

## **Preserving Your Rights to Challenge Environmental Approvals under CEQA**

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This article addresses the procedural aspects of participating in the environmental review process under the California Environmental Quality Act (CEQA), and the relatively easy steps that you can take to preserve all of your rights to challenge a flawed decision by an administrative agency in court. This article should prove useful whether or not you are actually planning a lawsuit over a project.

### **I. Why Should I Participate in the Environmental Review Process for a Proposed Project?**

Concerned citizens and groups will often confront an unwanted development proposal by participating in the environmental review process provided by CEQA. CEQA requires that an agency considering approval of a project study and disclose the environmental impacts of the project, evaluate feasible alternatives, and commit to reasonable and feasible mitigation measures if there are significant impacts. The CEQA process is often the best chance project opponents have to obtain changes in a proposed development. Legal challenges to project approvals, or just the credible threat of a challenge, can be your single most important tool to exert leverage on an agency and/or a developer proposing a project.

California courts have long recognized that CEQA lawsuits serve a dual purpose of (1) protecting the environment and (2) forcing public agencies to be accountable and transparent in their decision making process. However, CEQA (as almost every other administrative process) has strict rules governing what issues can be raised in legal challenges to projects. If you don't raise issues during the administrative review of a project, you can find yourself legally precluded from challenging questionable agency decisions in court (in legal parlance, one has a duty to "exhaust one's administrative remedies" prior to filing suit).

Even if you may not intend to actually sue over a decision, you should make your concerns known, because it will enhance your credibility with reviewing agencies (and the developers probably exerting pressure on them) and send a message that a lawsuit is at least a risk. Sometimes, showing public agencies that they may be vulnerable to a legal challenge can force significant changes in a project from agencies and/or developers wary of the time, expense, and uncertainty of defending against litigation.

### **II. What Am I Commenting On, and How Does that Affect My Comments?**

To be most effective when submitting comments, you should know what document you are commenting on, and what legal standard applies. For example, CEQA review produces several possible documents. Unless an agency determines that a project is exempt from CEQA, it will typically start the review process with notice that one of several documents is being reviewed and has an associated comment period (and

probably some type of public hearing too). The most important document is the Environmental Impact Report or EIR, which is a detailed statement of project impacts, alternatives, and mitigation. In the easiest case, it may be clear that the project will have significant environmental impacts, in which case the agency may have already decided to prepare an EIR detailing impacts, alternatives, and mitigation. If this is the case, the agency will issue a “Notice of Preparation” for the EIR and solicit comments on what the EIR should contain. Normally, the Notice of Preparation will be accompanied by an “Initial Study” that will provide a rough sketch of what the agency thinks are likely to be important issues. Your comments should simply reflect what you think will likely be important issues that need to be addressed, along with any background information you think would be helpful.

Sometimes, an agency will not have decided whether to prepare an EIR, and will prepare an Initial Study to help guide its decision. In this case, you will also want to raise any issues you may think are important, but you need to be more concerned with backing up your claims. Under CEQA, an agency must prepare an EIR if the record contains “substantial evidence” that supports a “fair argument” that the project may have a significant environmental impact. In this case, you will want to raise issues, but be sure not simply to assert a conclusion, but rather provide some background information to support your claims. Depending on the type of impact, it may be quite important to provide additional information. For example, don’t simply say “the agency should study traffic impacts.” Rather, point out existing traffic problems, highlight key intersections, etc.- more detailed comments and those with supporting information are more likely to meet the “fair argument” test. Also, be sure to state the basis for your opinion, such as if you have lived in particular community for a great length of time, pass by a certain intersection frequently, or have often hiked along a particular river or through a given forest.

Sometimes, an agency will have decided against preparing an EIR, and will issue a “Negative Declaration” or more commonly a “Mitigated Negative Declaration” (MND). In this case, you will need to explain why there is a “fair argument” that impacts will be significant. The agency will usually prepare an Initial Study to support its decision. You will want to carefully pick apart its reasoning and detail any weaknesses. The “fair argument” test is a relatively easy standard to meet, but it does require that the record contain “substantial evidence” of an impact, which is defined as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion.” In other words, tie your argument back to relevant facts. Bare conclusions or unsupported opinions, however strongly felt, will not suffice to meet the “substantial evidence” test.

