponsors or lead agencies will use AB 226. Even if the substantial evidence test does apply, the judicial loss rate remains 50/50 - a coin toss.

None of the adopted reforms has had any actual effect (i.e., none have resulted in projects being approved or built), and all are subject to known severe limitations on availability and practical effect.

Why not just give exemptions to specialty projects?

Providing exemptions to a small number of projects doesn't address the underlying need to bring CEQA up to date with current environmental law. It's a matter of fairness. Small infill projects, affordable housing, schools, small businesses and other local projects should be entitled to reforms, not just select special projects. Additionally, project by project CEQA exemption bills remove entire projects from the requirements of CEQA. The reforms pursued by the CEQA Working Group maintain and enhance CEQA's goal to ensure environmental disclosure and informed public debate by (1) preserving the requirement to develop environmental documents for projects, and (2) mandating public release of annual reports disclosing project compliance with required mitigation measures.

Doesn't your proposal gut California's environmental law that protects our air, water and public health?

No. Federal and state Clean Air, Clean Water, and toxic materials handling laws protect air, water and public health based on science and laws - and these standards are in effect every day, for thousands of regulated activities, and violators are subject to civil and criminal prosecution.

The reforms retain all existing California environmental laws and regulations, and ensure that CEQA remains a tool to evaluate the impacts of a proposed project, to provide adequate input from the community, and to require mitigation to reduce projects' impacts on the environment.

Can project opponents still sue under CEQA?

Yes, with limited exceptions opponents can challenge whether lead agencies complied with the procedural requirements of CEQA (e.g., adequate project descriptions, adequate notice and public hearings, etc.). Opponents can also sue under CEQA's substantive requirement to feasibly mitigate significant adverse impacts for topical areas that are not subject to federal, state or local standards or plans. Opponents cannot sue an agency under CEQA over whether project impacts that are subject to federal, state or local standards or plans are significant or adequately mitigated for CEQA purposes.

Can communities sue if they believe projects will not comply with applicable federal, state or local standards and plans?

Yes, opponents can sue the agency responsible for implementing the standard or plan requirements for failure to enforce its standards or plans if they believe a project is being unlawfully considered by another agency. An opponent can sue under a "writ of mandate" - the same legal mechanism used for CEQA lawsuits - to compel an agency to fulfill that agency's obligation to enforce that agency's standards and plans, but they cannot sue such agencies under CEQA.

Can communities sue if they don't like a standard or plan?

Yes, but not under CEQA. The reforms pursued by the CEQA Working Group do not change other existing laws, which allow lawsuits to be filed against agencies that unlawfully adopt or implement regulations and plans that violate the statutes. To the extent CEQA was being used by advocacy groups to bypass the legislative process that resulted in adoption of a statute, and use CEQA lawsuits to create "another bite at the apple" by re-opening the adequacy of standards adopted by statute (e.g., AB 32 or SB 375), the reforms eliminate this CEQA abuse and upholds the role of elected officials in making policy decisions about environmental standards.

Does this proposal change the fair argument standard?

No. Negative Declarations, and categorical exemptions for projects with "unusual circumstances", will continue to be subject to the "fair argument" standard of review for topical areas not superseded by applicable environmental standards and plans.

Will this prohibit groups from suing because of aesthetics?

Yes in part. Aesthetic impacts to designated public scenic resources such as highways continue to be covered by CEQA, and can be the subject of a lawsuit. The reforms clarify that changes to private views and other aesthetic design issues are not properly considered impacts for CEQA purposes.

Will Native American Cultural considerations be protected?

Yes. The reforms specifically clarify that there will be no change in the consideration and protection of Native American resources under CEQA.

What is the problem when 99% of CEQA studies go unchallenged in court?

The judicial loss rate remains 50/50 - a coin toss - under CEQA litigation. Such lawsuit outcomes typically emerge 2-4 years after project approval, and project approval itself typically follows 1-3 years of study, community outreach, and agency permitting. In other words, projects that are challenged under CEQA are substantially affected, often derailing projects in their entirety. The reforms will address such outcomes without negatively impacting the environment.

Does the bill exempt large or high-polluting projects from environmental review?

The bill does not create *any* exemptions for *any* project: CEQA continues to apply to all types of projects. It also preserves full disclosure, informed debate, and the right of communities and lead agencies to impose mitigation measures and other conditions to assure that community-based standards and concerns are met. The bill does prevent CEQA from being used as a basis for suing projects that comply with environmental standards, or with plans that have already gone through the CEQA review process.

Do the reforms pursued by the CEQA Working Group Weaken SB 375, Greenhouse Gas Law or other CEQA Infill Reforms?

No. In fact, the reforms are critical to the successful implementation of SB 375, which requires California to adjust our land use pattern to encourage higher density infill and transit-oriented development. Community plans for implementing SB 375 have repeatedly been delayed and threatened with derailment by CEQA lawsuits. For example, a CEQA lawsuit has delayed implementation of the San Diego Sustainable Communities Plan - which CARB approved as meeting SB 375 mandates. And scores of infill projects have also been sued under CEQA, even though these projects comply with applicable standards and adopted community plans that have already gone through the CEQA approval process. We cannot achieve SB 375 under CEQA's current structure, which allows anyone to sue any project - often multiple times - even if projects comply with law and will help implement SB 375.

Will the proposal promote urban sprawl?

No. It only applies to projects that comply with applicable environmental standards (including SB 375 and other infill-oriented mandates) or land use and other plans that have been adopted in compliance with CEQA. It also requires full compliance with standards and plans requiring preservation and mitigation of parks and agricultural lands.

Does the proposal exempt projects based on outdated plans?

No. The bill's plan-consistency provisions require projects to comply with environmental standards and applicable plans. If an outdated plan does not comply with an applicable environmental standard, then the project would be required to meet the environmental standard - and the project's compliance with an outdated plan provides no legal shelter from a lawsuit challenging a project that violates environmental standards.

Would the reforms apply even where plans conflict with one another?

The bill's plan-consistency provisions would require compliance with applicable environmental standards and applicable plans (including mitigation measures). The proposal makes no change to existing law, which requires consideration of all applicable plans and informed disclosure and

appropriate resolution of any plan conflicts, including potential conflicts in density, intensity and use restrictions.

Aren't you falsely blaming our economic problems and job loss on CEQA when the real culprit is the mortgage meltdown, tight availability of credit, and slow consumer demand?

There are a number of factors contributing to the economic meltdown. Both before and during this recession, however, the current version of CEQA is an obstacle to achieving the next generation of necessary improvements. CEQA's power to derail progress means it is now an obstacle to the change we have decided is critical for the environment and public health: transit-oriented, higher-density development patterns; renewable power; a new manufacturing base for Greentech; and major new infrastructure projects like high speed rail and Bay Delta and water supply protections.

Aren't the real interests behind this proposal the polluters and exploiters of our natural resources who will profit from this destructive plan?

A broad coalition of groups representing schools, hospitals, public transit, affordable housing, renewable energy, local governments and many others agree it’s time to reform CEQA to preserve its original intent – environmental protection and information – while stamping out abuses of the CEQA process brought for non-environmental reasons.