

In the course of a very good post about the benefits of environmental review statutes such as CEQA, Jonathan [ascribed to me the position](#) that “policymakers should [not] continue to look for useful exemptions to CEQA” based on [a prior post](#) that I had written opposing recent (now enacted) legislation creating limited exemptions from CEQA for certain kinds of development projects. Since I appear to be a [minority](#) on this blog in my position, I thought I should expand on my remarks as to why I thought the particular exemptions that were adopted were dangerous, and what kinds of changes to environmental review statutes are less dangerous. Because I want to develop the argument in detail, it’s fairly long, so it’s all below the fold.

My position is based in large part on two key principles. First, what is “good for the environment” is often eminently contestable. That in turn is the case for two reasons. In general, there is a lot of debate over what our goals are in environmental protection. The most classic example is the debate between Pinchot’s vision of conserving natural resources for human use and Muir’s vision of protecting natural resources for non-consumptive or intrinsic reasons. Both sides would argue they are “environmentalist” and indeed much of modern environmental law is based on both visions. But those visions can come into clear conflict – for instance, [whether to dam a valley in a national park in order to provide high-quality and inexpensive drinking water for a growing city](#) (surely another form of environmental good).

Another reason we have a lot of debates over what is “good for the environment” is because it is often very difficult to measure environmental quality. The data we have about the environment is often extremely limited, so in order to make policy decisions we often have to extrapolate or infer from that limited data. Extrapolation and inference requires judgment, which means that reasonable people can debate over what the implications of environmental data are: Do they show that an endangered species is decreasing or increasing? Or that a particular kind of development project is carbon-intensive or carbon neutral? In other words, there is a tremendous amount of ambiguity as to what is environmentally beneficial. This is not to say that there are not clearly right or clearly wrong answers – but simply that there is a lot of grey areas in this field, perhaps more than in other public policy areas. Classic examples of this are the (endless) fights over whether paper or plastic bags are worse for the environment, or [whether cloth or disposable diapers are worse for the environment](#) (the latter question is particularly relevant for a new parent like me!). Indeed, one of the reasons we have environmental review

statutes with public participation requirements is because of the difficulty and contestability of measuring what is good for the environment. Public participation makes it harder for an agency to skew its analysis in one particular way, as members of the public have the opportunity to point out the potential flaws and implications of various assumptions in the analysis.

The second principle has to do with the politics of environmental law. As a general rule, those who are subject to traditional environmental regulation are fewer in number and, per capita, pay a higher burden for the cost of regulation. There aren't very many oil refineries in California, and the cost of compliance with various environmental regulations for each of those refineries is very high. (Of course, depending on the nature of the market that the regulated industry is in, it may be possible for it to pass some of those costs on to consumers, thereby spreading the costs.) On the other hand, environmental regulation is generally intended to protect public goods. Public goods are often enjoyed by great numbers of people. Oil refinery regulations produce cleaner air, which everyone within a certain distance from the refinery will benefit from. Thus, the number of beneficiaries from environmental regulation will be large. But on the other hand, the level of benefit that each individual member of the public receives will generally be quite small – improved air quality might make each of our individual lives more pleasant, but on average that will be relatively small in value. (Again, there are exceptions – [those who suffer from asthma, for instance, will receive tremendous benefits from improved air quality](#).) This is not to say that the benefits do not often exceed the costs of environmental regulation. A small per capita benefit multiplied by large numbers of people will often exceed a large per capital cost multiplied by a small number of people.

But the importance of this asymmetry in the distribution of costs and benefits for environmental regulation goes to the relative ability of those who pay the costs for regulation and those who receive the benefits from environmental regulation to mobilize politically to achieve their goals. In general, a branch of social science called “public choice” theory predicts that on average smaller groups are easier to organize than larger groups. This makes intuitive sense – it's easier to get an agreement among three people on average than three hundred. Public choice theory also predicts that the more that any one individual person has at stake in a government decision, the more they'll invest to affect that government decision.

So in the context of environmental regulation, those who are subject to regulation are fewer in number and each individually have more at stake in the decision to

regulate compared to those who benefit from regulation. That means that, on average, those subject to regulation will likely have more incentives to, and more ability to, influence the decisionmaking process. In crass terms, those subject to regulation will be better lobbyists than those who benefit from regulation.

This public choice story is a generalization of course. There are lots of exceptions to it – after all, environmental laws were passed in the first place, and there has been a significant debate in the legal and political science literature about how this might have occurred despite the public choice dynamics. Many of those explanations depend on temporary activism by the public-at-large (perhaps inspired by high-profile environmental disasters) that overcomes these asymmetries. But when the wave of activism passes, then the asymmetry of lobbying reinstates itself, particularly for the low-profile job of implementing the enacted statutes through administrative action, legislative oversight, budgeting and adjustment, and judicial review.

The CEQA changes at issue involve ([relatively limited](#)) exemptions to some of the provisions in the statute (primarily accelerated judicial review) for projects that the proponents (including my colleagues on this blog) assert are “good for the environment.” Things like renewable energy production facilities, or infill urban development. The idea is that by providing these exemptions, we can make it easier for these “good” projects to proceed, while retaining the full panoply of CEQA review for “bad” (or perhaps more accurately, “less good”) projects. This will create incentives for people to pursue the good projects and reduce CEQA roadblocks to those projects. It all seems like a gain for the environment overall.