There is also a big difference in the leeway agencies have at various stages of the review process. If an agency is claiming that no EIR is required, all that it needed to defeat the claim is substantial evidence to support a “fair argument” of a significant environmental impact. If an agency decides to prepare an EIR, however, it then gets the benefit of the doubt, and a court will uphold its conclusions if they are supported by “substantial evidence,” even if project opponents can produce substantial evidence to

support the contrary position. Thus, it is important to know what stage of review you're in and what standard of review applies.

In addition, the responsibility to respond to comments varies depending on the stage of the review. An agency need not respond in depth to comments submitted on an Initial Study or Notice of Preparation, but it must fully consider such comments. Once an agency issues an EIR in draft form, however, a much stricter obligation to respond in good faith to comments received applies. The responses to these comments need to be included in the Final EIR.

### **III. Should I Wait to Raise Issues or Objections Until I File Suit?**

Absolutely Not. Some project opponents may make a strategic decision to withhold comments on a project, to keep the "element of surprise" as an advantage in a subsequent lawsuit. Delaying comments is not a good idea. It is best to raise objections as early and often as possible until the public agency changes its apparent course of action. If you strategically delay comments or objections until after the administrative review is finished, you waive your ability to press the issue at all in court. If you delay making objections until late in the process or delay proposing alternatives to a proposed project, the public agency may be less willing to make necessary changes, and courts may be less willing to require that the agency respond to your comments. CEQA contains provisions that limit court challenges to those issues that were brought up during the administrative process. While this provision doesn't require that you bring up the issue yourself, but just that someone brought up the issue, it is always a good idea, if you are concerned about an issue, to raise it yourself, even if others have already done so. Also, you may not bring a challenge under CEQA unless you or your group objected to the approval of the project during the administrative review. Thus, to preserve your rights to sue, you must do two things during the administrative process: 1) make sure that you (preferably) or at least someone has raised an issue in the administrative process (this is known as "building the record"); and 2) that you personally (or a member of your group) have formally objected to the project approval during the administrative process. Unless both conditions are met, you will not be able to sustain a suit at all.

If you form a group after the project is approved for the purposes of bringing suit, the group will be able to raise any claim that is "in the record" from any source if someone in the group objected at the appropriate time.

### **IV. At what point in the administrative process should I raise concerns/objections?**

A typical administrative process has multiple layers. For example, review by a city's planning commission will often be followed by review by the City Council (since CEQA allows automatic appeals of decisions from unelected decision making bodies to elected bodies). It is always preferable to raise issues and objections as early as possible, at the first public hearing on the matter. Courts will often look more skeptically at claims raised for the first time late in the administrative process, even if the claims are raised before the final decision. Courts may also be suspicious of the motives that led you to comment for the first time late in the process. The California Supreme Court has bluntly

stated that “We cannot, of course, overemphasize our disapproval of the tactic of withholding objections...solely for the purpose of obstruction and delay,” stressing that strategically delaying commenting on a project is not a “game to be played by persons who...are chiefly interested in scuttling a particular project.” (*Citizens of Goleta Valley v. Bd. Of Sup’rs of Santa Barbara County* (1990) 52 Cal. 3d 553, 568. (“*Goleta*”)) Thus, if you come to the process late, you should explain in your comments why you didn’t comment earlier, and make it clear that you are not engaging in the type of strategic delay that the Supreme Court disapproved of in *Goleta* (this disapproved practice is sometimes referred to as “sandbagging”). Also, courts will generally expect much more detailed consideration of comments and concerns that are submitted to an agency early in the review process, rather than at the last minute (see *Goleta*). You also stand a better chance of finding the agency with an “open mind” early on, before opinions have hardened. There are thus very good tactical and practical advantages to commenting early on.

It is not enough, however, to raise objections early and then wait to commence legal action. Claims are also waived if issues and objections are not raised at the *final* administrative step, typically before the City Council for a controversial CEQA project (although procedures vary by locality so you should inquire what the local or state review and appeal process entails). See *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal. App. 4<sup>th</sup> 577, 592 (“*Tahoe Vista*”). The best course is to comment at each stage of the process. The more reasonable concerns and objections you get into the administrative record, the better your position will be in litigation, and the more influence you will have on the administrative process. Commenting at each stage also lets the reviewing agency and developer know you are serious, and it may make them more likely to include you in any discussions regarding revisions to the project. However, if you can only comment at one point, make sure it is the last stage in the administrative process, since you will not be able to pursue a court challenge over any issue that wasn’t raised at the final administrative step.

