AHCS Common Ground Series

Session 5: Environmental Protections for Today's Environmental Risks

Speakers' Discussion Transcript

Jordan Grimes

Around the room, I think that I know most of you, but for those that I don't, hello, I'm Jordan Grimes, Greenbelt Alliance's, State and Regional Resilience Manager. And welcome to the final virtual session of the Alliance for Housing and Climate Solutions Common Ground Learning Series. Today's topic is Environmental Protections for Today's Environmental Risks, really trying to delve into our environmental laws, how they're working, and how we can strengthen them.

So please take a moment to introduce yourself in the chat. Tell us who you are and where you are. You know that could be both, that could be either physically or existentially, if you prefer.

But for those who are unfamiliar with us, Greenbelt is proud to co-lead the Alliance for Housing and Climate Solutions with Prosperity California. The Alliance for Housing and Climate Solutions has been around for the last several years now, working at the intersection of housing and climate. It has been really trying to build power to affect change on the topics that we care about most.

The Common Ground Learning Series is focused on bringing together environmentalists and housing advocates to try and have a space for difficult conversations—for folks to really lean in and learn from each other, without rhetoric, without heated debate, and try and better understand the issues that we're all grappling with. So with that, I am going to go ahead and turn it over to our moderator of the day, Gabe Ross, with Shute Mihaly, to kick off Session 5: Environmental Protections for Today's Environmental Risks. Thanks so much, Gabe, for joining us.

Gabe Ross

Thanks, Jordan. Hi everyone. I'm Gabe Ross. As Jordan said, I'm a partner of Shute, Mihaly, and Weinberger. I really split my practice between representing community groups working to protect wild and working lands—including several groups represented at this meeting today—and also representing public agencies that are processing and collaborating on housing projects. So I have some experience from different directions on the land use and environmental loss that we're talking about today.

I want to introduce our more experienced panelists. Linda Klein is a partner at Cox, Castle, and Nicholson. She's the co-author of the update of practice under the California Environmental Quality Act, and she mostly represents developers and titling projects. So the sort of third leg of the triangle where I've been representing the other two. Her undergrad degree is in civil

engineering from Rice, and she also has an architecture degree from Yale and went to law school at UCLA.

Our other panelist is Bill Fulton, who is a professor of practice in Urban Studies and Planning at UC San Diego, and edits and publishes the CPDR, the California Planning and Development Report, which is a standard periodical for keeping up on news like this, and is the author of the textbook, Guide to California Planning. He was the mayor of Ventura and the planning director in the city of San Diego, which, again, we've got several different legs of different approaches to environmental law and land use here.

We're mostly going to be talking about CEQA, which we all know is the law that requires environmental impact reports and other review. We'll pick up other details of how it works as we go along. What we want to talk about is how CEQA started out, how it has been used over time, how it has been used today, and what we can do to achieve what it was intended to do, or what we want it to do today—to look forward and think about both purposes and means of getting there. So I want to start out with a question to the two panelists, just to sort of set the stage. In addition to the quick bios that I've given, one at a time, tell us how you, in your day to day work, interact with CEQA and any other environmental laws that you think we ought to be talking about. Just because I can see him right on my left on the screen, I will start with Bill.

Bill Fulton
I have mostly not been a CEQA practitioner. I am proud to say that in my career as a planning consultant, I was, without question, California's worst initial study drafter at CPDR, and in the Guide to California Planning, which I'm currently revising. My job is to keep up with the changes and understand the big picture items. While I was playing director of San Diego, I brought the CEQA determinations into the planning department where they still exist. And so I was the decider of records in that job for basically all CEQA decisions for the city of San Diego.

Linda Klein
So I will say, when I started as a land use attorney, my practice was probably 90% CEQA, so a lot of just reviewing documents, making sure that every threshold was addressed,people showed their work, and there were no deferred mitigation measures. I always did this to the best of my ability but the documents got longer and longer and higher and higher numbers. I would say these days, though, my practice is a little less CEQA, a little more housing law, and I do think some of the changes we've seen since 2017 and housing law have helped.

