This is the second in a series of six blog posts on reforming the California Environmental Quality Act (CEQA). The first post, discussing different paradigms for CEQA, is here.

What reforms might be needed in orienting CEQA around a paradigm as a backstop environmental law? The criticism of environmental review that I believe has the most purchase is that it can be used, strategically, to force delays on projects, with the goal of causing them to be withdrawn or fail. And that approach is most likely to be successful when project opponents have the ability to continually identify new lines of analyses that must be reviewed, new alternatives that must be considered, new aspects for the scope of the project that must be examined, or new levels of significant impacts that must be assessed. That is the approach taken, for example, by the opponents to the UC Berkeley student housing project in People's Park, where the opponents identified the noise produced by the residents of the housing as an impact that should be analyzed and mitigated (an argument subsequently foreclosed by legislative action).

The solution then is greater clarity in how environmental review works: clarity as to what impacts are to be reviewed, what alternatives are to be considered, what level of impact requires mitigation. That clarity reduces uncertainty as to how environmental review works, and much that critics decry about environmental review – bloated and boilerplate environmental review processes; extended timeframes for reviews; the risk of time-consuming and unpredictable judicial review – would be significantly addressed by improved clarity.

However, improved clarity does come at a cost. One cost is the risk that there are important environmental impacts that we miss in a review process that has become more rule-like. In other words, by setting clear rules as to what environmental review covers, we do run the risk of false negatives in terms of impacts. This is a particular issue for the ability of environmental review to address new harms, which may be excluded by clear rules that focus on pre-existing harms. This is a problem that can be addressed to some extent by careful drafting of what the rules are. And the environmental harms here must be weighed against the benefits of good projects that we want to proceed.

Another cost is more fundamental. Much of the leverage that gives community groups veto power over projects, and thus that makes community voice and empowerment stronger, flows from the very uncertainty of the process. If the environmental review process is unpredictable enough that any complaint or

challenge might succeed (or at least cause significant delays), then project proponents have a powerful incentive to reconcile community groups, or just not do projects that community groups might oppose. In other words, with greater certainty in environmental review will come a lower ability for community groups to have veto power.

This does not mean that all community voice or empowerment would disappear. One can still have public hearings and public comment on environmental review documents, processes that may shape agency outcomes, and also reveal to agency decisionmakers that there is broad popular opposition to a proposal. (And for a local agency that is elected, such as a city council, that broad popular opposition may be a powerful deterrent to taking action.) But the ability to leverage the uncertainty and ambiguity of existing environmental review law through litigation would be significantly reduced.

There are a range of ways to achieve more clarity, all of which I will explore in more detail below:

- Create a specific and exclusive list of environmental resources that are to be considered by agencies in environmental review, reducing the ability to identify “new” impacts to be considered.
- Create thresholds of significance for all environmental resources that would be binding on agencies, such that if the threshold is satisfied, there is no significant environmental effect to analyze.
- Limit the alternatives to be considered to those that are relevant for significant environmental effects that will not be mitigated.
- Create pre-approved methodologies for analysis and pre-approved mitigation tools that agencies can use for specific impacts.
- Create a streamlined administrative and judicial review process to provide a quicker, more definitive resolution for disputes over environmental review.
- Create a state agency (or authorize an existing state agency) to create the specific lists and thresholds above, to have exclusive power to update them for new issues or projects, and to provide for administrative review of disputes.

Note that this proposal would retain many of the core features of current environmental review:

- Consideration of cumulative and indirect effects would remain.
- Projects would still have to demonstrate either that there are no significant

impacts, that those impacts have been mitigated, or that there is no feasible mitigation for those significant impacts.
- Public disclosure of impacts, and comments on the agency's analysis, would still occur as under current law.
- Judicial review, with deference, would be available to address failure to comply with the requirements of environmental review.

(An important aside here: My paradigm here – greater clarity that still ensures environmental standards are met – is developed in the context of CEQA, with its mandatory mitigation requirements. Environmental review under the federal National Environmental Policy Act is a more difficult issue to tackle, since it has no substantive requirements – if the threat of the veto is reduced through greater clarity, what does NEPA still provide? I would argue that the analysis and disclosure of significant effects identified with clear standards, can still play an important political, policy, and legal role, even if the clarity reduces NEPA's power as a veto-gate. But that is a topic for another series of blog posts.)

In the next blog posts in this series, I will discuss specific mechanisms for implementing these general reform concepts – though this is a work in progress, and I look forward to hearing about productive insights and ideas about other general reform concepts and about specific mechanisms of reform.