### **Environmental Law Series**

### A Legal Toolbox for Environmental Activists

# Workshop VI: CEQA, NEPA & Open Government

Presented by:



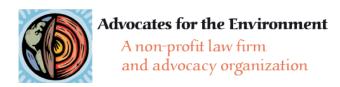


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MAURIELLO LAW FIRM, APC





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- Review of Handouts
- Political v. Legal Purposes
- CEQA Litigation Strategy
- Commenting on Environmental Documents
  - Scoping
  - (Mitigated) Negative Declarations
  - EIRs



### Political v. Legal

### Political

- Directly persuading the decision makers to act as you want them to
- Commenting is not a very effective way of persuading decision makers

### Legal

- Laying the groundwork for potential litigation
- Indirectly persuading decision makers through their fear of litigation

### Process

It can guide you, but don't blindly follow process without knowing why you're doing what you do.
 Dean Mallraff
 Wallraff

Advocates for the Environment

### **CEQA Litigation Strategy**

- Jennifer already discussed political strategy.
- Can't obtain remedy stopping project via a CEQA claim
  - Adoption of "statement of overriding concerns" allows agency to approve project no matter how bad its effects on the environment
- What you can get:
  - Delay perhaps sufficient delay to stop project
  - Bargaining chip with developers
  - CEQA "Reformers" don't like these uses



### Scoping Comments

- Generally trying to broaden scope of environmental documentation
- Think of all possible environmental effects and document them in the record
- Generally not litigated



# Commenting on (Initial Studies) and (Mitigated) Negative Declarations

- Usually want to force an EIR
- Legal standard: Fair argument based on substantial evidence in the record that the project may have a significant adverse effect on the environment.
  - Unlike with EIRs, the substantial evidence standard is working in our favor.
- For MNDs, can also show problems with mitigation measures:
  - Ineffective
  - Unenforceable
  - Improper deferral of formulation



# Commenting on EIRs

- Political: Making case against project, or for project improvements
  - "I weigh my publicity, I don't read it" Andy Warhol
- Legal: Setting stage for lawsuit challenging EIR
  - Comments focus on inadequacy of EIR
  - Exhaustion requirement:
    - "Exact issue" must have been raised by someone anytime during process
    - Petitioner must have objected to project during final administrative stage



### When to Comment on EIRs

- During official DEIR review period
  - Agency responses must described disposition of any significant environmental issue raised by commentators.
  - Agency must adopt feasible mitigation measures.
  - Good time to propose alternatives.
- Up until project approval
  - You can surprise the agency by putting in comments at the last minute, but there is little to be gained by waiting.
  - If you plan to litigate, give your lawyer time to submit comments, to effectively exhaust on the most important issues.



# EIR Litigation – An Asymmetrical Game

- Agency has time and resources to prepare bullet-proof EIR
  - But this is actually difficult to do
- Petitioner just needs to find one significant flaw to win lawsuit
  - Mortal v. venial sins
- Agency has more money to pay experts
  - They can usually commission studies finding the results they want.
- Legal error v. substantial evidence standards
  - Try to frame comments as "failure to properly analyze" an effect rather than reaching the wrong conclusion.



# Submitting Evidence

- You can submit evidence into the record, and it can be voluminous.
- No "data dumps"
  - Your comment letter should tie the evidence to the EIR issues.
- Expert submissions are better, and will be given more weight.
  - The Sierra Club is developing a list of experts willing to help with EIR commenting within their areas of expertise.



# Things to Look For

### Improper Baseline

- Baseline is the conditions at the time of the NOP
- Project's effects should be compared with this baseline, not a projected future.

### Global Warming

- Always find fault with the global-warming analysis.
- There is no established methodology for analyzing it.
- Most common analysis is X% reduction from business as usual, based on AB32. Courts have struck this down.

#### Blatant failures to follow the law

- More common in small jurisdictions
- Less common with EIRs

#### Public Trust Violations

 See Patricia Nelson's "CEQA and the Public Trust Doctrine: A Citizen's Guide" on the workshop Web page.



# Help Save CEQA

- CEQA is under attack in the state legislature
  - It's been attacked every year
  - This year the forces of evil are particularly strong
  - Please help out by donating, lobbying, etc.
- See CEQAWorks.org and PCL.org
  - Please donate



### More Information

See Handout for List of Web Sites,
 Organizations and Books

Questions???

