

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT AT 40

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I'm delighted to be here with my distinguished fellow panelists to join in a discussion of CEQA at 40. It's been observed that, although early on the California Supreme Court played an active role in interpreting and shaping CEQA, in the years that followed there was something of a hiatus in the court's CEQA jurisprudence, until the last five or six years, during which the court has issued a number of CEQA opinions.

First, I would like to briefly revisit the court's seminal CEQA cases, decided in the 1970s, the cases that set the stage for all that was to follow. Next, I'll describe the court's internal procedures for granting review and assigning cases. Finally, I'll touch on some of the principles established in our recent CEQA decisions.

* Associate Justice, California Supreme Court, 1994–2017. Remarks delivered at the State Bar of California Environmental Law Section 2010 Environmental Law Conference at Yosemite®, Session 2: “CEQA Turns 40,” October 22, 2010 (with co-panelists Susan Brandt-Hawley, Kip Lipper, James G. Moose, Ronald B. Robie, and Lisabeth D. Rothman).

I. INSIDE THE COURT

A. HOW CASES COME TO US

Before the Supreme Court can address an issue, of course, one of the parties in the case has to petition for review. Someone has to bring a lawsuit challenging an agency's CEQA compliance, the party losing in the trial court has to appeal, and the loser in the Court of Appeal has to petition us. We receive approximately 7,000 petitions a year, and we grant approximately one to two percent. Under our rules, a case is grantworthy (1) if there is a conflict among the lower courts, or (2) the issue is a recurring one that needs to be resolved, or (3) the case poses a question of statewide importance that would benefit by our resolution. In other words, we grant review to secure uniformity of decision or to settle an important rule of law.

B. CEQA GRANTS

With respect to CEQA cases, as I mentioned, the court's decisional output has fluctuated over the years. In the early days, right after CEQA's enactment, the Supreme Court accepted a number of cases involving the act, starting of course with the monumental *Friends of Mammoth*.¹ Until *Friends of Mammoth*, CEQA was thought to apply only to public works projects. *Friends of Mammoth* put an end to that, with the court holding that the act applied as well to governmental agency approval of private projects. We also articulated the principle that CEQA "must be interpreted to afford the fullest possible protection to the environment within the reasonable scope of statutory language."² Had we been wrong, the Legislature could have said so. Instead, it codified our decision.

After *Friends of Mammoth*, the next case to come before us was *No Oil, Inc. v. City of Los Angeles*,³ involving off-shore drilling of test oil wells, a project the trial court ruled did not require an Environmental Impact Report ("EIR"). In *No Oil* we rejected the trial court's standard that an EIR is required only if "there is a reasonable possibility that the

¹ *Friends of Mammoth v. Board of Supervisors of Mono County*, 8 Cal.3d 247 (1972).

² *Id.* at 259.

³ *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68 (1974).

project will have a momentous or important effect of a permanent or long enduring nature,'”⁴ and adopted the rule that an EIR is required if there is “‘substantial evidence that the project “may have a significant effect” environmentally,’”⁵ and this is so even if there also is substantial evidence supporting the contrary conclusion of no significant environmental impact.

The same year as *No Oil*, 1975, we decided *Bozung v. Local Agency Formation Commission*,⁶ involving a city’s annexation of agricultural land where a development was proposed and was expected to occur “within the near future.” in *Bozung*, we held that CEQA requires an EIR before any governmental activity — in this case, annexation — that may have as its *ultimate* consequence a physical change in the environment, and we also held that an EIR must be prepared at the earliest possible stage in the sequence of governmental actions that might lead to development. Finally, the last in this series of early cases was *Wildlife Alive v. Chickering*,⁷ decided in 1976, where we held exemptions from CEQA are to be narrowly construed.

The net result of these cases was that CEQA should be broadly construed to effectuate its purpose of environmental protection, and exemptions to CEQA should be narrowly construed. After this early activity, the court in the ensuing decades issued only a few CEQA opinions, until the last five or six years. The question seems to be if there is a particular reason.

Some have speculated that the composition of the court might explain our willingness or disinclination to take CEQA cases, but I would argue that’s simply not the case. While the court’s composition might affect *how* a case is decided, it doesn’t affect whether to grant review. Basically, we grant the cases that need to be decided. When there’s a conflict we almost always grant review. An exception might be when it appears the trend in the Courts of Appeal is in a particular direction, and we agree with the trend, so it appears likely the issue will be resolved without our input. Other reasons not to take an otherwise grantworthy case are (1) that the case is

⁴ *Id.* at 78.

⁵ *Id.* at 75.

⁶ 13 Cal.3d 263 (1975).

⁷ 18 Cal.3d 190 (1976).

not a good vehicle, in that it has some procedural problem or unusual facts that would preclude a clear statement on the point, or (2) there's recent legislation that has resolved the question, or (3) the court decides to let the issue "percolate" in the Courts of Appeal so we can have the benefit of the lower courts' views.

In the early years, there were a number of questions concerning the scope and application of the new law that needed addressing and which the court evidently felt were appropriate for judicial resolution. As time went on, these questions became fewer and so did petitions to our court.