Gabe Ross
Great. Thank you. You've actually started answering my next question, but I'm going to put it out there anyway: I'm hoping that you can talk about how the law has changed over time. If you feel comfortable, talk about it historically, or if you prefer, just over the time that you've been practicing. And I think for this question, I want to particularly look at CEQA, which really has evolved in its application, especially in the places and projects to which it may or may not apply.

Linda Klein
I have not been doing this as long as Bill, so I probably haven't seen as many changes as he has over the years. From just a CEQA perspective, some of the big changes were really the addition of tribal consultation to the process and the change from Level of Service (LOS)—which is about traffic congestion—to Vehicle Miles Traveled (VMT)—which is more about trying to get people in their workplaces closer together. So in some ways, it's a measure of air emissions in our transportation sector. This has been helpful for infill housing, I will say that. And the third one is the addition of greenhouse gasses in CEQA documents. So when I first started practice, that was not there. The addition of that created a lot of issues. How do you measure a significant contribution to global climate change from any individual project? So there's been both expansions and some, I won't say there's been any contractions, but I will say that the change from LOS and VMT, in some ways, has simplified urban infill projects.

Gabe Ross
Do you want to talk a little bit about housing law and how it changed our view or use of CEQA?

Linda Klein
There's been a lot of planning for housing, which has been helpful with pretty good CEQA documents that you can tier. I think there's more comfort using infill exemptions. We can talk about the pros and cons and questions around that one, hopefully later, if we have time. Because cities like San Diego and LA have instrumented their own streamlining in addition to state streamlining, there's really been less CEQA and there's been more ministerial projects. Like my affordable housing projects, they used to have CEQA, and now most of them are using SB 35, which is a ministerial process. That's in part why the discussions with the regulatory agencies are asking "Is this a waiver? Is this a concession under state density bonus laws?" Not sort of, okay, let's spend a month doing an MND for this project.

Gabe Ross
That's great. And I want to ask you one follow up question. When you're having that conversation about various pathways to ministerial approval—or pathways around CEQA—and you're having that conversation with city staff, with city attorney's offices, are those conversations generally collaborative or are those more confrontational with your client?

Linda Klein
It depends on the client and it depends on the jurisdiction.

Gabe Ross
Without naming any names on either side, are there any sort of general characteristics? Bigger cities do it this way, denser cities do it that way.

Linda Klein

No. I don't think there is. I've been helping one of my clients on some projects that are in Southern California. I do think there's different conversations for those projects than in Northern California. So I'll do it geographically.

Gabe Ross
Okay. Can you elaborate on how they're different?

Jordan Grimes
Gabe, I just want to quickly interject a comment in the chat. It made a good point that we often run away with jargon. To the ability that we can, if we can explain various acronyms, that would be helpful.

Gabe Ross
We dove right in. So I guess I'll warn the two of you. I'm gonna be alert and interrupt to ask you to elaborate. Let's explain what ministerial approval is, because that's going to keep coming up in this conversation. So you want to take that Linda?

Linda Klein
Sure. It's an approval that doesn't require enough discretion from a jurisdiction to trigger CEQA. So you need CEQA when your project requires the discretionary approval, and it has to be more than a yes/no level of discretion. It needs to be enough discretion that doing the work of the environmental analysis is meaningful, so that you know they can condition your project based on that work.

Gabe Ross
And I think from a policy point of view, a ministerial decision won't require CEQA, and also has fewer, if any, levers for challenge, right? Because, as Linda said, a ministerial decision generally, is yes/no. It's a checklist, essentially. And folks opposed to that project are rarely going to be able to step in during the process to make comments, and are also rarely going to have a litigation lever on the ministerial process. When we're talking about paths to ministerial approval, we're talking about moving a project through where essentially the approving agency is the check on the project, and there is much less public check on the project.

Linda Klein
Yeah, and I guess that if somebody did want to challenge a project, they would probably do it either by saying the project didn't meet the standards for that ministerial process. Usually, they would bring a planning and zoning law claim stating it isn't consistent with the general plan, or serve some other claim. The standards are more favorable for the lead agency. Then, it might be in a CEQA challenge, depending on what's being challenged.

Gabe Ross
Great, Bill, do you want to do a history overview?

Bill Fulton
Sure. I've been following CEQA closely since 1983/4, although I first heard about it in the late 70s, when I didn't even live in California. I was a young newspaper reporter in New York State at the time that New York State passed what is called mini NEPA, the state level version of the National Environmental Protection Act. All of the folks in New York had come to California to learn about CEQA. The history of CEQA falls into three periods.

