FORM AND REFORM:

FIXING THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

SPUR Policy Report

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Form and Reform

In the absence of strong statewide planning and in the presence of weak local planning, stopping projects is what California does best. CEQA has become the tool of choice for stopping bad ones and good ones. SPUR has reviewed CEQA from the standpoint of sound planning and environmental quality. We contend that after the law's 30-plus years of operation, the type and pattern of developments, viewed at citywide, regional, and state scales, are environmentally worse than before. Not all of this can be blamed on CEQA; it has improved individual project design in some cases. Yet viewed broadly, CEQA has contributed to sprawl and worsened the housing shortage by inhibiting dense infill development far more than local planning and zoning would have done alone. To re-form California, we must first reform CEQA.

We do not call for CEQA's outright repeal, but rather its application in truly sensitive open and natural resource settings, and its replacement in urban and suburban settings with a more robust planning process. At the same time, we call for allocating greater resources to the planning function, in part by diverting Environmental Impact Report (EIR) funding and deriving planning monies from the private sector through assessment.

A Promising Model

CEQA was enacted in 1970 with four major goals:

1. to inform decisionmakers about potential effects of proposals
2. to identify ways to avoid environmental damage
3. to identify ways to remedy any damage by requiring feasible changes
4. to disclose why a project is approved if environmental effects are found

CEQA was patterned after the 1969 National Environmental Policy Act (NEPA), a useful planning surrogate at the federal level, where no real planning function existed. NEPA required an environmental impact statement on all federal or federally funded projects that had significant effect on the environment, such as roads, bridges, dams, and federal buildings. CEQA originally was not applied to private projects, but only to state facilities and utilities. The California law took effect on January 1, 1971, but many questions about it remained unanswered. In a 1972 decision the California Supreme Court greatly expanded the reach of the law in *Friends of Mammoth* by holding that the environmental impact report (EIR) requirement under CEQA applied not only to public projects but to all private projects (residential, commercial, and industrial) for which public permission was sought.

After that decision and corresponding legislative revision, CEQA has not only been used to assess new public facilities at state and local levels but also countless private projects—leading to growing controversy.

The EIR is the centerpiece of CEQA. It focuses on individual projects and uses a "fair argument" standard (e.g. can a fair argument be made for identifying adverse effects), a highly subjective judgment with wide variation depending on locality and setting.

The core of the law is its procedures:

1. Determination of EIR applicability to governmental actions and approvals other than ministerial (routine) and very minor ones.

2. Determination whether the project may cause significant adverse environmental effects. This includes an initial study involving interagency consultation. It results in one of three options:
   a. the project requires an EIR.
   b. the project receives a negative declaration which means that no significant adverse effects are anticipated and no EIR is needed.
   c. the project receives a mitigated negative declaration, which means there will be no significant adverse effects if specified mitigation measures are included in the project, and that they will be monitored.
   d. If called for in step two, an EIR is prepared, including project description, alternatives, cumulative effects, growth-inducing impacts, and mitigation measures.

If the "lead agency" issues a statement of "overriding consideration" it may approve a project with adverse effects if it shows that positive economic or social benefits outweigh the negative environmental effects.

Viewed alone and in the abstract, this system must have seemed an appealing model. Unfortunately, the original CEQA supporters didn't anticipate a future where gauging environmental quality involved so many variables at so large a scale. The resulting patterns of growth waste public and private resources and exacerbates sprawl.

Benefits of CEQA: Information and Input

Several elements of CEQA are helpful, although many could be done more efficiently through strengthened local planning and zoning. Under the law, projects must be specifically described, and this is done in great detail, often graphically. This reduces distortion and rumor, and ensures that project proponents and opponents are dealing with the same facts.

Alternatives to the project must be set forth, usually corresponding to some important variable. Some very careful and creative work can be directed at devising alternatives. This tends to broaden the scope of consideration and makes clear what the scenarios would be with the project, without the project, with a revised project, and with a different project or projects in the same location. This comparative analysis sharpens debate in most cases.

Cumulative effects, including the project's, must be projected. The portion of the law that describes these requires that the EIR disclose the effects of the project in relation to other past, present, and reasonably foreseeable projects, mostly in the immediately surrounding area. Although this effort is enormously demanding and highly conjectural, it nevertheless references the planning policies of the community to make those determinations, and may point up needed change in policy.

