

# Pritzker Briefs

## PRITZKER ENVIRONMENTAL LAW AND POLICY BRIEFS

### The California Coastal Commission: Increasing Transparency, Accountability, and Opportunities for Effective Public Participation

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#### Executive Summary

The California Coastal Commission is a state agency whose mission is to preserve and manage the state's coast. Its decisions regarding planning and development implement core state policies and determine individual legal rights. Both the perception and the reality of a fair, just, and accessible process is crucial to maintaining public confidence in the Commission's decision making.

This article analyzes the processes and procedures that the Commission utilizes in making certain types of important decisions, called "quasi-judicial decisions." The Commission makes these types of decisions often, for example in reviewing coastal development permit applications, certifying local coastal programs, and reviewing the activities of the federal government to assess whether those activities are consistent with California law. The article identifies opportunities and recommends strategies to improve the transparency and fairness of the Commission's processes and procedures.

Complaints about the Commission's process have accumulated over a number of years. They have focused on perceived shortcomings with respect to fairness in access to the people making decisions; fairness in access to the information upon which the decisions are based; fairness in the availability of time to obtain, evaluate and respond to information provided by other participants in the process; and fairness in the hearing.

The aims of this article are to make the Commission's public decision-making process more transparent and fair, and to increase opportunities for effective public participation. The article first examines the manner in which the Commission gathers, analyzes, retains, and distributes, or otherwise makes available the information it collects to inform its quasi-judicial decisions. It then looks at issues of access to decision-makers and at the conduct of hearings themselves. Based on this review, it identifies opportunities and recommends strategies to improve the Commission's processes and procedures.



Dana Point, California

These recommendations, which can be advanced by the Commission on its own initiative and existing authority, include:

- Improving access to information in the record by expediting full implementation of the Commission's system for electronic filing and record keeping, with the goal that all documents placed in the administrative record are immediately electronically available to all participants, interested parties, and the public;
- Ensuring timely, complete, and comprehensive disclosure of *ex parte* communications conducted by Commissioners, with written records of these communications submitted electronically as part of the electronic records system, made public immediately, and incorporated as part of the administrative record;
- Closing the record for written submissions and *ex parte* communications sufficiently in advance of the hearing to allow all participants the opportunity to understand, evaluate, and respond to all record evidence at the hearing;
- Obtaining complete information from the applicant during the filing review process to better manage the time constraints of the Permit Streamlining Act;
- Continuing to develop and implement the Commission's current process of prioritizing permit matters and streamlining those that do not present difficulty, while developing separate formal procedures and informal practices for staged, multi-part hearings for complex and controversial matters; and
- Managing the hearing process with reasonable flexibility to ensure that all participants are able to present their perspectives effectively, so that the Commission is able to understand fully all points of view.

Finally, as the Commission considers whether and how to change its processes to improve transparency, fairness, and effective public participation, it should do so with full reflection upon environmental justice concerns, including the policies enacted by the Legislature and the commitments the Commission has undertaken as part of its recently adopted Environmental Justice Policy.



## Introduction

The California Coastal Commission (Commission or CCC) is a state agency with a unique and powerful role in preserving and managing the state's coastline.<sup>1</sup> Established more than 40 years ago, it serves as gatekeeper for proposals that affect coastal resources. Its decisions both implement core state policies and determine individual legal rights in ways that have profoundly shaped California's development. Both the perception and the reality of a fair, just, and accessible process is crucial to maintaining public confidence in the Commission's decision making.

This article analyzes the processes and procedures that the Commission utilizes in making quasi-judicial decisions, which are decisions in which the Commission acts as an adjudicative body to determine the rights or allowable actions of a specific party. Such decisions include, for example, determinations by the Commission on applications for coastal development. In recent years, aspects of the Commission's handling of such quasi-judicial proceedings have come increasingly under fire.<sup>2</sup> Stakeholders have complained, in particular, about the Commission's process for decision-making, which has been perceived as unfair in a number of ways.<sup>3</sup> This article assesses and responds to those complaints in a forward-looking manner: it describes the nature of the complaints received, evaluates the Commission's procedures, and makes recommendations regarding future Commission proceedings.

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Complaints about the Commission's process and procedures have focused on perceived shortcomings with respect to fairness in access to the people making the decisions; fairness in access to the information upon which decisions are based; fairness in the availability of time to obtain, evaluate, and respond to information provided by other participants in the process, particularly in the last days and hours before Commission decisions; and fairness in the hearing. Many of these concerns built over a period of several years as the Commission considered some large development proposals, including the Lawson's Landing redevelopment in Marin County (2011), the Poseidon desalination plant in Huntington Beach (2013), the Edge development in Malibu (2015), and the Newport Banning Ranch subdivision in Newport Beach (2016).<sup>4</sup> This period of concern grew and culminated at a clamorous hearing during

- 1 This article generally refers to the Commission herein as the institution, the governmental body that undertakes the responsibilities and performs the tasks specified in the Coastal Act (CAL. PUB. RES. CODE § 30000 et. seq.). These include specific actions taken by Commissioners and by the Commission staff formally on behalf of the institution. The report also occasionally refers separately to actions taken by the Commissioners as individuals, such as *ex parte* communications, or by the Commission's Executive Director and staff.
- 2 See Patrick McGreevy, *Lawmakers act to shine light on California Coastal Commission, other key state boards*, LOS ANGELES TIMES (Mar. 30, 2016), available at <http://www.latimes.com/politics/la-pol-sac-coastal-commission-ethics-proposals-20160330-story.html>; see also, Steve Lopez, *Join me at the circus, I mean, a California Coastal Commission hearing*, LOS ANGELES TIMES (Mar. 11, 2016), available at <http://www.latimes.com/local/california/la-me-0313-lopez-coastal-circus-20160313-column.html>; see also, Peter Fimrite, *War of words, battle for power after Coastal Commission firing*, SAN FRANCISCO CHRONICLE (Feb. 12, 2016), available at <https://www.sfchronicle.com/science/article/War-of-words-and-battle-for-power-follow-firing-6827476.php>. This led in turn to attempts to change or reform the process both in the legislature and in the courts. See e.g., *A murky bid to block Coastal Commission Transparency*, SACRAMENTO BEE (Aug. 6, 2016), available at <https://www.sacbee.com/opinion/editorials/article94054612.html>; see also *Spotlight on Coastal Corruption v. Steve Kinsey et. al.*, Cal. Super. Ct., Cty. of San Diego, Case No. 37-2016-00028494-CU-MC-CTL. There has also been some academic comment on the need for review of the Commission's process. See Deborah A. Sivas, *California Coastal Democracy at Forty: Time for a Tune-Up*, 36 STAN. ENVTL. L. J. 109 (2016), available at <https://law.stanford.edu/wp-content/uploads/2017/11/sivas.pdf>.
- 3 After an internal political crisis resulted in the replacement of the Commission's Executive Director, several Commissioners also were removed or left and were replaced. Since that time, the process is being managed more smoothly. As will be developed, most of the concerns and recommendations discussed herein reflect ongoing problems built into the Commission's regulations and informal procedures and practices.
- 4 One exception is the concern regarding *ex parte* communications, which has existed for more than thirty years. Early complaints led to the 1992 passage of legislative amendments to the Coastal Act regarding the conduct and reporting of *ex parte* communications (CAL. PUB. RES. CODE § 30320 et. seq.), but these amendments have not quieted the debate. The Commission periodically has conducted workshops to remind Commissioners of the legal requirements pertaining to *ex parte* communications (see, e.g., the agenda for Dec. 11, 2008), particularly with respect to reporting.

