



CEQA From the Beginning

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League of California Cities
Planning Commissioner's Academy
March 4, 2020

Presentation Overview

History & Purpose of CEQA

Terms and Acronyms

Who does what in the Process?

Types of CEQA Decisions

What is a Mitigation Measure

Public Comments

Mark: Feedback from our last 101 asked that we get even more basic in the discussion. We've modified the presentation to introduce more about the fundamental building blocks of CEQA, and the key things that are important to understand when reading an environmental document.

CEQA's History

Enacted in 1970; signed into law by Governor Reagan

Based on *The Environmental Bill of Rights*

Modeled after *National Environmental Policy Act (NEPA)*

Implementation at local agency level by *Friends of Mammoth v. Board of Supervisors of Mono County* (1972) 8 Cal. 3rd 247

Important amendments in 1972, 1976, 1978, 1984, 1989, 1993, 2010, and 2019

Amended all the time by the legislature, courts, and local jurisdictions

Shannon: This often surprises folks. Yes, the Great Communicator signed this into law when he was governor of California. While modeled after NEPA, CEQA went a different direction with more public input and comprehensive analysis. Originally CEQA only applied to state agencies, early in the process a court decision applied it to local agencies. Amended frequently...and yet not frequently enough...and of course we re-learn how to do this every time the court decides something.

What's the point?

Probable and/or Possible

Informs you of the environmental effects of the project
To solve a project's environmental impacts if possible; or,
To allow your consideration even if it isn't



Shannon. Paperwork is not the purpose, it just seems that way. The extent of information is often overwhelming, but the goal is simply to inform you of the possible impacts of your action.

Key Terms of CEQA

Baseline	A fixed point in time from which impact of future changes are analyzed
Environmental Impact Report	A means of approving a project that exceeds a threshold after mitigation
Exemption	A list of actions that the state believes do not need extensive analysis
Fair Argument	A reasonable person could come to a different conclusion
Impact	Change in the environment
Initial Study	Checklist of environmental topics to consider (Appendix G)
Mitigated Negative Declaration	A discussion of impacts that conclude that mitigation is needed
Mitigation Measure	A change to a project designed to reduce an impact below a threshold
Negative Declaration	A discussion of impacts that determine no mitigation is needed
Preponderance of the Evidence	51% of testimony supports the conclusion
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Significant and Unavoidable Impact	An impact that cannot be reduced below the threshold of significance
Significant Impact	Change in the environment that exceeds a threshold of significance
Speculation	Making up a future condition
Substantial Evidence	At least 1 study supports the conclusion
Thresholds of Significance	A point at which the agency determines an impact is important

Mark: As we all learned in grade school, words have power, and in CEQA these terms are important. These terms have much longer definitions embodied in state law and court decisions. However, for our purposes these word-bites are enough to understand most of what you'll see in this presentation.



CEQA Evaluates Change

Change from existing condition (not the plan...mostly)

Short- and long-term impacts

Direct and indirect changes

Cumulative changes (includes other projects)

Local and regional plans

Shannon. Later we'll talk about baseline and thresholds, but the basic principle here is that we are evaluating the change from the current condition (mostly anyway), and determining whether that change is significant.

The Players

Applicant:	A representative of the project who is responsible for the submittal of all information and usually both the cost of the environmental analysis and the legal indemnification if the agency is sued.
Staff:	Usually someone in the Planning Department charged with coordinating both in-agency review, and communication with other agencies.
Public:	The recipient of the information, and the target audience.
Lead Agency:	The agency with discretionary change to which the Applicant has applied.
Consultant:	Staff from either the public or private sector hired to provide assistance or expertise for the Lead Agency Staff.
Responsible Agency:	An agency with some permitting authority, but not approval authority over the project.
Planning Commission:	A volunteer body tasked with reviewing hundreds of pages of highly technical information in order to make a decision narrowly defined by law and to be roundly criticized for having made the decision.

Mark: Of course there are a multitude of other actors providing input, but these are the main players who will be referenced in the text, and you may see at the podium.

It all starts with a *discretionary* project...

- ▶ A project means the *whole of the action*, which has the potential for resulting in either a direct or a reasonably foreseeable indirect physical change in the environment.



Shannon: We spend a lot of time questioning the project manager or applicant because we must include everything in the project description. Including items they haven't thought about like construction methods, types of equipment, hours of operation, etc. We need information in the CEQA document that even the applicant hasn't thought about yet.