Public participation is fostered because the law requires that the public be given notice and an opportunity to comment on an EIR, negative declaration, or mitigated negative declaration. The lead agency must prepare responses to all comments and questions. At the outset of the EIR process, scoping sessions are often held to define the effects and subjects to be studied.

The courts provide an important level of oversight for the process. Because of its unique legislative underpinning, the courts take a special interest in the reports and provide relief that may root out local favoritism, bias, or mistakes in the development-approval process.

The result of these steps is that individual project design is improved. A range of specialists in many different fields may provide input and formulate "mitigation" of effects, which may take the form of redesign, revised regulations, or public programs.

Flaws of CEQA

CEQA is characterized by three major flaws:

1. Papering Over Planning
2. Dollars and Delay
3. Undermining Understanding

CEQA Flaw #1: Papering Over Planning

Environmental assessment is a portion of the local entitlement procedure, but not really an integral part of it. It is one of three processes—the other two being planning and regulation. Planning and zoning are required to be consistent, while environmental assessment occasionally intersects with them but never meshes smoothly. Some observers contend that with careful study, planning and environmental assessment could be somehow merged. However, it seems clear that such an effort would modify the planning and regulatory process so significantly that they would be unrecognizable and ineffectual. More seriously, the planning process would thereby be delayed correspondingly.

Independence might be tolerable if CEQA did not overshadow the planning function. In many large cities, there is a special officer, usually in the planning department, whose sole function is management of EIRs. That management involves manipulating paper. Much of the agency staffing is devoted to editing, printing, and promulgating EIRs, then re-editing, reprinting, and repromulgating. Additionally, substantial amounts of citizen energy are devoted to reading, reviewing, and testifying about EIR reports. In a bizarre overreach, general plans, area plans, and downtown plans, the preparation of which also involves data collection, devising and assessing alternatives, and mitigating impacts as planning proceeds, are themselves subject to EIR reports. Often the very same firm redundantly will prepare the two distinct documents. However, it now commonplace to prohibit a general plan consultant from doing the EIR on the plan it prepared for fear that the firm will simply validate its own work.

Finally, there is a high degree of redundancy in environmental assessment, with agencies at federal and state levels undertaking assessments of the same issues addressed locally, often without the knowledge of such localities (one example is the work of the state EPA on toxic remediation, often not known to localities). Overall, the blizzard of paper that is generated diverts attention from the truly crucial planning issues of California today.

In CEQA negotiations, there is an unarticulated premise that government—especially local government—and its planning function is not to be trusted, while EIR preparers are seen as honest and objective. Since EIRs are not policy documents building on past precedent, each EIR decision is based on totally new perceptions. This neither sharpens community policy nor is it incorporated into revised policy documents. Hence, CEQA is a simplistic response to complicated problems, ones that should be addressed by continuing public debate on broad issues, rather than separate and independent project review. Impacts are judged by professional EIR writers, often without the benefit of locally established environmental thresholds or public policy.

CEQA is thus in the dubious tradition of those who extol case-by-case administrative review, rather than firm pre-stated regulation providing predictability and certainty. The former market-based doctrine welcomes negotiations and deals among interested parties, presumably leading to the best outcomes. Unfortunately, this precludes early and efficient resolution of issues and leads to abundant litigation. EIRs are so voluminous that anyone, including judges, can find some passage to support a position, and court interpretations are disparate. Hence, reports are used as weapons rather than aids; the term "bullet-proofing to describe excessively long EIRs, is all too apt.

CEQA fosters incrementalism. The case-by-case after-the-fact character of environmental assessment is inefficient because each EIR is freestanding. EIR writers rediscover the future each time they write an EIR, and thus are unable to forecast accurately cumulative and growth-inducing impacts, the probability of those impacts occurring, or off-site and extra-jurisdictional impacts. Compounding this inadequacy, the EIR applies an end-of-the-pipe (when the project is completely done) perspective. All of the remedies for that fundamental flaw (e.g. public scoping and early interagency contact) tend to be ineffective.