Between 1970 and 1990 was pretty much the killing projects era, where the primary activity on the part of Project opponents was to use CEQA to drag things out and kill the projects. This was the era during which environmental impact reports got a lot bigger. It was the era during which many, though not all, of the basic questions were resolved. Friends of Mammoth was a famous lawsuit that concluded that CEQA did, in fact, apply to permits of private development projects and asked the question of "What is a project?" So that was era one.

Era two started in 1990. The Golita Valley court case in front of the California Supreme Court was really the turning point from 1990 to about 2015. I'd call that the mitigation era, or the getting money era, where the focus of CEQA, particularly on the part of the plaintiff, shifted from trying to stop the project altogether to simply trying to beef up the mitigations and try to extract funds to do other things. Jurisdictions sued each other a lot during this period. This was when the mitigated negative declaration emerged, which was the middle-ground in between no CEQA required, and then the EIR and so forth.

Then about the last 10 years, very much to Linda's point, I would call this the end run era, where the legislature is unable to comprehensively reform. There's a lot of reforming CEQA, but there's lots of things they don't like about it, particularly on the housing front. So they created a bunch of end runs and punched a bunch of holes in it. I've called the holes creating Swiss cheese CEQA. Linda, you've probably heard me say that before, things like the expanded use of Article 32, the infill exemption, the number of infill exemptions, the number of exemptions versus the number of mitigated negative declarations.

I'll use the statute as an example. The legislature passes a law saying this type of project simply isn't subject to CEQA at all, and then the lead agency, usually, the city or county, attempts to apply that to a particular situation; they find that the exemption applies. So for example, there is the Article 32 infill exemption. I don't remember all the details by recollection: it is five acres or less, surrounded on at least three sides by other urban development, and there's a bunch of other stuff in there too. But the city or the county has to say "this qualifies for an exemption." So that's an end run. The ministerial approvals that Linda was describing, particularly on housing, is another end run. If you're familiar with the People's Park situation in Berkeley... Project opponents in Berkeley were trying to prevent the construction of mostly student housing on the People's Park property owned by UC Berkeley. Plaintiffs were successful in the appellate court. The

legislature passed a law essentially punching a hole in CEQA so it couldn't be used on this project. It is now being built.

And most recently, and most blatantly, opponents of the Capital Annex—the legislative office building project in Sacramento—got a couple of successful appellate court rulings. The legislature simply passed a law saying this project is not subject to CEQA at all, which is entirely within the legislators prerogative. And one of the things I always try to remind people is that CEQA is just a law and it can be changed. It could be changed, it could be reformed, it could be repealed at any time. It's difficult to reform or repeal it, but we've seen more end runs and more hole punching in the last few years.

Gabe Ross
Thank you for that. I do want to note that in the early 2000s, at least until 2015, we did plenty of project killing.

Bill Fulton
Right? Project killing did not immediately stop in 1990 although the court case I was referring to, the judges of the Supreme Court was pretty clear in saying, "Stop using CEQA to kill projects."

Gabe Ross
Indeed they were. Importantly, the distinction between looking for mitigation and killing a project is not always a clean distinction. But, thinking about the mitigation era is a good way to start thinking about where CEQA has got us. We know on its face that CEQA tends to inform the public and inform decision makers to make better environmental decisions. So I'd like us to think concretely about whether that has been fulfilled, and concretely what we've got out of it, with examples, if you will. So why don't you start? Linda, you seem enthusiastic.

Linda Klein
I was just thinking about several projects recently where there are very long EIRs or complicated, bigger projects. Inevitably we get a comment that just says, "I don't understand this. I didn't have enough time to review it. 45 days, let's say, and I don't get it. Like, how am I supposed to get this?" We've made the documents so complex that I worry they are no longer a source of informing the public, and also so long that it's likely the public doesn't read it.