The problem is who gets to define what is good for the environment. I am a big supporter of renewable energy projects and infill urban development myself. If I was dictator of California, I would surely do all I could to advance those kinds of projects. But (fortunately for the citizens of California) I am not dictator. California has a democratic political system that involves a lot of lobbying and influence by various interest groups. Many of those groups surely have an interest in trying to reduce the burden of environmental regulations – including CEQA review – on their activities.

Those interest groups could make a range of arguments about how to justify such a change in the law. They could argue that overall environmental regulations are too burdensome and not worth the cost – the House GOP has been making this argument repeatedly over the past couple of years (and [many of us at Legal Planet](#)

[have been sharply critical of those arguments](#)). Those arguments are more politically difficult to make – they call for wholesale revision of environmental laws, a fairly high-profile political event, and they might affect a wide range of people and interest groups, attracting even more political attention.

But an alternative route might be much more attractive: Argue for a limited exemption for your particular activities from the relevant regulations. Because the exemption is limited, you might be better able to get the legislation in under the political radar, and it is less likely that what you're asking for might affect other interest groups who might get involved. Of course, just asking for an exemption for yourself can sound an awful lot like special pleading, and that might not be very convincing. (Though it has been very successful at times for industries such as oil and gas, mining, and agriculture in the context of federal environmental regulation. In fact, [the oil and gas industry has gotten some great exemptions for their development projects from NEPA in recent federal energy legislation.](#))

But even better is the argument that, hey, our activities are good for the environment, and so we should encourage them by reducing the regulatory red tape that they face. Here is where the two principles I developed early in this blog post come into play. First, there is a wide range of debate over what is good for the environment. So lots of interest groups will be able to make plausible arguments about why (for instance) nuclear power is good for the environment and so should receive special treatment. Second, turning these arguments into regulatory exemptions (through the legislative, administrative, or judicial process) requires lobbying. But the interest groups that will, on average, have an advantage in lobbying will be those groups who are subject to regulation, not those who benefit from regulation.

The risk, then, is that over time interest groups with a stake in weakening regulation will use debatable arguments over the environmental merits of their projects to get more and more exemptions from generally applicable laws, weakening them substantially. If there is a strong precedent that the law should not be amended to create special exemptions, then these kinds of arguments will have less political force and there will be fewer (or no) exemptions. But once the precedent is broken, then the door is opened more broadly for this kind of special pleading.

I can understand why my blogging colleagues support the CEQA exemptions in question. The exemptions are relatively limited in terms of the reduction in CEQA

compliance requirements; the kinds of projects that qualify (in general) seem to be good for the environment. The question is whether these short-term benefits are worth the potential long-term political costs to CEQA by opening the door for other groups to argue for exemptions from the law. Given the current political climate in California, this also seems [like a reasonable gamble to take](#). Right now California Democrats are dominant, and Democrats are the current primary allies of environmentalists in the state, who themselves have shown their political power by (for instance) [defeating Proposition 23 last fall](#).

But the political winds can change. About 25 years ago, [California was a much more conservative state](#). In the future, Democrats might not be so dominant, or they might not be so closely allied with environmental groups. Indeed, even in these friendly political times, some of the specific CEQA exemptions show the risks here. Two of the specific projects that got CEQA exemptions are proposed football stadiums in Los Angeles – whatever the environmental merits of the particular proposals, these are not the kinds of projects that in general most people think of when they think of “green” projects. (Indeed the just-released EIR for one of the football stadium proposals [predicts massive traffic problems as a result of the project](#).) These projects got exemptions because they had [friends in powerful places](#), who were able to make a (perhaps plausible) argument that the [projects were good for the environment](#), projects that coincidentally will also make a few people a lot of money. What’s to stop others from making similar arguments in the future for nuclear power plants, or natural gas power plants (intended to replace coal-fired electricity produced out of state), or highway expansions (after all, traffic jams result in more air pollution!)? Surely even Los Angeles, in the context of Mono Lake, could have come up with an argument about how importing water from in state was better than trying to get water from other sources (desalinization uses a lot of energy!). Would a CEQA exemption for LA’s diversions from Mono Lake have been okay if they had made the project carbon neutral?

Given all this, what kinds of CEQA changes do I think might be less problematic politically? If there are [concerns that various elements of CEQA are too burdensome](#), then we should look to either [change the law for all projects](#), or think about creating special procedures in a way that don’t depend on special interest pleading for exemptions for their particular projects. (What I have in mind for the second example is something like the provision under CEQA in which an agency’s separate regulatory program can be deemed to be an effective replacement for the CEQA process.) These kinds of proposals are likely to be more high-profile, depend

less on contestable claims that particular kinds of projects are “good for the environment,” and therefore less likely to result in problematic outcomes in terms of law.

I could be wrong about the implications of these CEQA exemptions. I hope that they’ll be applied appropriately and well by the agencies and the courts. They might not open the door to other projects getting exemptions (though there’s already a proposal, [as Ethan noted](#), to exempt some rail projects from CEQA, and [many observers](#) agree that the recent wave of CEQA exemptions was prompted by the initial exemption in 2009 for the first LA football stadium proposal). If so, they might well be worth it in terms of encouraging more renewable energy projects and infill development. But my fear is that this is just the first step in a long-term weakening of CEQA.

There are other reasons to be skeptical of these kinds of exemptions in the specific context of environmental review statutes, but this post has gone on far too long already, so I’ll leave those to another day.