The Changing Face of the California Environmental Quality Act

By Ed Casey

In 1970, the California Environmental Quality Act (known as CEQA) was enacted by the Legislature to ensure that public agencies fully consider and mitigate to the extent feasible the environmental impacts of development projects before approving or carrying out such projects. Over time, CEQA became a tool for local groups to raise a variety of environmental complaints, usually focused on more local issues such as traffic, noise and visual impacts.

However, environmental issues have evolved to become more regional and even global in nature. Examples include the state's water supply and global warming. One would think that such broader environmental matters would be addressed by the state or federal government given the scope of the problem. But CEQA contains a provision or federal government given the scope of the problem. But CEQA contains a provision that requires Environmental Impact Reports (EIRs) prepared for local projects to analyze not just environmental impacts that would be caused by the project, but also the project's "contribution" to a "cumulative" environmental impact. As CEQA defines it, cumulative impacts are caused by the aggregate of the impacts caused by multiple projects, past, present and future.

The problem lies in the absence of meaningful guidance provided by CEQA and the courts to local agencies on how they should assess the significance of such cumulative environmental problems and a project's contribution to the problem. If the project's contribution is significant, CEQA requires that the local agency impose on the project all "feasible" measures to mitigate the impact. But when is an individual project's contribution to a cumulative environmental problem so small, that the contribution should be considered insignificant?

Even the courts have had difficulty answering this seemingly simple question. Indeed, one appellate court in 2002 tried to provide guidance on this matter, but it could only formulate this unhelpful standard - a cumulative environmental problem may be so substantial already that any additional contribution by a proposed project must be considered significant, but under other circumstances, a project's contribution may be so low that it should be considered to be insignificant.

The quandary posed by CEQA's requirement to analyze cumulative environmental impacts is now front and center as agencies preparing EIRs for local projects try to grapple with how to analyze the project's contribution to such emerging environmental issues as global warming and water supply. Take global warming. Some environmental groups argue that global warming is the epitome of a "cumulative" environmental problem caused by the aggregate emissions of greenhouse gases by everyone on the Earth. Since that wide-reaching problem has progressed to the point, they advocate, of dire consequences, any new emission of greenhouse gases must be considered significant and fully mitigated by every new project. Yet, the California Air Resources Board has determined the state's goal of lowering greenhouse gas emission to 1990 standards can be achieved not by denying all new development projects, but reducing emissions on a per capita basis.

But is that enough for CEQA purposes to label an individual project's contribution to global warming as insignificant? The issue is muddied by the different approaches taken by various land use permitting
agencies throughout the state, as well as different approaches adopted by various air quality management districts in California. For example, a number of cities (such as Los Angeles) often employ a *qualitative* standard to measure the significance of a project's contribution to global warming, namely whether the project insets all state and local plans aimed at reducing the emission of greenhouse gases. Other cities look to a *quantitative* standard recommended by a trade group known as CAPCOA, that suggests different levels of mitigation measures based on the amount of a project's greenhouse gas emissions. Add into this mix of varying approaches the different decisions made by local air districts, most notably the Bay Area and the South Coast air districts in San Francisco. Such differing standards simply hands a tool to groups with environmental agendas to press for adoption of the most conservative approach to assessing a project's contribution to global warming, which can lead to the imposition of unwarranted and even untested mitigation measures (e.g., buying carbon offsets).

The problematic application of CEQA's cumulative impact requirement to broad environmental issues is not limited to global warming. Water supply is also susceptible to this concern, although state legislation enacted in 2002 was intended to alleviate the concern. For certain size projects, that legislation requires the preparation of a water supply assessment by the local water agency that will serve the proposed project. The purpose of the assessment is for the agency with authority over the resource to determine if the supply of water will be adequate to meet the cumulative demands of present and future users. Makes sense, right?

But what happens when a state-wide change occurs, as happened when a federal court ruled in 2007 that less imported water from the State Water Project can be delivered from Northern California to Southern California due to effects on a fish called the "delta smelt?" Of course, state and regional water agencies have been taking action to address the issue. And in the meantime, what analysis of this issue (let alone what conclusions to draw) must be undertaken in a development project's EIR to satisfy CEQA's requirement for assessing the project's cumulative impact on water supply? Again, different local agencies have taken different approaches on the issue, which leads us back to the quandary that arises when CEQA's cumulative impact requirement is applied to broader environmental problems.

In the end, to describe the problem is to pose the solution. It is perfectly legitimate to require a local project's EIR to analyze the project's contribution to a cumulative environmental problem *that the local land use agency has the authority to control*. For example, an EIR should examine the project's contribution to cumulative traffic on local streets since the city can adopt a mitigation program that can alleviate the problem. But if the environmental problem reaches beyond the permitting jurisdiction of the local agency preparing the EIR, then the task of assessing and formulating solutions to the problem should lie with the regional or state (or even federal) agency with jurisdiction over the natural resource at issue.

If certain groups believe that solutions to the environmental problem are not being implemented quickly enough, then legal action should lie against that agency, not the local land use agency whose job is to evaluate local development projects. A contrary outcome - which, unfortunately, is the current trend under CEQA - would shift the responsibility for solving our broader environmental problems onto the backs of local agencies and developers. That trend in CEQA can only hinder the economic growth we so sorely need in California.