Once we have a project, then...

We must determine the level of environmental review.

Three basic outcomes:

- Exempt
- Negative Declaration or Mitigated Negative Declaration
- Environmental Impact Report

Mark: We make these decisions early on, often without the results of the studies. Not really a gut-level decision, but often it amounts to that. The decision sets the wheels in motion...some of which can take years to finish.

Yes, the CEQA Guidelines say this...

Once a lead agency has determined that an activity is a project subject to CEQA, a lead agency shall determine whether the project is exempt from CEQA. (15061(a))



Shannon: I enjoy reading this to new practitioners. Words often have a different meaning in CEQA-land.

Ministerial vs. Discretionary Projects

Ministerial:	Little personal judgment, use of fixed or objective standards
Discretionary:	Requires exercise of judgment or deliberation
Mixed Decision Projects:	Considered discretionary

Shannon: All discretionary projects require some form of CEQA action, even if that action is to determine the project qualifies for an exemption.

Exemptions

- Statutory:** Items ruled by the legislature to be exempt from CEQA. (15260–15285) and other places in the state statutes.
- Categorical:** Items in the state or local agency guidelines that are considered to have little or no environmental impact in most instances. (15300–15332)
- General:** A determination that the project will not result in direct or reasonably foreseeable indirect physical change in the environment. This is known as the *common sense* exemption. (15060(c))

Shannon: Exemptions are not guaranteed; many things can prevent the use of exemption.



How are CEQA determinations made?

- Knowledge of the community
- Precedent of decision makers
- Understanding of the impacts
- Results of technical studies
- Public Controversy

Mark: Often the determination of what kind of environmental document is made at the counter discussing the potential project with the future applicant. The planner's experience with the community, and knowledge of past decisions all feed into the determination. Other factors include changes in law, or often a decision of a court case. While rare, it is possible for the determination to change between application and decision. Occasionally one of the technical studies will surprise us with a significant impact that we didn't know about beforehand. For example, a new species, hazardous materials, or cultural resources, can all be unknown before the analysis begins. One of the more important factors considered by the planner is the previous decisions by the Commission/Council on similar projects. If previous decisions have leaned one way or another, the planner is going to be predisposed toward doing the same thing again. While public controversy is not supposed to drive the decision, it often is the sole reason a project is required to do an EIR. In fairness, the litigation battlefield is littered with agencies that attempted to streamline CEQA, only to being forced into an EIR.



Managing Risk

Weighing cost with benefit

Higher 'protection' comes at a cost

Not all decisions are obvious

The deciding factor is the difference between fair argument and substantial evidence

Shannon: While providing information on the environmental impacts of a project is the intended purpose of CEQA, it is also about managing investment risk. It can cost millions of dollars to procure land and secure entitlement. Even if the developer does excellent due diligence, (and most do), there is a level of risk that they cannot control. First is the public process where everyone has an opinion and CEQA affords them an opportunity to weigh in, the second is the decision makers who must balance community concerns with adopted standards, and finally the courts who can derail even the best of plans. Add the time cost of money and the differing level of challenge, and you can see why some developers choose to complete an EIR rather than attempt an IS/MND

Fair Argument Standard (CEQA Guidelines 15064[a])

When must an EIR be prepared? – When it can be fairly argued, based on substantial evidence, in light of the whole record, that a project may have a significant environmental effect

- This is purposely a low threshold for EIRs
- “Fairly argued” means that there is evidence of the potential for impact in the administrative record before the agency
- Impacts = direct, indirect, and cumulative contribution impacts
- “May have” means that the evidence need not be absolute or unequivocal

Mark: The fair argument standard is why negative declarations are so difficult to defend. Not impossible, but all it takes is someone to credibly challenge the assumptions in the document, and you’ve triggered an EIR. Of course by then you’ve spent several months and thousands of dollars and essentially must start from the beginning.

Substantial Evidence

15384. SUBSTANTIAL EVIDENCE

(a) "Substantial evidence" as used in these guidelines means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.

(b) Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.

Mark: This is directly from the CEQA checklist and is the gold standard for protection. Ironically both exemptions and EIR's share this protection – seemingly at either end of the spectrum. The Courts don't generally question the assumptions of an agency when prepared within an EIR. It used to be that preparing an EIR took longer and cost more than an IS/MND, those days are long gone. The same technical studies must be prepared and the writing cost differential simply isn't as great as it used to be.

What is substantial evidence?