which the Commission's Executive Director was removed in 2016. Particular areas of complaint expressed during this period included:

- Fairness in access to Commissioners;
- Failure by Commissioners to report *ex parte* communications, either in full or in part;
- Fairness in access to staff;
- Fairness in access to information in the record;
- Late submittal of pertinent factual information, such as scientific reports;
- Late submittal of proposed project description changes or of proposed condition language changes;
- Staff inability to respond properly to late submitted comments;
- Inability of the public to respond to a late issued addendum;
- Unequal time distribution in hearings and unequal opportunity to present views; and
- The disproportionate effect of each of these challenges on full participation by some members of the public, especially based on income, race, and disability status.

The article first examines the manner in which the Commission gathers, analyzes, retains, and distributes, or otherwise makes available the information it collects to inform its quasi-judicial decisions. This information forms the legal record upon which those decisions are based. The article then identifies several ways in which the Commission's current process of gathering and evaluating information makes it difficult for participants, and particularly for members of the public, to track that information and to engage in the process effectively. Difficulties exist not only for applicants, other parties, and the public, but also for the Commission and its staff when the proceeding involved is complex and the record is voluminous. For participants, key difficulties include a lack of effective access, or sometimes any access at all, to information in the record, including late-submitted factual information and project changes, as well as late-issued addendums. For the Commission and its staff in particular, the process difficulties stem from the need to integrate relevant information and make last minute additions to staff recommendations and proposed findings due to late-submitted factual information and project description changes, as well as to respond properly to late-submitted comments.

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Second, the article identifies opportunities and recommends strategies to improve the Commission's processes and procedures. Implementing improvements to these procedures would increase transparency and accountability, improve access to information in the record as the process moves forward, and increase opportunities for effective public participation. These recommendations, some of which may involve changes to the Commission's regulations and informal administrative practices, include:

- Improving access to information in the record by expediting full implementation of the Commission's system for electronic filing and record keeping (the Coastal Data Management System), with the goal that all documents in the administrative record are immediately available to all participants and interested parties and to the public;



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- Ensuring timely and complete disclosure of *ex parte* communications conducted by Commissioners, to ensure full compliance with California Public Resources Code § 30324(b), with written records of those communications submitted electronically as part of the Coastal Data Management System, made available to the public immediately, and incorporated as part of the administrative record;<sup>5</sup>
- Closing the record for written submissions and *ex parte* communications sufficiently in advance of the hearing at which the decision is to be made to allow all participants the opportunity to understand, evaluate, and respond at the hearing to the submitted information;
- Obtaining complete information during the filing process for coastal development permits to better manage the time constraints of the Permit Streamlining Act;<sup>6</sup>
- Continuing to develop and implement the Commission's current process of prioritizing the processing of permit matters and expediting those that do not present difficulty, while developing separate formal procedures and informal practices for staged, multi-part hearings for complex and controversial matters; and
- Managing the hearing process with reasonable flexibility to ensure that all participants are able to present their perspectives effectively, so that the Commission is able to understand fully all points of view.

These changes can be advanced by the Commission itself using its existing authority, and should help to address many of the elements of the Commission's process that have been perceived as unfair in the past.<sup>7</sup> This will help to ensure that all Californians have a full and fair say in preserving and managing our coastline and its resources.

## Background on the Coastal Commission

The Commission is a state agency that was established to protect the quality of the coastal zone and its critical resources, including access to the coast, while ensuring that development, utilization, and conservation of coastal zone resources could occur consistent with that protection.<sup>8</sup> Its functions include planning and management, as well as decision-making about the fate and effects of particular development proposals. It was always envisioned to be a political agency, not in the partisan sense, but rather in the broader sense of an agency implementing policies within the complex scheme of public affairs relating to land use and development in

- 5 The issue of *ex parte* communications has raised particular concerns. See the *Spotlight* decision, *supra* note 2, in which the Judge, in the context of ethical complaints about the Commission and its process, including failure to report or improperly reported *ex parte* communications, discusses at length perceived shortcomings of the Commission structure and process. Most of the recommendations of the Court would require legislative change, and are beyond the scope of this paper. That case is not yet final. Sivas, *supra* note 2, recommends repeal of the provisions of the Coastal Act that permit *ex parte* communications, to be replaced by the current prohibitory rule of the California Administrative Procedure Act (CAL. GOV'T CODE § 11430.10).
- 6 Many complex and controversial projects come before the Commission pursuant to appeals from local government action on coastal development permits and most of the process problems discussed here are applicable to appeals as well as to permits. However, because the Permit Streamlining Act does not apply to appeals, this issue of time constraints is not as critical in those proceedings.
- 7 In addition to the changes that the Commission can make informally, or through the adoption or amendment of regulations, there are also issues identified here, and for example in some of the sources cited in note 2 that could be better or more completely remedied through legislative change. Those issues are beyond the scope of this paper.
- 8 The Commission was established by the passage of Proposition 20, in 1972, and then by the Legislature's adoption of the Coastal Act in 1976.

the coastal zone of California. Every development considered, whether permitted or denied, is reviewed in the context of how it may impact or protect coastal resources, and reshape or conserve the coastal environment, not simply for the applicant but for the public. Every decision implements one or more coastal resource policies or resolves policy conflicts. There is always a built-in tension between development that impacts coastal resources and the management and protection of those same coastal resources. The Commission navigates that tension.

The composition of the Commission reflects this broad mission and establishes the Commission to be relatively independent of the Governor and other individual political actors.<sup>9</sup> The Coastal Act requires the appointment of twelve voting Commissioners, to be made evenly, four each by the Governor, the Speaker of the Assembly, and the President pro tem of the Senate. It also mandates that half of the twelve appointed voting Commissioners be local government officials from designated geographic areas divided along the coast, the other half being at-large members of the public.<sup>10</sup> Appointed Commissioners are not full-time state officials; rather, they serve these roles on a part-time basis, with the day-to-day agency functions performed by full-time staff.

Public participants are considered integral to the Commission's process. Citizen involvement had been essential to the passage of both Proposition 20 in 1972 and the Coastal Act in 1976. Reflecting these origins, the rights of the public to access the coast and to participate in the decision-making process regarding coastal development were central to the vision of the Coastal Act's authors.<sup>11</sup> The goal of maximizing public participation has always been somewhat in tension, however, with the operation of the Commission as a quasi-judicial decision-making administrative agency.<sup>12</sup> The goal of the recommendations contained in this article is to retain and encourage, to the greatest extent possible, the effective participation of the ordinary California resident in the decision-making process, while at the same time making that process fairer within the context of the quasi-judicial structure of the Commission's decision-making.

