

Environmental Law Series

A Legal Toolbox for Environmental Activists

Workshop VI: CEQA, NEPA & Open Government

Presented by:



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Advocates for the Environment
A non-profit law firm
and advocacy organization

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CEQA Commenting Strategies



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CEQA Commenting Strategies

- 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.

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 describe 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? ? ?