- ▶ What it is:
 - ▶ Facts
 - ▶ Reasonable assumption predicated on facts
 - ▶ Expert opinion supported by facts
- ▶ What it isn't:
 - ▶ Argument
 - ▶ Speculation
 - ▶ Unsubstantiated opinion or narrative
 - ▶ Clearly inaccurate or erroneous information
 - ▶ Socioeconomic impact not linked to physical environmental impact



Shannon: You would think that facts would be obvious, but often the answer isn't clear and requires some interpretation. Much of the environmental analysis is interpretation of incomplete information by professionals experienced in the field. Because of this, all sorts of questions and criticisms can be introduced as part of the public process.

Types of CEQA Documents

Substantial Evidence

Exemptions

- Statutory
- Categorical

Environmental Impact Reports

- Subsequent
- Supplement
- Master
- Program
- Project

Addendum to EIR

Fair Argument

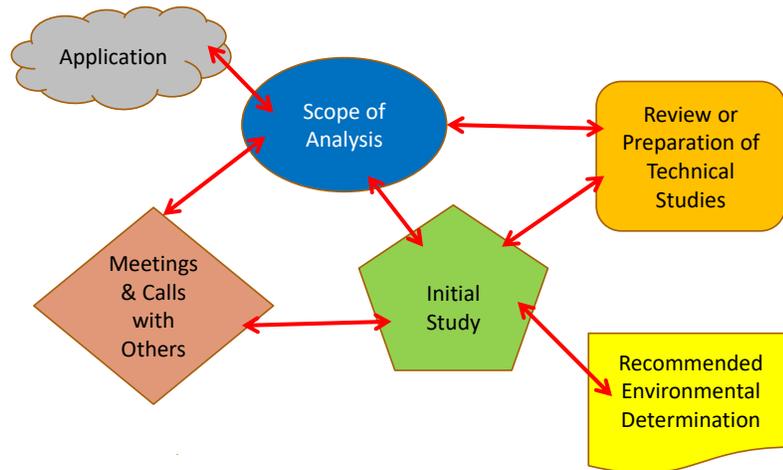
Negative Declarations

- Negative Declaration (No Mitigation Measures)
- Mitigated Negative Declaration

Addendum to Negative Declaration

Shannon. While this decision is typically made well before the Commission sees the document, its important to know why some applicants ask for an EIR, while others are ok with an MND. Most of the decisions on the level of CEQA analysis are made based on facts...will the project have a significant impact or not? But some are made by the applicant (or their attorney) based on the type of protection each level affords. The substantial evidence threshold of challenge is the highest standard and gives the lead agency the most protection. The fair argument is easy to challenge, and seldom used for controversial projects...aka something that may be litigated.

Nonlinear Process



Mark: While simple on paper, in practice the period from idea to application to consideration can span a year or more. The process is also not without cost.

Context is Everything

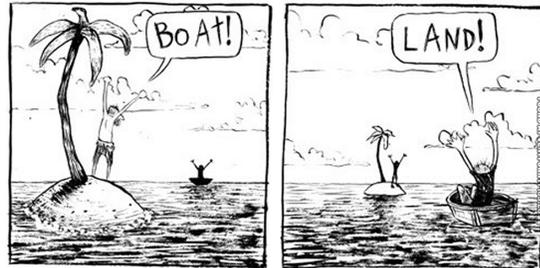
Every community has different standards

Comparing agencies is difficult

Not all large projects have impacts

Not all small projects don't

How do we know?



Shannon: Data without analysis is meaningless. Without understanding the information within the context of the city, county, state, nation, world, or universe, you have no idea if it's a big deal or not. CEQA implores agencies to adopt their own thresholds of significance, but most agencies do not. The default most agencies use is the Appendix G Checklist...even though the Guidelines themselves admonish us not to think of them in that fashion.

Threshold of Significance

A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, noncompliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant.