I also sat as a planning commissioner for a couple years in El Cerrito. I don't know anyone who reads the whole CEQA document all the way through. So there's that. I'm working on a project in Dougherty Valley. It has a really long history. It's out of San Ramon, Danville, Contra Costa County. There was, in the 90s, large development proposed by the county. This goes to Bill's point. San Ramon and Danville sued. There's a settlement agreement between the three agencies that are building out that area. I'm working on one of the last parcels. But there's a watch group that has really carefully looked at development through that time, and one of the things they did was compare two EIRs by two different CEQA consultants and just noted how similar they were. In

other words, they weren't learning anything special about the project. And even with two different consultants that it was kind of same verbiage being handled to them over and over. And to me, that's actually a failure. You do want the document to educate the public. You do want them to be useful.

Gabe Ross
I think there's a contrast there, right? That is a way in which CEQA is not fulfilling its goals. The question is, what do we get out of CEQA? The question is whether CEQA was previously providing information, and whether there are other benefits, despite long and impenetrable documents. Are there concrete benefits that are coming out of the law—stopping projects, mitigating them. Bill, would you want to weigh in on that?

Bill Fulton
You've stumbled into the trick question I always ask my students here at UCSD: what is the purpose of CEQA? And about half the students always say, to protect the environment. And I say, No, that's not the purpose of CEQA. The purpose of CEQA is very clear: inform, identify, prevent and disclose. Those are the four. And if a student writes those four words down, they get full credit. Inform the public; identify potentially significant environmental effects; prevent, that is, say, mitigate environmental damage that can be mitigated; and disclose all of the information to the public.

I think CEQA has mostly done that. So in that sense, it's done its job. There's no question. And of course, the CEQA defenders will always say that this is what CEQA does. There's no question that in many, many cases, CEQA has made projects better. I think that's probably more true on greenfield projects than infill projects. If you are able to protect natural resources that you wouldn't otherwise be able to protect and still achieve the developer's goals, which I think happens a lot, that's enough.

Plus, I think the question is: Is CEQA the best, most efficient and least expensive way to do that? I'm not sure the answer to that is yes, because it's a complicated and potentially open-ended process and because it's not intended to directly protect the environment. I'm old enough to remember, CEQA is like NEPA: "the if only we'd known law." You go back to the seminal disaster effects that triggered the modern environmental movement, including the Santa Barbara oil spill in 1969. CEQA is set up to be, "Oh, my God, if only we'd known." I think in general, mitigation has been a step forward over what was there previously. Again, the question is, if you repealed CEQA today, would there be a better, cheaper, more efficient way to achieve those objectives? And I'm guessing the answer to that is yes.

Gabe Ross
I want to ask you to roll back a little bit and elaborate on what you talked about before: how can CEQA in Greenfield projects lead to preserving and protecting natural habitat, and what's the

mechanism that gets us from an environmental impact report disclosure to information to protect that habitat? How does that actually work in the CEQA process?

Bill Fulton
Well, this is where significance comes in, right? The trigger in CEQA is if there is a potentially significant impact, then you have to mitigate. Then you have to begin to figure out how to mitigate, either off of the EIR or get a negative declaration. I'm sorry for the jargon. So once a potential significant impact has been identified, then you have to deal with it; then you have to address it.

One of the great weaknesses of CEQA to me is that significance is in the eye of the beholder. There is no state standard for what's significant. There is no requirement that local governments have standards to determine what's significant. Sometimes local governments do have significance thresholds. Oftentimes—and this is, to me, one of the really weird things about CEQA—is that who decides what's significant? It's the environmental scientist at the private consulting firm hired by the local government, paid for by the developer. You're entirely beholden to that cohort's personal integrity, which is generally pretty good, but, that's a potentially very scary thing. Imagine, if Donald Trump were governor, and all of a sudden he'd run over that one. You know what I mean?

I think it's a weird vulnerability of CEQA, and I know that AEP—the Association of Environmental Professionals, the CEQA practitioners—takes this question of significance very seriously, and they talk about it a lot. But nevertheless, the fact that there's no state standard and no requirement for a local standard concerns me. And often no standards for the mitigation. I had a friend that I went to planning school with who helped to found a successful environmental planning firm, and he transitioned in his career from doing general plans to doing CEQA work. He said, "it's way, way more fun." And I said, "why?" He said, "Because I get to sit in my office, look out the window, and dream up mitigations." In other words, oftentimes, it's done on the fly. And how do you know that that's the best result? You don't know.

