May 15, 2023

Little Hoover Commission
925 L Street, Suite 805
Sacramento, CA 95814

Via email to: Tristan Stein, Project Manager

Re: Creation of a CEQA Court

Dear Commissioners,

We write to address the suggestion that the enactment of a "CEQA Court" would improve judicial review of decisions under the California Environmenal Quality Act (CEQA). As we understand it, the proposal would call for a single, centralized court authorized to hear all CEQA cases in California. The governor would appoint the judges.

The undersigned are academics who have extensive experience in CEQA practice on behalf of both plaintiffs and defendants. We have taught Environmental Law at the law school level for decades, and both of us began our legal careers working in the California Attorney General's Office. We believe that, while the creation of a CEQA Court might be a superficially appealing idea, the drawbacks of this idea far outweigh any potential benefits.

1. Politicization of a CEQA Court

To begin with, the appointment process for a court that would hear only cases with such a narrow, controversial subject matter would almost inevitably become highly politicized. Various interest groups would lobby the governor for the appointment of their favored candidate. Candidates would be pressed for their views on specific CEQA issues, for their approach to review of decisions under CEQA, and for their view of CEQA generally.

If the proposal for a CEQA Court included a formal confirmation process for nominated judges, that process would certainly reflect this politicization. Interest groups would support or oppose nominees based on the nominees' substantive views on CEQA. Since expertise in CEQA would be a primary qualification for the position, candidates past "track records" in litigating CEQA cases would become a central focus.

Moreover, the politicization would not end after the initial appointment, for the question of reappointment would inevitably arise. A term would have to be fixed for such judges, and it would presumably be shorter than for judges under the current court system. If the governor sought to reappoint a current CEQA judge, consideration of that reappointment would focus closely on the individual decisions of the judge in this narrow area of law. If a new governor chose to appoint a different individual, the type of politicized confirmation process described above would again start.

Because of these factors, it seems certain that a CEQA Court would be viewed far differently than courts in the current judicial system, even though it would be performing the same type of functions as courts in that system. A CEQA court would be seen as a politicized court, and its legitimacy to impartially perform judicial functions would constantly be in question.

2. Assumption Regarding the Improvement of Precedents

One argument for a CEQA Court is that "[o]ver time, the court would build up a body of binding precedents that would contribute to certainty in the law by spelling out for agencies and applicants just what is required to comply with CEQA."[1] We think it is highly unlikely, however, that the decisions of a CEQA court would necessarily provide more certainty.

California's appellate courts are highly regarded. They seriously grapple with CEQA issues and approach them from a neutral perspective. Moreover, the courts deal competently and professionally with a wide variety of difficult legal issues such as those involving property disputes, contract claims, landlord/tenant disputes, class action suits, tort suits, and claims under copyright, constitutional, and water law. We submit that, like the rest of the work of the California appellate courts, the body of CEQA law that they have produced is of high quality.

We seriously doubt that a new group of CEQA judges would produce decisions attaining that high standard of quality. The judges would presumably be selected for their CEQA competence based on their experience with CEQA in the past. However, they will lack any previous judicial experience. There is absolutely no certainty that transforming practitioners into judges will produce better case law.

Moreover, the existing body of CEQA case law was produced by a large number of court of appeal justices throughout the state, and by the seven justices on the California Supreme Court. Under the CEQA Court proposal, a small group of CEQA judges would issue decisions binding throughout the state. The current judicial process benefits from different judges considering issues—judges who often have decades of experience. Transfering CEQA cases to a small group of newly appointed judges with no prior experience on the bench would lose the institutional benefits of the current judicial process.

Finally, we note that, for some time, the Legislature has required many jurisdictions to appoint "CEQA Judges." Those judges hear all CEQA cases filed there. Obviously, these judges develop expertise in those cases. Moreover, the Judicial Council's Center for Education Research has for over two decades offered "in house" CEQA training courses for California trial judges and appellate justices. The instructors (including one of us) are highly experienced practitioners who represent a variety of parties in CEQA cases.