CEQA Flaw #2: Dollars and Delay

Since 1972, enormous amounts have been spent in California on thousands of EIRs for private projects. On average, total EIR costs for a jurisdiction far exceed entire general planning budgets: the Olshansky–University of Illinois 1996 survey of 1990 EIR expenditures revealed that about ***ten times more*** was spent on EIR document preparation, even without staff time included, than on both consultant and staff costs for the local general plan.[1] The 1990 cost of EIRs by California local governments, 80 percent of which was on private projects, was about $20 million, excluding administration. This

[1] Olshansky, Robert, *Survey of CEQA in California Agencies, 1996*, Questions 13 and 27; and Landis, Olshansky, Pendall, and Huang, Fixing CEQA: Options and Opportunities for Reforming the California Environmental Quality Act, 1996

extrapolates, with inflation, to a total direct cost of somewhere around one billion dollars since the mandate was imposed in 1972, although other estimates are much higher.

To deal with increasingly obvious inadequacies, remedial planning-oriented legislative amendments and administrative regulations have been sporadically adopted. They have confused rather than clarified: an EIR can be Standard, Program, Tiered, Supplemental, Focused, or Master, and negative declarations can be Unmitigated or Mitigated. In the CEQA reform amendment of 1993—the most significant reform of the law since 1971, though still a very modest one, the Master EIR was intended to lend order to the increasingly chaotic process and reduce the number of EIRs. It did not do so. It was unclear how the new MEIR document on, say, a general plan or specific plan, was intended to forecast impacts in a future so complex that infinite amounts of data with a limited lifespan would have to be collected.

Expense to the private developer in terms of delay and increased holding costs (the money a developer pays for the right to develop a property while waiting for permission to develop) is equally significant. Developers typically add a year to the entitlement schedule for EIR processing and raise housing prices correspondingly. Unlike zoning, which is usually known in advance of undertaking a development, there are no official environmental criteria to guide the developer. Evaluation comes after the design is completed, so the designer cannot benefit from known environmental thresholds, which vary for like contexts from jurisdiction to jurisdiction, and often within jurisdictions, if they exist at all. This adds to uncertainty and leads to more voluminous reports to "cover all bases." The Olshansky Survey showed that although a small proportion of all California projects are required to prepare full EIRs, the more visible ones almost invariably do. Also procedures to avoid full EIRs—initial studies, mitigated negative declarations, and so on—remain time-consuming and reduce certainty.

Delay has other effects. Under zoning, when a development is subject to discretionary review under specific criteria, progress is made in review of the development before detailed design, but the prior negotiations become academic once the developer has to proceed with that final design and the totally separate EIR process. After the developer has paid for these later steps, still with no firm assurance of approval, the high total cost stiffens a resistant posture, hindering rather than encouraging compromise and redesign.

The most serious shortcoming is the EIR's use in discouraging needed development. EIRs and the requirement for them are the first line of defense to discourage unwanted but socially desirable uses (e.g., housing) in many California localities.

CEQA Flaw #3: Undermining Understanding

Today's EIR fails to achieve its stated purpose of regularly providing useful information, fostering understanding, and encouraging input into the development approval process. The reports are often too cumbersome to properly inform the public. Redundancy and superfluity, but not readability, seem to be rewarded by local agency and judicial acceptance. Focus is sacrificed to inclusiveness, and brevity to detail, resulting in dull, dry, lengthy technical tomes.

The reports encourage selective perusal and inappropriate "cherry-picking" for advocacy positions. This becomes evident in scoping sessions and public hearings, which often become a forum for airing political grievances and unrelated issues, and later in litigation. Many advocates use EIRs to justify positions they already hold or to litigate over, but virtually never to learn something they did not know before the EIR was undertaken. The EIR, with the threat of litigation hanging over it, always errs on the side of inclusiveness at the expense of clarity.

The Ultimate Issue: Our Environment

The two key questions Californians should be asking ourselves are: 1) whether the original goal of CEQA is being furthered, i.e. whether the state's environment has improved, remained unchanged, or declined, and 2) whether alternatives to CEQA would be more effective. In its 2002 citizens' survey on the environment, the Public Policy Institute of California found that 27 percent of respondents felt environmental quality was getting better, while 51 percent felt it was getting worse. SPUR concurs with the majority.

Our neighbors to the north provide a dramatic model for change. At almost the same moment that California turned to environmental impact reports to protect its environment, Oregon turned to a strengthened planning program, requiring effective local plans and zoning by all jurisdictions. Oregon has protected and greatly improved its natural environment without review of individual projects, but with sound intergovernmental planning. The recent property-rights crusade that passed compensatory zoning at the Oregon ballot box does not lessen the fact that the Oregon environment remains one of the most pristine in the country.