Linda Klein
CEQA requires you to analyze the impacts of your project on the environment, but also whether your project would either create a new significant impact, or if past and current development has already created that cumulatively significant impact—then your project would make a cumulatively significant contribution to that significant cumulative impact. And even just getting those sentences out, you can see that it can be very hard if you are somebody who is more mathematically-minded, or who likes things that are a little more black and white, to figure out what that standard is. That standard and the way that gets analyzed really changes from jurisdiction to jurisdiction, which for a state law is a little strange.

Gabe Ross

So we talked about some of the benefits and weaknesses of the law in the way it's applied. I want to pretend for a moment that contrary to Bill's point, CEQA is intended to protect the environment. Despite its statutory goals, that is ultimately its purpose. And I want to ask you whether it's been effective at doing that. We've talked about some of its benefits, but we also know that it has weaknesses. So on net, or in specific examples, looking at the state as a whole, is CEQA doing its job? Is it? Is it informing us, and is it thus protecting the environment?

Bill Fulton
Well, I would say a couple things. Is it informing people about the potential impact? With the caveat that Linda articulated eloquently—which is that some of these documents are impenetrable—I would say the answer is yes. It has generated robust public debate about the environmental impact of innumerable projects. That is what it's supposed to do. So it does do that. Does it protect the environment? I think in many cases—I believe this is more true in greenfield projects than in infill projects—it does protect the environment. But oftentimes, there's other ways to protect the environment too. So for example, if you think about the whole history of protecting endangered species in Southern California, how big of a role does CEQA really play in that, as opposed to the role of the Endangered Species Act? CEQA did not play as big a role as others in this particular case. It doesn't seem to me like you needed CEQA to accomplish that goal. Is it really protecting the environment in many ways? Is it the best or right way to do it? It's a fair question.

Then SB 743 came in which changed the analytical framework for traffic, from congestion to the overall amount of driving. I think CEQA really lost its way on traffic analysis for a long time: for some, it really became a way to use CEQA to figure out how to get more traffic lights, more left turn lanes and more lanes. I never understood why traffic congestion had an environmental impact.

Linda Klein
I don't do a lot of greenfield development, and I don't see the whole state. I definitely have read stories about fights over CEQA and greenfield development, and have seen both sides and understand the concerns. I think part of how those get raised is through CEQA, and it's doing its job. My practice is pretty suburban/urban, so I practice mainly in a donut around San Francisco—every place but San Francisco. Because my practice tends to be urban infill projects, the types of impacts and how you mitigate them also tend to be really standardized. So, is studying every project over and over really that informative?

And I will say, give a shout out to Oakland. One of the things they did in the 2010s, is adopt their Standard Conditions of Approval (SCA)—or their standard sequence mitigation measures for all urban infill projects—and the Mitigation, Monitoring, and Reporting Program (MMRP). So that's how they get the acronym, SCA/MMRP. Because the council adopted these standard conditions of approval that read like your standard mitigation measures, projects there that trigger CEQA can use an exemption. This is a consumption that sits in CEQA under guideline section 15183,

which are for projects that are consistent with the density in a general plan and don't have any peculiar impacts. A peculiar impact is not an impact that's handled by standard conditions of approval or a uniformly applied development standard. They tied the adoption of all these standard conditions into CEQA in a way that streamlined the process for projects that might not meet the conditions for the infill exemption, like the 5 acre limit. So let's say you're at 6 acres. There's still a streamlined CEQA pathway in the city of Oakland for that. Local agencies can make the CEQA process more streamlined, but it's their choice.

Bill Fulton
And it's highly dependent on the local jurisdiction as to whether they want to do that or they don't want to do that. But I think Linda makes a good point. If most of the impacts and most of the mitigations are pretty standard, then why don't we somehow standardize them, either at the state level or at the local level. And I think as a result of this conversation, Linda, I'm going to start a consulting firm, which is just AI on CEQA. I'll just do all those initial studies and come up with the mitigations just by asking ChatGPT, and as you know, Gabe, I got to run. I have a hard stop at 2:15.