As a state agency, the Commission's operation is subject to state and federal law. While the policies it implements are embedded in the Coastal Act, the procedures and processes that govern the manner of that implementation are the result of a patchwork of state and federal statutes, implemented by regulations adopted by the Commission as well as through non-regulatory administrative and informal practices.

Two types of laws govern the processes and procedures of the CCC. First, external laws bind the actions of the Commission and its staff. Both statutes enacted by the Legislature and judicial decisions establish minimum standards that the Commission must meet for particular types of actions. Under many of these laws, the Commission may set more stringent standards, if it chooses, but it cannot act in a manner that does not meet those minimum standards. For example, the Bagley-Keene Open Meeting Act requires that the Commission give notice at least 10 days before acting upon any item; it can provide more, but no less than

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<sup>9</sup> See CAL. PUB. RES. CODE § 30310 et. seq.

<sup>10</sup> The Legislature amended the Coastal Act in 2016 to require that one of the Governor's appointees to the Commission also "reside in, and work directly with, communities in the state that are disproportionately burdened by, and vulnerable to, high levels of pollution and issues of environmental justice, including, but not limited to, communities with diverse racial and ethnic populations and communities with low-income populations." See CAL. PUB. RES. CODE § 30301(f).

<sup>11</sup> CAL. PUB. RES. CODE § 30210 specifically relies upon and implements the public access rights guaranteed by Article X, section 4 of the California Constitution.

<sup>12</sup> A quasi-judicial agency as used herein is an administrative agency whose designated powers include some that are like those of the judicial branch of government. When such an agency makes a quasi-judicial decision, it is required to follow specific procedures that are similar but not identical to those of judges and the judicial branch. Quasi-judicial decision-making is discussed in more detail in the next section.

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this standard.<sup>13</sup> Each of these external laws controls the Commission's process in some specific manner, and is outside the authority of the Commission to change.

Second, the Commission has developed regulations and informal administrative practices that govern its work. The structure embodied in these procedures and practices defines much of the experience of the participants as the Commission makes its quasi-judicial decisions. These practices govern, for example, when documents and reports must be submitted; who has access to those documents and in what format, and following what procedure; what opportunity individuals or interested parties have to respond to the submissions of other participants; and who speaks at what point when the Commission is hearing a matter, and for how long.

These procedures are internal to the Commission. Some are contained in rules, formally embedded in the Commission's regulations; these include, for example, what information is required to be provided before an application can be accepted for filing, or how late in the process written communications will be accepted into the administrative record. Other procedures are simply administrative practices: expressions of either the Chair, or the Executive Director and the staff. These informal administrative practices include how long a person has to speak at a public hearing, or when and where a matter will be scheduled for hearing. It is these formal rules and informal practices, which are completely within the authority of the Commission, that provide the principal opportunity for improvement to increase transparency, accountability, and effective public participation in Commission proceedings.

One recent change in policy at the Commission that is closely related to effective public participation concerns environmental justice. In 2016 the Legislature passed Assembly Bill 2616 (Burke). That bill amended the Coastal Act to:

- Affirm that California Government Code § 11135 is specifically applicable to the programs and activities of the Commission;
- Embed the definition of "environmental justice" already contained in California Government Code § 65040.12 into the Coastal Act;
- Mandate that one of the appointed Commissioners reside in and work directly with communities affected by environmental justice issues; and
- Add environmental justice as an additional standard against which the Commission or an issuing agency reviews coastal development permit applications.<sup>14</sup>

In March 2019, the Commission adopted an environmental justice policy and a series of supporting statements and commitments. Among those commitments was "identifying and eliminating barriers to its public process in order to provide a more welcoming, understandable, and respectful atmosphere for those who may be otherwise intimidated or deterred from taking part in governmental proceedings." The aims of this paper are to make the Commission's public decision-making process more transparent and fair, and to increase opportunities for effective public participation. This analysis and set of recommendations should be considered in the specific context of effective implementation of the goals of AB 2616 and the Commission's Environmental Justice policy.

<sup>13</sup> CAL. GOV'T CODE § 11120 et. seq.

<sup>14</sup> Chapter 578, Statutes of 2016 amended the Coastal Act to add California Public Resources Code §§ 30013, 30107.3, 30301(f) and 30604(h). Potentially the most critical for future Commission action is § 30604(h), which provides: "When acting on a coastal development permit, the issuing agency, or the commission on appeal, may consider environmental justice, or the equitable distribution of environmental benefits throughout the state."





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## Quasi-Judicial Proceedings

Quasi-judicial proceedings form an essential part of the Commission's work and provide the structure for most of the important decisions that affect the development of California's coastline. A quasi-judicial proceeding involves the exercise of adjudicative authority by a non-judicial body in which it applies a previously established legal standard to a particular set of facts in order to determine the rights or allowable actions of a specific party – individual or group. The proceeding results in the adoption of findings that reflect, justify, and memorialize the decision in that proceeding, and a determination of legal rights of affected parties. At the Commission, these proceedings usually determine the fate of a proposal to develop a specific property or a geographic area, through the application of policies embodied in the Coastal Act. The Coastal Commission ascertains these facts through a process involving the submission of information, including written reports and oral and written testimony, by the applicant and interested parties, as well as the independent gathering of facts by Commission staff.

The Commission undertakes quasi-judicial proceedings in important contexts, including whenever it reviews and decides on coastal development permit applications, certifies local coastal programs, and determines whether federal proposals that affect coastal resources are consistent with California law.<sup>15</sup> In making decisions of this type, the Commission must:

- Act within its jurisdiction;
- Follow the legal direction prescribed by the Legislature and the Courts;
- Have a fair hearing process;

<sup>15</sup> See CAL. PUB. RES. CODE § 30321 regarding the jurisdiction of the Commission.

- Support its decision with findings; and
- Have substantial evidence in the record to support those findings.<sup>16</sup>

This is the legal baseline for the Commission's decisions and actions.