**V. I found out about a project right before the final decision, but after the comment period has closed. Should I bother commenting at all?**

Yes. Although ideally comments should be made early on, if for whatever reason you don’t know about a project until the last minute, comment anyway. Even if you submit detailed comments immediately before a final vote is taken by the last administrative decision maker, the issues are preserved for purposes of administrative exhaustion and litigation. See *Tahoe Vista, supra*, 81 Cal. App. 4<sup>th</sup> at 594. However, the later you submit the comments, the less the administrative agency will be expected to consider them in detail, per *Goleta*. As a practical matter, your attorneys will likely want to explain in their legal briefs why comments were submitted so late in the process, but you can still get through the courthouse door to have your case heard. If you submit comments after the final decision is made, or not at all, those courthouse doors will be shut on you.

## **VI. Do I need to hire experts?**

“Substantial evidence” includes expert opinions supported by facts. Experts can be useful, especially if the subject matter is highly technical or complex (traffic and noise studies are classic examples). Individuals may find it too expensive to hire an expert, but groups may be better able to bear the financial burden. Experts can cost thousands of dollars or even more. California allows a prevailing party to recover costs of litigation (including attorneys fees) if the litigation is brought to vindicate an important public right, and the person or group bringing the litigation does not have a strong financial interest in the outcome. However, expert fees are currently not included in the recoverable costs. If you or your group cannot afford to hire an expert, and even if you can, it is a good idea to contact state expert agencies and try to persuade them to write a comment letter expressing concerns. For example, if a local agency claims that a project will not have a significant impact on endangered species, but the California Department of Fish and Game comments to the contrary and points to a study or survey to support its position, a court is likely to give great weight to the state’s concerns. State agencies may not always comment, but it is worth the attempt to contact them and let them know of the concerns.

## **VII What impacts should I look for?**

CEQA takes a broad view of environmental impacts, though not an unlimited one. In general, any clearly environmental issue is fair game (biological impacts, traffic, air quality, etc.). Aesthetic and historic impacts are also considered environmental impacts under CEQA. Purely economic impacts are not considered environmental impacts, nor are purely private aesthetic impacts (for example, a development that blocks one person’s private views from an abutting property). The limits of CEQA’s subject matter jurisdiction are explored in the case law. However, you don’t need to be familiar with the case law to make effective comments. If it sounds like a common sense “environmental” issue, it probably is, and you should comment. When in doubt, comment anyway. There is no penalty for raising an issue outside the scope of CEQA—the worst that will happen is you will spend time and effort detailing an issue and receive a boilerplate comment in return that the issue is beyond the scope of CEQA. While possibly annoying, such a response will not weaken any other claims you may have made that are within the subject matter of CEQA. That said, commenting about a potential depreciation in your property value is not a good idea since it is not an environmental impact and can complicate attempts to recover attorney’s fees if you prevail in court.

## **VIII How Can I use the Public records Act to my advantage?**

It is sometimes useful to trace the development of an EIR through various iterations, to see where the agency thinks significant issues (and potential vulnerabilities) lie. It can also be useful to see what types of correspondence exist between an agency and a developer. To see intermediate drafts of reports or correspondence on a project, you can make a Public Records Act request to the agency preparing the EIR. While discussion of the Public Records Act is beyond the scope of this article, you should keep

it in mind as a potentially useful tool in reviewing an EIR, particularly in holding agencies accountable for their decisions and exploring whether the agency has an overly “cozy” relationship with the developer.

## **IX What other resources are available?**

CEQA can seem daunting, especially at first. In fact, even to the initiated it can seem daunting. Most court systems must appoint designated judges specifically to build expertise in administering CEQA, since it is a complex law with an even more complex subject matter- the natural and human environment. If you can master the intricacies of CEQA, you can master any administrative process. Fortunately, you do not have to master it alone. There are numerous web based and printed resources available to assist you in making the most out of your participation in the process. The Planning and Conservation League Foundation puts out an excellent guide, currently available for \$35, entitled “Community Guide to the California Environmental Quality Act.” The foundation also sponsors a series of all day workshops on CEQA, moderated by environmental law practitioners. The California Resources Agency and Governor’s Office of Planning and research maintain the California Environmental Resources Evaluation System (CERES) website ([www.ceres.ca.gov](http://www.ceres.ca.gov)), which discusses CEQA at some depth. Of particular interest on the CERES website are the Guidelines for the implementation of CEQA. Appendix A of these Guidelines contains an interactive flowchart for how the CEQA process is supposed to proceed. Our firm’s website ([www.cbcearthlaw.com](http://www.cbcearthlaw.com)) also contains links to various other resources to guide you through CEQA and other key environmental laws.