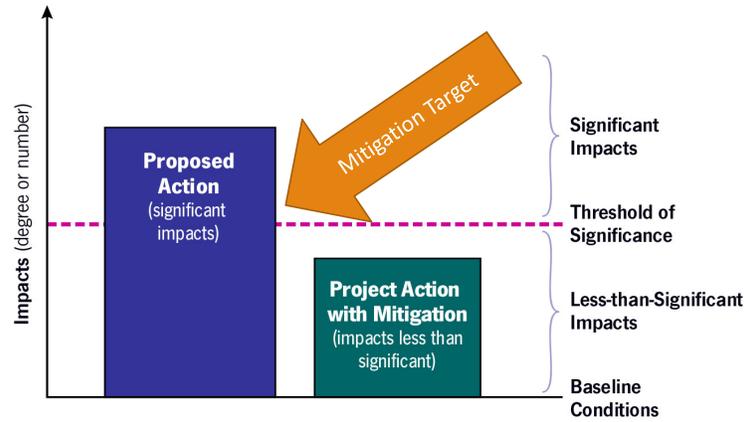
Found in:

- CEQA Guidelines
- General Plan
- Municipal Code
- Adopted Development Standards

P-VALUE	INTERPRETATION
0.001	HIGHLY SIGNIFICANT
0.01	
0.02	
0.03	
0.04	SIGNIFICANT
0.049	
0.050	OH CRAP, REDO CALCULATIONS.
0.051	ON THE EDGE OF SIGNIFICANCE
0.06	
0.07	HIGHLY SUGGESTIVE, SIGNIFICANT AT THE P<0.10 LEVEL
0.08	
0.09	
0.099	HEY, LOOK AT THIS INTERESTING SUBGROUP ANALYSIS
≥0.1	

Shannon: This is the ever-fixed mark against which impacts are measured. The idea is to adopt a level for an environmental issue that reflects community expectation. Below the level and the community would agree that the impact is not significant. Conversely, by exceeding the level more study is needed and potentially changes to the project that will reduce the impact to that level.

Understanding Thresholds



Shannon: Just to drive the point of the mitigation home.

What Is a Mitigation Measure?

Avoid	Avoid the impact altogether by not taking certain action or parts of an action
Minimize	Minimize impacts by limiting the degree or magnitude of the action and its implementation
Rectify	Rectify the impact by repairing, rehabilitating, or restoring the affected environment
Reduce or Eliminate	Reduce or eliminate the impact over time through preservation and maintenance during the life of the action
Compensate	Compensate for the impact by replacing or providing substitute resources or environments

Mark: The basic idea is that we need address issues raised in the analysis to reduce the impacts to below the threshold. Sometimes the best way to do this is simply avoid the area. Another way is to minimize the impact like reducing the size of the project or changing how its built. Only if the impact can't be avoided in some fashion do we look at other changes. Paying fees should be the last resort in mitigation because the agency seldom collects enough to deal with the impact.

Once its Drafted, Then What?

Writing of the documents (normally):

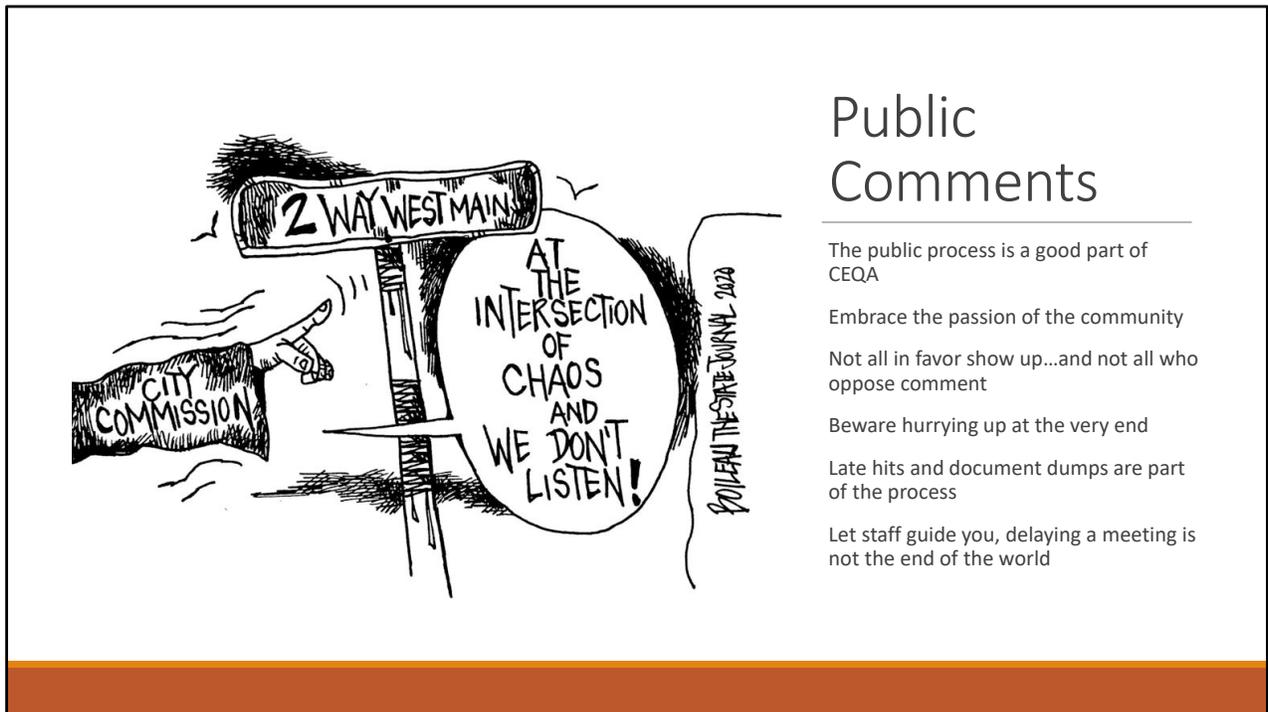
- Exemption: < week
- ND/MND: 20 to 180 days
- EIR: 90 to 200 days