The legal parameters of these quasi-judicial proceedings have been established in various ways. They are specified both in standards set by the Legislature in statutes, and in judicial determinations, either where constitutional due process issues have been raised, or, more commonly, in challenges to administrative decisions that courts evaluate under California Code of Civil Procedure (CCP) § 1094.5(b). That provision sets the parameters for the judicial review of many California agency actions. Due process considerations can arise, generally speaking, when a governmental action may adversely affect a protected liberty or property interest.<sup>17</sup>

Judicial review of state agency decisions provides an important check on agency authority and has provided the opportunity for courts to articulate many of the parameters of that authority. Decisions or actions of the Commission are reviewable pursuant to Code of Civil Procedure § 1094.5.<sup>18</sup> This judicial review process, called an administrative writ of mandate, applies to adjudicatory or quasi-judicial actions that require a hearing and evidence in a record to be filed with the court for its review as required by law. That section provides in part:

The inquiry in such a case shall extend to the questions whether the respondent [agency] has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.<sup>19</sup>

Due process considerations are sometimes at issue in Commission actions, where those actions implicate constitutionally-protected property interests. The California Supreme Court, in *People v. Ramirez*, noted that “due process is flexible,” and that procedural protections depend upon what the balancing of interests in a particular situation demands.<sup>20</sup> In some instances, the Court said, “this balancing may counsel formal hearing procedures that include the rights of confrontation and cross-examination, as well as a limited right to an attorney,” while in others “due process may require only that the administrative agency comply with the statutory limitations on its authority.” The Court then articulated the general criteria to be considered in each situation:

More specifically, identification of the dictates of due process generally requires consideration of (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>21</sup>

<sup>16</sup> CAL. CIV. PRO. CODE § 1094.5 (b).

<sup>17</sup> See e.g., *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972).

<sup>18</sup> See CAL. PUB. RES. CODE § 30801.

<sup>19</sup> CAL. CIV. PRO. CODE § 1094.5 (b).

<sup>20</sup> *People v. Ramirez*, 25 Cal.3d 260, 269 (1979).

<sup>21</sup> *Id.*

The analysis in this article assumes that property interests, governmental interests, and what the *Ramirez* Court called dignitary interests all are involved in Commission quasi-judicial proceedings.

Both the Courts and governmental agencies that conduct administrative hearings have attempted to distinguish among hearing processes based on the above criteria. Courts distinguish in particular between “evaluative” and “adversarial” hearings, which warrant different types of procedural protection for parties because of the differing roles played by the agency. In evaluative hearings, staff provides neutral advice to the hearing body, which is performing an “evaluative” function in the matter before it at the request of an “applicant.” The administrative body evaluates whether or not to grant something that the applicant is seeking. At the Commission, permit hearings, local coastal program (LCP) certifications, and hearings on federal consistency matters all fall into this evaluative category.<sup>22</sup>

## The Coastal Commission’s Evaluative Decision-Making Process

This section of the article discusses the types of problems that the Commission has had with its evaluative hearings, including the characteristics of its proceedings that have generated the most significant difficulties. It assesses the sources of law that affect the Commission’s evaluative process, and directs particular attention to the problems associated with factual issues in those complicated and controversial matters which are the principal locus of the complaints about the Commission’s process for decision-making.

Evaluative hearings include many of the Commission’s most important and contentious decisions about the development of the California coast, including:

- Submittals and amendments of local governments’ plans for land use and development contained in Local Coastal Programs (LCPs), as well as similar land use and development plans of ports and universities, that govern future development in a specific area of the coastal zone, where the Commission’s role is to certify the consistency of the submitted plan with the standards of Chapter 3 of the Coastal Act;
- Review of coastal development permits, where the Commission applies the standards of Chapter 3 of the Coastal Act (or of a certified local coastal program in the case of an appealed permit) to the particular facts of the development proposed; and
- Federal consistency matters, where the Commission evaluates the consistency of proposed federal actions and federally permitted activities with the State’s approved federal coastal management program, including Chapter 3 of the Act.

22 A hearing is characterized as “adversarial,” and not evaluative, if staff is perceived to have a particular interest in opposition to the interest of an outside party that has been summoned or compelled to appear in the administrative proceeding. This article will not address adversarial proceedings, in which the “sides” each present facts and law to support their “position.” In those proceedings, the administrative body is determining whether to take action against someone, or to compel some behavior. Those hearings require more formal due process protections, such as separation of functions within the agency. See generally Adam Lindgren, *Common Issues in Quasi-Judicial Hearings*, League of California Cities Annual Conference, Sept. 18, 2013; *Witt Home Ranch, Inc. v. County of Sonoma*, 165 Cal.App.4th 543 (2008); *Nightlife Partners Ltd. v. City of Beverly Hills*, 108 Cal.App.4th 81 (2003). At the Commission, enforcement proceedings such as cease and desist orders and restoration orders fall into the adversarial category and require separation of functions.



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These various categories of evaluative hearings form almost the entirety of the agenda at Commission meetings.

The Commission's process itself is not the subject of controversy in the vast majority of Commission decisions. Staff has done their job; facts have been presented and analyzed; conditions have been imposed, as necessary; agreement has been reached without much controversy. Nor does the Commission have significant process problems in most cases where it is dealing with matters that present primarily planning or policy issues, even difficult ones, rather than factual issues. Planning and policy issues can be controversial, because the outcome goes to the core of what the community wants itself to become, and can pose conflicts between development goals and the protection of state coastal resources. But in those matters, if the facts are not disputed and participants get a chance fully to present their views, the process typically is not contributing to the controversy.

Rather, the Commission has had the greatest difficulties with its evaluative process when it has considered large projects, particularly those that are proposed in iconic locations, are precedent-setting, or are locally controversial, and when facts are in dispute about the nature or importance of the resources to be protected and about the projected impact of the proposed development on those resources. Where projects are large and/or controversial, and there is no clear, objective metric to resolve factual disputes or to provide the underlying factual basis for judgments about how to balance competing policies or values, the process itself is critical. The ability to control the record, access to information in the record, access to the decision-makers, and the fairness of the hearing itself become both crucial and controversial.

Agencies employ an evaluative hearing process to ensure that all the information that may form the basis for a decision on the proposed action is in the public record, and that everyone has an opportunity to respond to and contest the evidence, proposals, observations, and comments of the other interested parties. Accordingly, new information generally should not be permitted to be submitted into the record at a time or in a manner such that other interested parties do not have or are not given a chance to fully evaluate and contest it. And no information should form a basis for an agency decision if the staff has not had an opportunity to fully evaluate it and respond appropriately. This concept of an "opportunity to respond" is intended to provide the public with knowledge of what the Commissioners are considering and an opportunity to fully engage with, evaluate, and respond to that information. This concept is translated into the particular processes and procedures of the Commission in ways unique to the Commission. But the critical task of its procedures is to allow and ensure full and fair participation to deliver complete information—submitted facts, reports, responses, comments, and opinions from all participants in the process—to the Commission to fully and fairly inform its decision.