Gabe Ross
Understood, so we've got five minutes, and I think we'll keep talking with Linda for a moment after Bill has to go. So I can just save a technical question for Linda. We've been talking about strengths and weaknesses, so assume that we're not going to repeal CEQA, and that we do want it to function to protect the environment. And I would add that we've been talking about what it has done and what it has failed to do. Although it may have improved many greenfield projects, many greenfield projects are still getting approved and those are adding carbon emissions and eating habitat. They may be doing less of that than they would have without CEQA, but it's still happening. With that in mind, what is, in a broad sense, a way that we could strengthen the statute without repealing it, to make it more efficient, cheaper, better to achieve what we need today for protecting the environment? Because it's what we got.

Linda Klein
Yeah, I mean, one of the things you mentioned is that there's still greenfield developments in part because it's really hard and expensive to develop in places like San Jose and around here. CEQA looks at the difference between a baseline in your project, but doesn't get at regional impacts. My CEQA document is not going to tell me about the 9-county Bay Area regional benefit of putting my housing in San Jose rather than in Manteca. I don't know if there's a way that you could change it to do that, but that might get at some of the things I think you would want out of the statute.

Bill Fulton
At the state level, you have to decide what it is that you're really trying to protect, then lay down some kind of standard that CEQA can measure projects against; then you can really protect what you're trying to protect. Right now, we have a bunch of environmental laws which have a bunch

of standards in them: Clean Air Act, Clean Water Act, Endangered Species Act at the state level, also at the federal level. Then you've got SEQA, which ought to be a gateway to the standards. Rather than having the standard be decided on the fly on an ad hoc basis on every project, have some statewide standards for certain things, not everything. This goes back to 30 years ago when John Landis and Ralph Bendall proposed this exact thing from UC Berkeley. There ought to be some statewide standards that CEQA measures projects against or plans against. There has to be a requirement that there are local standards rather than just this ad hoc stuff. And with that, I gotta go. Thank you.

Gabe Ross
Now that it's just the lawyers, I want to talk a little bit about the infill exemption, because one thing that you talked about is this pressure theory: right now, it's easier to develop greenfields, so that happens. By this theory, if we could just reduce the pressure on infill, it would become more competitive, and we might shift that balance. So that's what the infill exemption is supposed to do. It's supposed to make it so that a project in an already urban location will not have whatever burden and expense and difficulty CEQA places on a project. So is it doing that? Is that infill exemption having that effect?

Linda Klein
Partially. So it's definitely easier. There's macroeconomic reasons why we are having more greenfield development and you're having very few multi-family that's outside of CEQA. Let's put that aside for a little bit. I litigated Parker Shattuck neighbors and that project went through two different rounds of CEQA. The first time around, that project actually used an infill exemption. That project used to be Berkeley Honda, for people who know Berkeley really well, a car dealership. It had some leaking underground storage tanks and some oil from the car lifts. Like a lot of urban infill sites, it was cleaned and closed. But once you're on a list of contaminated sites, you can never come off. In CEQA, there's a bunch of exemptions that are categories and you cannot use them if you have a contaminated site. I would love to see the exception for contamination. Say, if you are claimed and closed to residential standards and have a closure letter and sign off on the water board or DTSC that you are safe for residential development, then you can still use the infill exemption.

Gabe Ross
So that's key, because many of the remaining infill sites have been contaminated. People will say, if they were contaminated, we need to look at them under CEQA. And you're saying that we need to trust the state agencies, that are saying that they're safe now?

Linda Klein
Yeah, right. So they went through remediation with the proper oversight from the experts on it. That should be good enough, particularly if it's a low level of contamination. I'm not talking about

the plumes that run under Sunnyvale, or something that can be like the Mohawk plume. That could be much scarier. I would love to see that small change. I do think it would make it a lot easier on these sites that were either used as parking lots (parking lots often have low level contamination), car shops, and particularly these places in our second tier cities, like surrounding San Francisco, that are under utilized right now. That would make such great sites for housing or mixed use or straight retail.

Gabe Ross
That's a great practical note to end on—a very specific thing that could have specific results for particular sites all around the state, not just to the Bay Area. I want to look at Jordan and see if you have anything you want to add, because I feel like closing with practical advice to legislators is a great way.

Jordan Grimes
No, I think that's a great note to end on Gabe, and thank you so much for that, Linda. For the rest of our participants, now that we've gotten to hear from the experts, we're going to move into breakout groups to talk about everything that we just heard.