Mandatory public review periods:

- Exemption: none
- ND/MND: 30 days
- EIR: 85 days
 - 30 days for Notice of Preparation (NOP)
 - 45 days for Draft EIR
 - 10 days for Final EIR



Mark: After technical studies are complete the writing begins. Starting early seldom works, and it just takes time. In addition to the preparation there is the iterative review process and public comment period.



Shannon: We almost always learn something from the public comments. In some cases we learn that people don't like the project. In others we may find an issue we hadn't evaluated, or that one that we did needs more study. The best way deal with this is to understand that its part of the process. Public comments are an integral part of the process until the very end. This means that late hit comments aren't going away anytime soon. As part of the 'team' the Commission is another set of eyes on the document and can help set things straight, and help make sure the City is positioned for the best possible project. Asking leading questions of staff is permitted.

It's done by the time I get it, what can I do?

CEQA is not done until the project is approved

You are the last set of eyes before the decision is made

Give staff time a heads up if you have a question

Add your reasoning to the record

Mark. We are a team of professionals all working toward the same goal. While we've put a lot of work into the document, the decision is yours. Ideally, you've had an opportunity to read through the entire document, and asked staff if you have any questions. Its good to add your reasoning to the record because this reasoning is often used to defend the decision if challenged.

EIR Myths

The EIR will stop the project.

The EIR will tell me how to vote on the project.

The EIR will be more expensive than a mitigated negative declaration.

The EIR will take longer and than a mitigated negative declaration.

The EIR will be more thorough than a ND/MND.

The EIR will be bulletproof.

Mark/Shannon: An EIR is intended to solve problems, and if they can't be solved, provide a way to make a decision for the project anyway. Far from killing a project it's a way to ensure one gets approved. The EIR must not make a recommendation on the approval of a project. Instead, it should only disclose information on the probable impacts of making the decision. Substantial evidence, in the form of technical studies, are required for both documents. Thus, the cost is often the same. More for the MND if you then have to do an EIR. Same here, the studies take the time, and if you have to go back and do an EIR, the time is much longer than an MND. No such document exists or can given the legal world we live in.

What CEQA isn't...

Perfect

An advocate for a project

The project itself

A chance to fix existing problems

An encyclopedia of everything everywhere

The analysis of 'worst case'

A decision maker



Shannon/Mark. Perfection is not required or even sought after...costs too much and takes too long. The CEQA document does not advocate for or against a project...it only informs. The decision is still yours to make. Don't mistake CEQA compliance for the project. Focus on the design of the project and don't rely on the CEQA compliance to suggest approval or denial. The environmental process is not the time to try and fix existing problems (i.e. traffic, parks, water, sewer). Finally, CEQA compliance should be short and should not be history of everything in the community...think Wikipedia not encyclopedia.

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I'm here about the CEQA Document

That's it...

CEQA evaluates how the project changes environment

The evaluation is circulated for public review

If the change is above an adopted threshold then an agency must take action to:

- Adopt measures (mitigation) to reduce the impact below the threshold; or,
- Make findings of overriding consideration to approve the project anyway

The agency must consider the changes as reported in the analysis before taking action

Mark/Shannon: Well in a nutshell anyway. Of course the hard part is all the details leading up to the decision, and of course those opposed to the project that will use all those details to derail the project.

Questions?

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