## Key Sources of Law Governing the Coastal Commission's Evaluative Hearing Procedures

The Coastal Act, along with the regulations that the Commission has adopted to implement that law, governs the Commission's adjudicative process in most respects. In addition, the Commission also must follow other umbrella state laws that significantly affect its processes and procedures. The most important of these are the Permit Streamlining Act (PSA) and the California Environmental Quality Act (CEQA).<sup>23, 24</sup>

The PSA, enacted by the Legislature to expedite the processing of permits for development projects, establishes time limits within which agencies, including the Commission, must either approve or disapprove permits. Although the Commission usually does not have difficulty meeting these requirements, they occasionally have made it difficult for the Commission to obtain necessary information, and to analyze and respond to late-submitted information. Unlike most other agencies, the Commission's start date for its 180-day review period begins very early in the agency's administrative process, further limiting the time for review. For a CEQA "lead agency," the time limits of the PSA generally do not begin to run until CEQA review (e.g., certification of an Environmental Impact Report (EIR)) is complete. This is an open-ended process and for complex projects may take many months or years after review begins. While the Commission typically acts as a CEQA "responsible agency," its environmental review of coastal resource impacts is unique, and its review process for these complex permits, pursuant to its certification from the Resources Agency, is the equivalent of an EIR. Yet for the Commission, the PSA's 180-day review period begins to run from the date the permit application is found or deemed to be complete, and is filed, not from

the date when environmental review is complete, as it would be for a lead agency.<sup>25</sup>

The Coastal Act and the federal Coastal Zone Management Act (CZMA)<sup>26</sup> similarly prescribe time limitations within which to act upon, respectively, LCP submittals and federal consistency submittals.<sup>27</sup> These time limitations also occasionally constrain the ability of the Commission to obtain, analyze, and respond to information, particularly once a matter has been filed and the clock begins to run.<sup>28</sup>

CEQA requires that California state and local agencies disclose, analyze, and mitigate significant environmental effects of a discretionary project prior to any final vote to approve the project. The Commission's review of permits and local coastal programs has been exempted from certain procedural requirements of CEQA because its evaluative process has been found to be "functionally equivalent" to the process involved in the preparation of an Environmental Impact Report (EIR).<sup>29</sup> However, other requirements of CEQA remain applicable to the Commission's process. In particular, the Commission must find that the proposed project "would not have any significant or potentially significant effect on the environment;" or, if the project would have such an effect, the Commission must require "alternatives to the activity and mitigation measures to avoid or reduce any significant or potentially significant effects that the project might have on the environment."<sup>30</sup>

In addition, CEQA requires the Commission to evaluate and respond to comments received during its review process and comment period.<sup>31</sup> Under its current regulations, the period during which the Commission receives comments extends at least until the Chair closes the public testimony portion of

the public hearing, but also arguably includes applicant and public responses to Commission questions during its deliberation process. Accordingly, the staff must respond to all comments received prior to the Commission's vote on the project. This affects the procedures and formality with which the Commission presently conducts its evaluative process.

The particular laws that form the basis for the Commission's authority, the Coastal Act and the CZMA for federal consistency matters, do not prescribe any particular procedures for the process of Commission decision-making, although as previously noted both set time limits for Commission action.<sup>32</sup> The Coastal Zone Management Act relies upon the Commission's decision-making process as prescribed under California law and certified under the CZMA as California's approved coastal management program. The Coastal Act declares generally that the public has a "right to fully participate in decisions," and that achievement of its goals "is dependent upon public understanding and support" and "should include the widest opportunity for public participation."<sup>33</sup> But it is not specific in its mandates regarding participation.<sup>34</sup>

Instead, the basic processes and procedures of the Commission that affect the public's participation in its decisions are contained in its regulations, and in its informal practices, both at the staff level and in the hearing process.<sup>35</sup> At their core, these procedures and practices provide a structure for the gathering of information by the staff to present to the Commission for its "evaluative" decision and for the Commission to conduct the proceeding that concludes with that decision.

23 CAL. GOV'T CODE § 65920 et. seq.

24 CAL. PUB. RES. CODE § 21000 et. seq.

25 The PSA applies to permits, but does not apply to administrative appeals to state agencies, such as the Commission (CAL. GOV'T CODE § 65922 (b)), nor to LCP submittals.

26 16 U.S.C. § 1451 et. seq.

27 CAL. PUB. RES. CODE §§ 30512(a)(3) and 30513; 16 U.S.C. § 1456(c)(3).

28 The time limitations are particularly short, for example, with respect to federal consistency determinations, where the time for determining information completeness is 14 days, and the state must concur within 60 days. See 15 C.F.R. § 930.41.

29 CAL. CODE REGS. tit. 14, § 15251(c) and (f); see also CAL. CODE REGS. tit. 14, §§ 15252 and 15265.

30 CAL. CODE REGS. tit. 14, § 15252; see also CAL. CODE REGS. tit. 14, § 15091(a).

31 CAL. CODE REGS. tit. 14, § 15088.

32 There is one exception. The Public Resources Code specifies several limitations with respect to "decision-influencing" behaviors such as *ex parte* communications and gifts. See CAL. PUB. RES. CODE §§ 30320-30329.

33 CAL. PUB. RES. CODE § 30006.

34 See also, CAL. PUB. RES. CODE § 30503, which similarly encourages "maximum opportunities to participate" in LCP matters, but does not prescribe any particular procedures for that participation. As noted earlier the Commission's new Environmental Justice Policy also addresses full and effective public participation.

35 See generally CAL. CODE REGS. tit. 14, §§ 13052-13096.



View of downtown Ventura, California

## How an Evaluative Hearing Process Unfolds: The Basics

An evaluative decision-making process at the Coastal Commission typically unfolds as follows. The process is initiated by the submission of a document (such as a permit application, a local coastal plan, or a federal consistency submittal) by an “applicant.” An applicant must submit certain specified information before its application is determined to be complete.

After the application is filed, staff gathers information from all known interested parties and sources including from its own independent investigation. Staff provides the Commission with background factual information as well as analysis of the Commission’s standard of decision (either the policies of Chapter 3 of the Act or the provisions of a certified local coastal program, as applied to those facts). Staff brings this information together in a report that (almost always) provides a recommendation for action, together with proposed findings of fact that form the basis for that recommendation and evidence in support of those findings, for adoption by the Commission.

Public input follows several paths. For the applicant (typically a private developer or a governmental entity), the basic information necessary for the staff evaluation is prescribed, and should be submitted at the beginning of the process, at the filing stage. The matter should not be accepted as complete and filed until that information has been submitted. That process frequently entails an ongoing dialogue between the staff and the applicant regarding the need for and the adequacy of the detailed content of that information. On major projects this dialogue can begin long before and continue long after the application is submitted.

Involvement of other interested parties and the general public may already have begun if the matter was considered previously at the local government level. But otherwise, for example on some federal

consistency matters, where there is no local review, there may have been no notice to the public or opportunity to comment prior to the filing. Across the various types of matters that come before the Commission, for many individuals in many proceedings, actual notice occurs when the staff issues its report and the matter is placed on the agenda. Regardless of when or how notice occurs, the applicant initiates and the other interested parties, including the general public, respond. A dialogue ensues among the applicant, the staff, other known interested parties and the public regarding the staff recommendation. All may and do contribute information that the staff may use as it prepares its report.

Between the issuance of the staff report and the hearing, all interested parties can review the information discussed in and appended to the staff report, and comment upon that report. Staff continues to gather information, and may, depending upon the information submitted by the applicant or other interested parties, modify its recommendation. As noted previously, Commission regulations presently permit new information pertinent to the decision to be submitted through the close of the public testimony portion of the public hearing.