These two activities—CEQA Judges and training—constitute meaningful steps, already taken, to develop and maintain CEQA expertise in the California court system.

In short, it is hard for us to see how the proposed change will produce better or "more certain" CEQA decisions.

3. Conflicting Decisions

We also question a key criticism of CEQA case law that underlies the suggestion of a new CEQA Court. Some critics of CEQA complain about "conflicting" appellate decisions.

[1] Letter dated April 15, 2023 from James G. Moose to Little Hoover Commission, p. 3. We emphasize that we have the highest respect for Mr. Moose, whom we know. However, we disagree with his position on this point.

There are, of course, issues on which court of appeal decisions are in conflict. In those instances, which occur in many areas of law, the California Supreme Court must resolve them. On the whole, however, the CEQA case law is not inferior to the law made in many other areas. For example, we have respectively taught Civil Procedure and Tort law to law students for decades, and we have seen no marked difference in the quality or the consistency of the CEQA cases in comparison to Civil Procedure and Tort cases.

We are also unaware of specific examples of conflicting or erroneous CEQA decisions by the courts that might argue for the transfer of such cases to a special court. Lawyers often disagree with the outcomes of cases if they lose. But the Commission should not readily accept the premise that a large body of erroneous CEQA decisions exists. We believe that, before a proposal for a CEQA Court is seriously considered, the burden rests on these critics to demonstrate that a substantial number of CEQA cases were erroneously decided, and to provide specific examples of why those cases were mis-decided. Additionally, they must demonstrate that the number of conflicting CEQA decisions exceeds that in other areas of law.

The Commission should also be aware that, while our judicial system emphasizes the need for decisional uniformity, it also recognizes that review of legal issues by multiple courts provides a benefit. It allows issues to be addressed in a variety of contexts before the highest court weighs in. The California Supreme Court has recognized the value of leaving "novel and substantial" issues "for the lower courts to address in the first instance." *People v. Contreras* (2018) 4 Cal.5th 349, 378.

Eliminating California's long-standing system of trial and appellate review would undercut this process. There is no certainty that a panel of CEQA judges would get difficult issues "right" the first time.

It has been suggested that appellate review could be preserved by allowing direct appeal of decisions by the CEQA Court to the California Supreme Court, but this procedural feature alone would not guarantee improved decisions. Most appellate decisions now are not appealed to the California Supreme Court, and of those that are, the court grants only about four percent of petitions for review in civil cases.[2] In 2022, only a single CEQA case reached the high court.[3] As with every other area of law, it is the courts of appeal that develop most of the CEQA jurisprudence, not the Supreme Court.

Lastly, the charge has been made that the courts as a whole are "result-oriented" in considering CEQA issues, i.e., that judges are issuing decisions reflecting their personal biases in CEQA cases. Based on our long experience with the law, we strongly dispute that assertion. We think it should be ignored.

4. Discarding Existing CEQA Case Law.

The proposal for a single CEQA court raises the question of the continued role that the 50-year body of case law under CEQA would play in such a court's decisonmaking. Is a CEQA Court

[2] Judicial Council of California, 2021 Court Statistics Report: Statewide Caseload Trends, 2010-11 Through 2019-20, p. 16 (2019-2020 figures), https://www.courts.ca.gov/documents/2021-Court-Statistics-Report.pdf
[3] *County of Butte v. Department of Water Resources* (2022) 13 Cal.5th 612.

supposed to accept that body of law as an agreed framework? Or does it have authority to re-fashion the case law in any way it deems appropriate?

There is one indication that the proposal for a CEQA Court may envision the broader scope of court power: the suggestion that the decisions of a CEQA Court would be final, with no right of appeal to a higher court. This concept seems to envision that only the decisions of the new CEQA Court will govern CEQA issues. Moreover, if, as we discussed above, the need for a CEQA court is premised on the existence of erroneous decisions by the current California courts, a CEQA Court would seem authorized to make significant changes in existing law as it saw fit. If this were the case, however, the status of the existing legal framework supporting the Act would be uncertain. Public agencies, applicants, and members of the public would have no idea which appellate decisions the new CEQA judges would adhere to and which would be discarded.