C. CONFERENCE AND ASSIGNMENT OF CASES

So, let me take you to our Wednesday morning conference. Every Wednesday morning, we meet in the chief's chambers to discuss and vote on petitions for review. The number of petitions can vary from 150 (this past week) to over 500 (two weeks ago, when we had a double conference). Of course, we have our "A" list and our "B" list, the "A" list petitions being those that we expressly consider at conference and the "B" list being those that are deemed routine and are not discussed. Four votes are required to grant a petition. If a petition is granted, after conference the chief justice assigns the case to one of the justices who voted to grant.

We don't know exactly what the chief justice's system is, but no one has ever complained; well — with some few exceptions. At the least, he considers who is likely to write an opinion that will garner a majority, and he also considers each justice's work load.

No justice is considered an expert in an area of the law for the purpose of being assigned cases; in other words, we don't specialize, and even if we *think* we're a specialist, that holds no weight in the assignment process. Nor is it our practice for individual justices to request assignment of a particular case. Be that as it may, some kinds of cases do tend to be assigned in bunches. For a number of years, I seemed to be assigned all the SLAPP cases (Strategic Lawsuit Against Public Participation). I may at some point have said, "Please, don't SLAPP me again!" Others have complained of drowning in water cases. But this is all in fun. With respect to CEQA, for reasons unknown to me, of the court's twelve most recent CEQA opinions, I was the assigned author of seven.

D. FROM GRANT TO OPINION

Moving, then, from the grant of review to the opinion, what happens is that after the case is assigned and has been fully briefed, the assigned chambers prepares a so-called calendar memorandum setting out the issues and the arguments, the proposed analysis, and the assigned justice's tentative conclusion. The other justices then have 30 days to submit written preliminary responses, which can range from a straight concur with no comment, to concur with reservations, doubtful, or disagree, all of which require a statement of reasons. When the calendar memo has garnered a tentative majority, the case is set — or calendared — for oral argument. We confer on each case immediately after argument. If the assigned justice retains her majority, she drafts an opinion, which is then circulated, and any dissenting justice circulates a dissent. When everyone has signed one of the opinions, the case is filed.

II. THE COURT'S ROLE IN DEVELOPING CEQA

In the early years the court played an important role in the evolution of CEQA, addressing its substantive provisions and giving the law a broad scope. Today the cases that come to us involve not so much the meaning and scope of the law, but its proper application, both procedurally and substantively. Doubtless to the frustration of practitioners and agencies, many of the decisions are intensely fact specific and not amenable to “bright line” rules. But I'll mention a few established principles:

A. THE STANDARD OF REVIEW

First, the standard of review — judicial review of an agency's compliance with CEQA extends only to whether there was a prejudicial abuse of discretion. The court does not pass on the correctness of the EIR's environmental conclusions, but only on its sufficiency — procedurally or factually — as an informational document. A prejudicial abuse is established if the agency has not proceeded in a manner required by law, or if the agency's factual conclusions are not supported by substantial evidence. We review questions of law or procedure *de novo* and questions of fact for substantial evidence. The court's scrutiny, therefore, depends on the nature of the alleged defect.

In recent cases, we've reviewed de novo the following issues of law or procedure: whether an activity is a project (*Muzzy Ranch Co. v. Solano County Airport Land Use Commission*⁸); what is the proper baseline for CEQA analysis (*Communities for a Better Environment v. South Coast AQMD*⁹); what is the appropriate time for CEQA compliance (*Save Tara v. City of West Hollywood*¹⁰); is mitigation feasible and can an agency be responsible for mitigation of off-site impacts (*City of Marina v. Board of Trustees of the California State University*¹¹); the necessity for recirculation of a draft EIR after public consultation and input (*Vineyard Area Citizens v. City of Rancho Cordova*¹²); and whether the agency followed correct procedure in analyzing cumulative impacts (of a timber harvest plan, in its choice of assessment areas) (*Ebbetts Pass Forest Watch v. Cal. Dept. of Forestry*¹³), to name only a few.

B. SUBSTANTIVE DECISIONS

We've also issued some substantive decisions:

(1) In *Muzzy Ranch* — we held CEQA may require lead agencies to consider the effects of “displaced development” resulting from restrictive land use policies, where such development can be reasonably anticipated.

(2) In *Communities for a Better Environment* — we held the proper baseline for CEQA analysis is actual conditions in existence, not previously permitted pollution levels.

(3) In *City of Marina* — we held an agency's mitigation responsibility may extend to off-site impacts.

(4) In *Save Tara* — we held an agency's substantial commitment to a public-private agreement for land use was an “approval” requiring an EIR, notwithstanding the agreement was conditioned on subsequent CEQA compliance.

(5) And in *Vineyard Area Citizens* — we established that an EIR must contain all its relevant information in one document so as to clearly

⁸ 41 Cal.4th 372 (2007).

⁹ 48 Cal.4th 310 (2010).

¹⁰ 45 Cal.4th 116 (2008).

¹¹ 39 Cal.4th 341 (2006).

¹² 40 Cal.4th 412 (2007).

¹³ 43 Cal.4th 936 (2008).

communicate the project's significant environmental effects, and we also outlined the information an EIR for a long-term land development project must contain concerning its proposed water sources and the environmental impacts of using those sources.

CONCLUSION

Let me conclude by saying that, as the cases come to the court, we will continue to take the ones that require resolution and do our best to clarify the law — admittedly not an easy task with CEQA. Thank you.

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