At the hearing, staff presents its recommendation along with a summary of the underlying information upon which that recommendation is based. The applicant then presents its proposal, and indicates in what respects, if any, it disagrees with the staff recommendation. Members of the public then present their views, after which the staff responds and makes final comments. Commissioners then ask questions and discuss the proposal, before making a decision upon the application.





Beachfront real estate, coastal California

One additional element of Commission practice that complicates the issue of information compilation and management results from *ex parte* communications between interested parties and Commissioners. An *ex parte* communication is a communication between one party in a legal proceeding and the judge or decision-maker in that proceeding, outside the presence of other parties in that proceeding. In judicial and in formal administrative proceedings, such communications are prohibited.<sup>36</sup> In 1992, however, the Legislature amended the Coastal Act to permit *ex parte* communications with Commissioners provided that they were properly disclosed.<sup>37</sup>

The law now requires that *ex parte* communications be reported within seven days of the communication, or, if made less than seven days before the hearing, on the record at the hearing. It also requires that such reports include not only the identity of the person on whose behalf the communication was made and of those persons present when the communication was made, but also a “complete comprehensive description” of the content of the communication, including all material that was a part of the communication.<sup>38</sup> As noted earlier, if, when, and how *ex parte* communications are reported has become a significant process concern, and an issue regarding fairness and the perception of fairness in Commission proceedings.<sup>39</sup>

<sup>36</sup> See CAL. GOV'T CODE § 11430.10. For a more general comparative discussion of *ex parte* communications at California Boards and Commissions, see California Research Bureau and Charlene Wear Simmons, *Ex Parte Communications: The Law and Practices at Six California Boards and Commissions*, CALIFORNIA AGENCIES (2008), available at [http://digitalcommons.law.ggu.edu/caldocs\\_agencies/290](http://digitalcommons.law.ggu.edu/caldocs_agencies/290).

<sup>37</sup> See CAL. PUB. RES. CODE § 30320 et. seq.

<sup>38</sup> CAL. PUB. RES. CODE § 30324(b)(1)(B).

<sup>39</sup> See *Spotlight on Coastal Corruption v. Steve Kinsey, et. al.*, Cal. Super. Ct., Cty. of San Diego, Case No. 37-2016-00028494-CU-MC-CTL; Sivas, *supra* note 2.

## Concerns About Commission Process

Both the perception and the reality of a fair, just, accessible process is crucial to maintaining public confidence in the Commission's decision making. Concerns expressed about the Commission's process fall within three general areas. First, there are concerns relating to fairness in access to information in the record, and fairness in the ability to respond to information in the record that has been presented by others. Second, there are concerns about fairness in access to the decision-makers, to both the Commissioners and the Commission staff. Finally, there are concerns about the fairness of the hearing process itself. Those concerns, as well as the elements of the Commission process from which they derive, interact with each other, each exacerbating, or, just as important, appearing to participants to exacerbate the effects of the others. This section discusses each of these concerns in turn.

### 1. *Fairness in Access to Information in the Record and in the Ability to Respond to that Information*

If there is one overarching concern, it is that all participants in the process should have timely access to all of the information upon which the decision is to be based, and the ability properly to respond to or comment upon that information. This concern is at the heart of any quasi-judicial process. To examine it in the context of the Commission, one must analyze the process by which the Commission obtains the information for its decision: Who provides that information? And to whom is it given and in what form? When can it be submitted? Once submitted, how is it shared with other participants? And finally, once it is in the record, how does the Commission, both the staff and the Commissioners, utilize, evaluate, comment upon, and respond to that information?

It is natural that after an application has been submitted, the information that staff accumulates initially comes from the applicant. This is how the process is supposed to work. It is the burden of the applicant to justify the change of the status quo that approval of the application would bring, and so information is submitted for that purpose. Some potential participants may know about this application and information; others may not. That information is not easily available to the public. Presently, in order to learn what has been submitted regarding an application prior to the issuance of the staff report, a person must make a request under the Public Records Act (PRA) or otherwise informally ask Commission staff and wait to obtain a paper copy (or visit the office to view such a copy).<sup>40</sup> No electronic copy of individual documents or of the file is readily available until a staff report has been issued, to which are attached electronic copies of some of the critical documents. In addition, because Commission file documents, including staff reports, are not fully indexed or searchable through the agency website, it is also difficult or sometimes impossible to identify or search for and obtain documents independent of the staff reports for specific agenda items.<sup>41</sup>

*Presently, in order to learn what has been submitted regarding an application prior to the issuance of the staff report, a person must make a request under the Public Records Act or otherwise informally ask Commission staff and wait to obtain a paper copy (or visit the office to view such a copy).*

<sup>40</sup> CAL. GOV'T CODE § 6250 et. seq.

<sup>41</sup> The Commission makes its quasi-judicial decisions by applying the relevant statutory policies to the particular facts of each case, referencing but not bound by its prior related decisions. It presently maintains an electronic index of meeting agendas by date, with staff reports or adopted findings linked therein. But if one wanted, for example, to review the Commission's application of the environmentally sensitive habitat policy or the conflict resolution policy across a range of prior cases, there is no searchable way to obtain that information without prior knowledge of the particular adopted findings in which those policies have been applied.

*The “open to the end” process does not provide a party that may disagree with a late-submitted communication with a genuine opportunity to respond to it, or sometimes even to learn of it.*

The situation only becomes more complicated after the staff report is issued, because at this stage of a complex proceeding, responses and supplemental information are coming in rapidly from multiple sources. The advent and now common use of digital technologies has exacerbated the problems of continuing to use a process designed and first implemented in the 1970's. Absent electronic availability of documents, there has been no easy way to ensure that this late-submitted information was available for quick redistribution to interested parties. Even experienced Commission practitioners sometimes have had difficulty keeping up with these late submissions; for inexperienced members of the public it has been almost impossible to know what has been submitted by others and to be able to analyze and respond to it in a timely manner.

Thus, while consistent with present procedures,<sup>42</sup> the practice of accepting late comments and late factual additions to the record creates challenges for the Commission's management of that information, for the ability of parties and the public to respond to that information, and for the ability of Commissioners and staff to evaluate and address that information. Moreover, late submissions by applicants that include substantive changes to the proposed project create even more severe challenges for agency staff, Commissioners, other interested parties, and the public.

Section 13060 of the Commission's regulations contemplates that communications may be submitted to the Commission up to the close of the public testimony portion of the public hearing.<sup>43</sup> Written communications may be submitted either to the district office prior to the day of the hearing or in the hearing room on the day of the hearing. Written communications submitted to the district office must be available for public review during normal working hours; those submitted at the hearing may not be available to the public until after the decision is made. This “open to the end” process was intended to allow members of the public who do not hear about the matter until the last minute nonetheless to participate in the hearing. As a practical matter, however, the “open to the end” process does not provide a party that may disagree with a late-submitted communication with a genuine opportunity to respond to it, or sometimes even to learn of it.