Eighteen states have enacted analogues to CEQA, but none of them are the states with potent state, regional and local planning functions—Florida, Washington, Maine, Vermont, Maryland, Oregon, and New Jersey. Florida experimented with a system called Developments of Regional Impact for a short period, but abandoned it on the grounds that it was inefficient and detracted from its growth management and planning functions. The Oregon model, which has been followed to some degree in these other states, stops sprawl by mandating strong planning and growth management, not procedures for environmental review of projects. There is ample evidence that this approach works better than ours.

A Growing Consensus for Change

There is a clearly discernible and growing call for CEQA change across the state. It comes from a host of entities along the political spectrum rarely heard from on this issue. The California Performance Review Commission last year found that attempts to encourage revitalization of older developed urban areas as an alternative to sprawl are thwarted in part by environmental review and called for development on vacant underused land in urban areas. It found current exemptions to be too limited, and

cited John Landis, then chair of the UC Berkeley's Department of City and Regional Planning, to state that developers see CEQA as a barrier that adds time, cost, and uncertainty to infill and mixed-use development projects. The Commission called for use of a master EIR on a general plan as the only precondition to an exemption for infill housing and mixed-use development.[2]

The Urban Land Institute convened a task force in 2002 that called for revision of CEQA and the state planning law to avoid duplication and increase coordination. It recommended that urban infill projects be offered expedited environmental review and increased certainty when meeting upfront smart growth and environmental criteria. A new short-form EIR ***cum*** zoning requirement was proposed to be given a limited period of circulation and judicial review, with a short statute of limitations for potential litigants.

Even in conservation circles, there are signs of disenchantment with CEQA. For instance, the former director of the Planning and Conservation League stated in 2004 that he would consider a proposal (since recanted after his departure) to support repeal of CEQA provided significant protections were applied to open and natural resource areas. He also stated that when a general plan or specific plan has been subjected to an EIR, a project consistent with the plan should move through the approval process without further environmental review.

A notable declaration came this year from Bay Area regional agencies, which have a broad insight on managing urban growth. The executive directors of the Metropolitan Transportation Commission and the Association of Bay Area Governments, and the deputy director of the Bay Area Air Quality Management District, jointly called for the state "to address the unintended consequences of its actions that discourage smart growth, including the ironic use of CEQA reviews as a tool for NIMBYs."

Principles of Reform

We propose the following principles to help us think about how to improve CEQA:

1. Cities should continue to rely on developers to pay a *pro rata* portion of the cost of developing plans, policies, zoning and zoning approvals, and whatever environmental assessment is needed involving their sites. This may require a new form of assessment or exaction.

2. Whatever system is used in place of CEQA *must* ensure that the state's unique environment is fully protected. Sound policy respecting the environment should be included in newly defined and updated general plans.

3. CEQA reform should reflect sound planning tenets, particularly those mandating a regionwide perspective on all urban and environmental matters, so that the result will be intensified population centers and protected greenfield areas viewed at a regional scale.

[2] California Performance Review Commission, *A Government for the People for a Change: Streamline the Environmental Review Process to Discourage Sprawl and Revitalize Older Developed Urban Areas*, 2004.

4. All development-related processes—planning, zoning, and environmental assessment, should be coordinated so that they use common environmental thresholds, standards, and criteria, interact smoothly, and do not require separate bureaucracies to administer. The imposing of expense and delay are not worthy growth-management measures.

5. Guidance about which projects are desirable and which ones are not should be offered to applicants before a project is underway, not after enormous investment in planning and redesign after environmental assessment.

6. Environmental review procedures should consider the location of a project, and not treat all projects, no matter the setting, in a one-size-fits-all mode. A development that would be environmentally beneficial inside a city next to transit might be environmentally harmful on the suburban periphery or in exurban, rural, or open settings.

7. Absent CEQA, the planning process should include mechanisms to grapple with the impact of land-use decisions on low-income communities in urbanized areas.

Recommendations for Reform

Using these principles, SPUR advocates the following proposals for consideration in the reform of CEQA. They may be used as alternatives, or in some suitable combination. The assumption is that the California Environmental Quality Act will remain as a division of the California Public Resources Code with its present title, but with amended content.

