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## Green Energy Mandate Lifts Effort to Reform CEQA Rules

### Chamber of Commerce Claims Projects Will Stall Without Action

By Erica Phillips  
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Ask nearly any land-use lawyer in California and they'll tell you without hesitation: developing a project in California is more complex and presents more uncertainty than it does in any other state.

Many point to the California Environmental Quality Act as the source of project setbacks. But calls to reform the 40-year-old law, which have pitted business leaders against environmental groups for decades, have yet to drive large-scale reform.

Now those prospects could change.

Earlier this month, Gov. Jerry Brown signed an aggressive Renewables Portfolio Standard into law that would require all utilities to obtain 33 percent of their power from renewable sources by 2020. In an ironic twist, CEQA — a statute many Californians praise for its progressive environmental standards — could inadvertently stop renewable energy development in its tracks.

In March, the U.S. Chamber of Commerce published a study titled "Project No Project," quantifying the economic effects of 351 solar, wind, biofuel, gas, wave, nuclear, coal and transmission projects that had been proposed but are currently facing permitting challenges around the country.

The 31 California projects cited would have created 142,100 jobs up front and boosted the economy by \$6.5 billion in their first year. Business leaders in Los Angeles say a number of those projects were stalled because of CEQA.

Seizing on this perceived contradiction, an L.A. Chamber of Commerce task force has generated a pointed list of "CEQA Strengthening Recommendations," which the group presented to legislators in Sacramento last month.

"It will be very difficult for California to comply with the new renewable energy regulations," said Chamber President and CEO Gary Toebben, "unless some of our recommendations on how to return CEQA to its original intent are put in place."

L.A. Chamber Public Policy Manager Beverly Kenworthy said when the Renewables Portfolio Standard was first introduced, "the economy was booming and [CEQA litigation] was just the cost of doing business.

"Now it's really critical for the state," Kenworthy said, noting competitive interests take advantage of the statute to stall or drive away projects altogether. Amid a harsh economic climate, she added, "It has just reached a crisis."

David Pettit, a senior attorney at the Natural Resources Defense Council who has litigated several CEQA cases against developers, said the vast majority of CEQA lawsuits are based on legitimate environmental concerns.

"If you're going to build a renewable facility in an area where there are endangered species, that's a conflict that needs to be worked out," Pettit said. "CEQA is a useful tool because

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—Lucinda Starrett

it forces the entity developing the project to confront those issues and explain how they're going to take care of them."

When developers suggest these kinds of reforms, he said, "What's behind them is very simple: it's money."

CEQA was enacted in 1970 as a state-level project review that required all public and private projects in California to be assessed for their environmental impacts. CEQA went beyond the evaluation required under the National Environmental Policy Act, which governs only public projects proposed on federal land.

While developers might devote a significant portion of their budgets on the CEQA review, known as the EIR, members of the public who have "substantial evidence" against conclusions in the EIR are able to bring lawsuits at nearly no cost. And when a project enters litigation, there is no way of knowing how long the fight will last.

"There are projects among Chamber members that have been going on 10 years and longer," said Lucinda Starrett, a land-use lawyer at Latham & Watkins LLP and vocal member of the Chamber's task force.

In an introductory letter to the U.S. Chamber's "Project No Project" report, Bill Kovacs, senior vice president for environment, technology and regulatory affairs, pointed out that the Senate managed to pass an amendment to the American Recovery and Reinvestment Act of 2009 allowing for "expeditious" NEPA review for 70

percent of the projects proposed in the Act.

This "categorical exemption" allowed projects to obtain permits, qualify for time-sensitive federal incentives, and get to work — something Starrett and her colleagues on the task force would like to see with renewable projects in California in light of the 33 percent mandate.

"When the governor signs that bill for renewable energy," Starrett said, "there should be a similar provision in CEQA that says we're going to get those projects built."

Starrett went on to describe specific reforms the task force included in its recommendations, such as enforcing time limits for opponents to submit claims and providing protections from changes in the law so developers aren't forced to revisit an EIR once implementation is underway. They also proposed that opponents be required to post a bond at the beginning of the case, and that unfounded and hyper-technical lawsuits be discouraged.

The proposal is more comprehensive than most, Starrett said, and the group has plans to recruit a broad base of stakeholders from environmental and labor groups.

Pettit of the NRDC may not be easily won over.

"Every developer thinks litigation against them is frivolous because they always think they're right," he said. But Pettit did find some common ground.

"One of the things I do agree with," he said, "is to tighten standing requirements so that people that just have a business dispute wouldn't be able to sue."

Dario Frommer, a governmental affairs partner at Mayer Brown LLP and former Democratic majority leader in the California Assembly, said it's going to take strong leadership to bring such a broad range of interests together. He noted that three renewable projects were approved last year, and 40 remain pending.

"We really are in a quandary," Frommer said. In order for clean energy to truly drive CEQA reform, he said, "Elected officials need to come together and say 'We need to prioritize.'"

Still, Frommer agrees with most in the legal community that with a 33 percent renewable mandate, California offers a major payoff for developers who shoulder the uncertainty and dive in — even without major legislative reform.

For his part, Pettit of the NRDC doesn't foresee the governor approving a "wholesale revision of CEQA," he said, "I see the possibility for some nibbling around the edges."