As previously noted, the Commission's regulations and policies were conceived and written prior to the advent of electronic communications, and rely on management of paper documents rather than electronic availability. This mismatch between long-established policies and current reality exacerbates the challenges created by late filings. Comments and other submissions from various participants are often available to the public chiefly in the form of an appendix compiled by agency staff, aggregating those comments and attaching them to its staff report, or publishing them in an addendum subsequent to that report. Short of constantly inquiring of the relevant Commission analyst (time-consuming for all concerned), other interested parties may not know what written communications have been submitted, and by whom, prior to issuance of that report. Managing paper documents is cumbersome and time consuming in the best of circumstances; copying them, once found, adds a layer of work that may be difficult for staff to provide immediately, due to the press of intense workload demands in the days before a Commission hearing. Requests for information pursuant to the Public Records Act are sometimes met with a “we'll get to it as soon as we can, within ten days as the law requires” letter, as permitted under that statute. But in the week before a hearing, this might as well be never; the Public Records Act is an ineffective tool in this circumstance. In short, it is hard for interested parties, particularly for members of the public who do not maintain regular contact with Commission staff, to stay fully abreast of the

<sup>42</sup> See CAL. CODE REGS. tit. 14, §§ 13060 and 13066.

<sup>43</sup> CAL. CODE REGS. tit. 14, § 13060.



information in the record of a proceeding. And it is often hard for Commissioners themselves to obtain and synthesize information in a timely and thorough way.

The Commission's consideration of late-submitted communications, and the difficulty of identifying, obtaining, and responding to those communications, have created a significant perception among some members of the public of unfairness in the Commission's hearing process. Some of this perception results simply from the complexity and controversy that surrounds certain projects and from the voluminous nature of the administrative record in those proceedings. The difficulties that the Commission faces in dealing with complex proceedings and the bulk and flow of last-minute information they engender, as well as the problems and perceptions of unfairness that can arise in these circumstances, are illustrated in the example of the September 2016 hearing on the Newport Banning Ranch project.<sup>44</sup>

For that hearing, the Commission issued its staff report (including proposed findings and conditions) on August 25, 2016, in anticipation of its public hearing on September 7, 2016. That report consisted of 192 pages, and in addition had attached to it 9 appendices (including substantive file documents, *ex parte* communication reports, and groupings of letters) as well as 22 exhibits (including plans, maps, and substantive reports). Interested parties and the public responded, and the staff then issued a 297-page Addendum on September 2. Publication of this Addendum produced another wave of responses from interested parties and the public, which in turn resulted in yet another 231-page Addendum issued on September 6, the day before the hearing. Clearly, the process for incorporating such voluminous late information in such a short period of time handicaps both the public and the Commissioners in their ability to comprehend, synthesize, and respond to this information to inform their actions at the hearing.

As the Banning Ranch example makes clear, the flow of information in the last several weeks before a Commission hearing on a complex matter makes acquisition, comprehension, and response to that information extremely difficult for all participants, as well as for the Commission and its staff. It should be emphasized that staff, in the Banning Ranch hearing, did the best it could with all of the filings and correspondence submitted. But the time pressure created by such complex matters raises several issues about the Commission's internal ability to make informed decisions, even aside from the potential for public frustration with and disengagement from the process. How can the staff be expected competently to play its role in the evaluative process? To what extent do these circumstances impair the Commission's ability to satisfy its CEQA obligations? How can (part time) Commissioners effectively read and evaluate all of this material? Given the extent of the record in complex proceedings, and in this timeframe, these are herculean tasks. It should not be viewed as a complete surprise that some Commissioners come to rely upon *ex parte* communications with familiar and trusted agents to help them comfortably sort through this detail and complexity. The Commission's current process, one created almost forty years ago and based upon the transmission of information more limited in scope and solely on paper, is simply not designed to deal effectively with voluminous late-submitted information, or to allow the public sufficient access to and the ability to respond to that information. Electronic submission and management of information relevant to a matter before the Commission, as discussed below, could reduce the time and effort needed to integrate new information into a file, organize it for review, and share it with Commissioners, applicants, other interested parties, and the public.

*Some Commissioners come to rely upon ex parte communications with familiar and trusted agents to help them comfortably sort through detail and complexity.*

<sup>44</sup> See California Coastal Commission, *Meeting Agenda*, Sept. 7, 2016, available at <https://www.coastal.ca.gov/meetings/mtg-mm16-9.html>.

Relatedly, the lateness of staff's CEQA-required response to comments received subsequent to the issuance of its staff report can exacerbate these challenges. Because time is limited and in major projects the comments received may be both voluminous and technical in nature, staff not infrequently issues its addendum just prior to the hearing, as it did in the Newport Banning Ranch matter. No public response is possible to the addendum except in testimony at the hearing itself, not only because of time constraints but also because comments received subsequent to the addendum are not distributed electronically but only at the hearing, in written form with limited copies. By that point, most participants are already too busy to read and analyze them, and as discussed below, time limits for oral presentation may preclude any effective response. Further, these late-submitted communications and late addendums eliminate the ability of persons who are unable to physically attend Commission hearings (whether for reasons of time, distance, or economics) to comment knowledgeably upon the full set of information before the Commission.

Finally, an occasional but disturbing trend has been for the applicant to submit substantial additional information just prior to, or even during, the public hearing, sometimes including changes to its project and/or a detailed rebuttal to the staff recommendation. Sometimes, these submissions will include proposed alternative motions, conditions, and findings. While this information may have been shared with one or more Commissioners as *ex parte* communications, it sometimes is not made available to the staff until the day of the hearing, and perhaps not even until the hearing has begun;<sup>45</sup> and it is almost never made available to project opponents and members of the public. Consequently, it is difficult for the staff to respond adequately to this information, and it is essentially impossible for the public to respond. This lack of information and response time is unfair to the public and to anyone affected by the project. It also raises significant concerns regarding the Commission's ability to satisfy properly its CEQA obligations, and to do a necessary evaluative check upon the meaning and effect of the late proposed changes to the conditions and to the language of the proposed findings.

The courts, and some other administrative agencies, have previously faced the problem of separating the process of gathering facts from the process of applying the standards of decision to those facts. They have developed various ways to deal with the problem, at least in more formal proceedings. Principally, they close the factual "record" at some time prior to the actual decision-making – that is, they prohibit parties from introducing new factual information into the record beyond a date certain, and provide a mechanism for correction if a party should attempt to submit information after the deadline.

Two agencies that have implemented more formal procedures, in a different context, are the California Public Utilities Commission (CPUC) and the California Energy Commission (CEC). Their processes may be instructive for considering changes to procedures at the CCC, but the context for those processes is quite different and cannot serve as a real model for the Commission's very different proceedings. Both of these agencies conduct some of their adjudicative proceedings in a very formal manner that is quite different from that of the CCC. Both distinguish between the informal comment of members of the public, made available to the decision-makers but not considered evidence, and the formal testimony of parties, who have been granted full participant status in the proceeding, and whose testimony is considered evidence

*Late-submitted information is unfair to the public and to anyone affected by the project. It also raises significant concerns regarding the Commission's ability to satisfy properly its CEQA obligations.*

<sup>45</sup> Occasionally in the past Commissioners even have had this information at the dais, unbeknownst to either the public or the staff.