1. Differentiate the level of applicability of CEQA by location of the proposed project, distinguishing among urban, urbanizing, or rural areas. This would exempt projects in all urban jurisdictions with adequate general plans and plan-consistent zoning ordinances, provided the ordinance includes detailed environmental protection criteria in all its discretionary review processes. In urbanizing areas, projects would be totally exempted that are consistent with specific plans or city or county subarea plans that have been subject to an EIR for that location. In rural or open areas outside of the urban and urbanizing areas, which are invariably more vulnerable, EIR's should remain applicable. The mapping of the three above-noted areas would be the responsibility of specified regional agencies, which in the case of the Bay Region could be the Joint Policy Committee, representing the Metropolitan Transportation Commission, the Association of Bay Area Governments, and the Air Quality Management District, or some equivalent interagency entity. The entity could make use, in the short term, of information from the Smart Growth Livability Footprint program mapping. This approach would offer an incentive to develop in urban and urbanizing areas rather than rural areas by making it more demanding to develop on greenfields due to the environmental impact requirement.

2. Expand the types of development that can be exempted from CEQA compliance, including transit-oriented development and infill and refill projects. The conventional definition of transit-oriented development includes development within a quarter to half mile from a transit station, although this varies based on setting and community.

Infill or refill (on a previously developed site) projects are usually defined as being within an urban growth limit line. This could also require development that achieves minimum densities, perhaps contains a minimum mixture of uses, and provides a suitable level of neighborhood-serving uses. These forms of development are integral to what has come to be called "smart growth." This exemption would be buttressed by further protections in the form of the desired specifications of urban design, density, intensity, landscaping, and public and private services.

3. Expand the concept of functional equivalency so that adopted and up-to-date plans, plan elements, or planning policies would substitute for, and serve the same function as, an EIR, provided they address the necessary issues and undergo regular review and updating. This likely would include adequate general plan conservation elements consistent with state and regional policies, implemented by plan-consistent zoning ordinances, and incorporating within their substance accepted criteria based on appropriate environmental thresholds—what in CEQA are called "mitigations." In this way, the plan becomes the functional equivalent of an EIR, and achieves the same ends. Were California to adopt a statewide growth-management system, this goal would be much easier to achieve. In fact, SPUR continues to advocate what might be called "The Oregon Option," which could be a fourth option were it not so different and difficult by calling for a totally new planning system. (It would constitute a comprehensive state-regional-local planning system, with some California-specific modifications.) Notwithstanding the recent property rights revolt, Oregon's system continues to be accepted and has produced excellent outcomes for as long as CEQA has existed. Oregon has no state environmental protection act because none is necessary, and would only complicate a smoothly operating process.

The above three proposals provide flexibility in legislation. That is, each of them could be pursued independently or in tandem; none is inconsistent with the others. SPUR takes no position on which of them, singly or in combination, should be enacted first or to the exclusion of the others. Nor does SPUR discourage useful CEQA reform at the local level, which, given its constraints, could have only minimal remedial effects.

Conclusion

CEQA does not achieve the policy outcomes it was designed to achieve. Instead, CEQA exacerbates sprawl and thwarts higher density development in urban centers. Over the past 35 years, CEQA has come to overshadow comprehensive planning in California. This is due in no small part to the fact that CEQA creates an easy funding mechanism by passing costs to the private sector.

CEQA reform is perhaps secondary when viewed against the full spectrum of desperately needed reforms to achieve sound, well-located development and conservation. A future filled with EIRs, although unwanted, is less threatening than a future that arrives before we are ready for it. The larger problem is our inability to overcome a strong but anachronistic "home rule" tradition in an era of exponential

growth where local jurisdictional boundaries mean relatively little for the quality of life of the population. Reform also could be a logical starting point for a new land-use initiative providing the opportunity to convey the distressing picture of a state moving inexorably toward environmental decline. Not only can CEQA reform place the larger issues center stage, but also will itself go a long way toward freeing up the necessary resources to plan California's future.

Yet even without bolder change, the system that should replace CEQA would incorporate environmental protection that is stronger and more effective than CEQA's. And as we refine our new environmental assessment instruments, we can work to forge a California-wide consensus on the enlightened policies any change should serve. CEQA reform thus will become an important catalyst for anticipating and addressing the future land use needs of our state, region, and city.

This report was adopted by the SPUR Board on November 16th, 2005 and represents official SPUR policy. Paul Sedway served as the report's primary author.