The existing case law on CEQA that binds agencies throughout the state is important. Even critics of CEQA must recognize that it provides an established and valuable framework within which to consider issues. Discarding it would be a recipe for chaos.

One additional problem will also arise. A CEQA case may well raise at least some issues that extend beyond the CEQA context. There might, for example, be issues of civil procedure or administrative law that are not simply "CEQA issues" but that could also arise in non-CEQA cases. Does the CEQA Court have power to decide these? If so, must the CEQA Court's decisions on these issues be consistent with decisions on those issues made by courts in the general system? Are the CEQA Court decisions on these issues supposed to be binding just in CEQA cases? These are, to say the least, knotty problems not easily resolved.

5. Litigation Delay

Various witnesses before the Commission have cited the delay that applicants face due to litigation under CEQA. But delay alone provides no reason to eliminate the current system of review of CEQA cases. There are other, less radical ways to reduce the time that CEQA cases require as they proceed through the courts. For example, we believe there is considerable room for improvement in matters such as time for the preparation of the administrative record.

6. The Context of CEQA Litigation

The need for a special CEQA court also needs to be placed in the overall context of the amount of CEQA litigation. The most current evidence indicates that petitioners have filed, on average, 192 cases each year since 2002.[4] That rate of CEQA litigation is not high; less than two percent of projects requiring environmental review face litigation.[5] And this figure excludes numerous actions taken by public agencies every day that are exempt from CEQA because they do not involve discretionary review or have been given statutory or categorical exemptions.

CEQA cases that are brought can be controversial and attract considerable attention. But we do not believe that the amount of CEQA litigation warrants the creation of a special court.

[4] The Housing Workshop, *CEQA by the Numbers: Myths and Facts* (May 2023), p. 3, https://rosefdn.org/wp-content/uploads/CEQA-By-the-Numbers-2023-5-5-23-Final.pdf

[5] *Id.*

7. Other Factors

The Commission also must consider other factors relevant to the creation of such a court. One is the expense: it would be costly. Creation of the court would require recruiting, hiring, and training new judges; hiring staff such as research attorneys, judicial secretaries, and court reporters; setting up a system for docketing and tracking the cases; finding courtrooms for the proceedings; adopting court rules and protocols; and so forth. In the past, both the California Judges Association and Judicial Council (the policymaking body of the California courts) have opposed efforts to create specialized CEQA courts in part for this reason.[6]

The Judicial Council has also opposed efforts to create specialized courts for tax or business.[7] It found no justification for prioritizing these types of cases above other important cases on the courts' dockets—such as juvenile cases, criminal cases, wage theft cases, unlawful detainer cases, and foreclosure cases.[8] The Council stated: "The courts are charged with dispensing equal access to justice for each and every case on their dockets. Singling out this particular type of case for such preferential treatment is fundamentally at odds with how our justice system has historically functioned."[9]

Finally, we mention one other factor that some might find militates against creating a CEQA Court. Such a court presumably would be a single court of statewide jurisdiction. Instead of judges elected locally throughout the state, judges from one court appointed by the governor would hear all the cases. Some individuals might well object to the creation of a CEQA court on this ground alone because they have more confidence in local judges than in a single, statewide court.

Conclusion

We believe that the suggested benefits of a CEQA Court are strongly outweighed by the various considerations that we have outlined above. It is a radical idea that is not warranted.

Thank you for your consideration.

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[6] *See* Senate Judiciary Committee analysis of Senate Bill 123, as amended April 4, 2013 (SB 123 Judiciary Committee Analysis).

[7] *Id.* at 8.

[8] *See, e.g.,* Judicial Council of California, opposition to Senate Bill 861, April 11, 2022, p. 2 (https://www.courts.ca.gov/documents/ga-position-letter-23-24-senate-sb861-dahle.pdf).

[9] Judicial Council of California, opposition to AB 490, April 12, 2019, p.2 (https://www.courts.ca.gov/documents/ga-position-letter-19-20-assembly-ab490-salas.pdf).