Golden Gate Bridge, San Francisco, California

in the proceeding. Both have multi-part proceedings that are conducted first at the evidentiary stage by one Commissioner or an Administrative Law Judge, and then subsequently provide opportunities for the parties to submit briefs and/or make oral argument prior to a decision of the full Commission, and sometimes also to comment upon a proposed decision.

Notably, both the CPUC and CEC engage in complex utility regulation and ratemaking processes of a type that, at the federal and state level and across jurisdictions, is customarily subjected to more formal proceedings. Moreover, both of these agencies have their adjudicative operations funded by a process outside of the State's General Fund. Finally, neither is bound by the same time limitations as are imposed upon the Commission by provisions in the Coastal Act, the CZMA, or the Permit Streamlining Act. In short, while the processes used by each of these agencies may be instructive in some ways for the task at hand, neither provides an exact template as a basis for rethinking the Coastal Commission process. The Legislature designed the Coastal Act to have public participation in some ways analogous to local government land-use decision-making. Because its legal structure and process is unique, the Commission needs to address the problem of fairness in access to information in the record, and in the ability of participants to respond to that information, within the particular context of its own legal structure and of the particular needs and customs of environmental and land-use quasi-judicial decision-making.

## ***2. Fairness in Access to Decision-Makers***

As noted previously, there are a number of aspects of the Commission's process that have led to the perception of unfairness, aside from those relating to late submittals, information distribution, or ability to participate meaningfully in hearings that were addressed above. These include fairness in access to the Commissioners, incomplete reporting of *ex parte* communications, and fairness in access to staff.



The problem of access to staff arises in large part from the nature of the process itself, and staff's role in that process. Commissioners are part-time officials, preparing for and making decisions at the Commission's monthly meetings. The Coastal Commission's particular system of evaluative hearings relies upon Commission staff to gather, analyze, and present to the Commission the information that it needs to make those decisions. This involves continuing contact with all interested parties and with the public. Further, the nature of this work inevitably leads to greater contact with the applicant, for example, than with project opponents. The applicant has the burden of demonstrating that its project is consistent with the applicable Coastal Act standards. It must submit detailed information regarding the project and its potential impacts, and respond to any staff inquiries. In complex projects, staff might spend hundreds of hours meeting with applicants and their representatives, exchanging emails, reviewing documents, and in joint site visits prior to preparation of the staff report. Even though project opponents also have a significant burden to produce evidence regarding potential project impacts, it is not likely that their access to staff will be equal during this dialogue.

*If ex parte communications with Commissioners are not timely or properly reported, then the system has failed to deliver a fair and proper quasi-judicial hearing process.*

Fairness in access to Commissioners presents a different set of problems, because the Commissioners are the decision-makers. The difficulties that differential access to information in the record causes can be compounded if all of the information upon which a decision may be based (or appear to be based) is not in the record. Legislative authorization of *ex parte* communications with Commissioners enables a system of differential access to the Commissioners as decision-makers. Knowledge of how the system works and the familiarity that regular participation brings provides an advantage to professional advocates. The lack of a "place" where Commissioners work, and a statewide as opposed to a local process, provide an advantage to those who can afford the extra expense of travel to multiple locations for those *ex parte* communications. These difficulties are compounded when individual Commissioners decide to have *ex parte* communications with some participants, but not others. Further, all of these factors, interacting together, not only raise generally applicable fairness concerns, but may also particularly exacerbate existing environmental justice issues, because members of these communities are often least familiar with the process and least able to overcome these barriers.

The Legislature attempted to ensure the fairness of the quasi-judicial hearing process while allowing *ex parte* communications by requiring complete and comprehensive reports of those communications. However, if *ex parte* communications with Commissioners are not timely or properly reported, then the system has failed to deliver a fair and proper quasi-judicial hearing process. Further, even if the substance of communications has been properly reported, if it is not perceived by participants as having been properly reported, then the process itself is not perceived as fair. This problem of perception is important. Even if the public knows all of the information upon which a decision is based, if it has evidence that leads it to believe that it does not have all of the relevant information (for example, from cursorily reported *ex parte* communications) then there is no trust that the decision has been properly made. This undermines a critical foundation of a legal system.

Not all *ex parte* communications are reported, nor do the reports that are made uniformly provide a "complete, comprehensive description of the content" of those communications. This is a problem that the Commission needs to address.

### 3. *Fairness in the Hearing*

Once the actual hearing commences, the presentations are similarly driven by the applicant, both in format and in substance. The applicant first presents its proposed project, and is generally given 15-30 minutes for its presentation. Governmental agencies, any organized opposition, and members of the public are then given an opportunity to present their views on the proposal, before the applicant is given an opportunity to rebut. While an organized opposition, at the discretion of the Chair, can be given time equal to that of the applicant, individual members of the public are frequently allowed only three minutes, and sometimes less, for their presentations.

This is a dilemma for the Commission. Because three minutes is only enough time to make one or two points in a summary manner, and is not adequate to make any detailed comment upon a technical issue or a complicated scientific matter, some accommodation needs to be made to ensure that the Commission gets a full appreciation of the nature of the disagreement between the proponent and the opposition. While it makes sense not to give each member of the public equal time with the applicant, because the testimony may simply be of opinion and duplicative, it is also impossible, where the project is large and the issues technical, for ten uncoordinated three-minute presentations to respond to one organized thirty-minute presentation; and no individual, however well informed and prepared, can respond adequately to a thirty-minute presentation in just three minutes. This is the reason that in some case members of the public and organizations have requested an “organized presentation” of equal time to the applicant and combined their time to allocate it consciously among the particular issues that need to be addressed. The Commission has also allowed the “ceding” of time from one speaker to another to allow particular issues to be more adequately addressed. Still, there is no assurance that such organization among speakers will occur; and more often than not, it doesn’t.

Thus, even when all the information is in hand, the time limits in the hearing process sometimes limit effective public comment. Where there is organized opposition to a project, the Commission Chair has frequently allowed that group to have equal time to present its views to the Commission, and while this does not necessarily include the full expression of views, it does substantially alleviate the inequity that otherwise exists in the allocation of time for testimony. However, where, as discussed earlier, critical information is not readily available until the day of the hearing, if even then, effective public input is largely precluded. Even those who can attend the hearing cannot properly participate. Those who cannot attend, for reasons of money, or time, or distance, are also precluded from effective participation. Even where they have gone to the effort of submitting comments in response to a proposal prior to the hearing, if the proposal has subsequently changed, their comments become simply an expression of sentiment rather than a position of reason. It is in the hearing itself that the interaction of the three fairness concerns becomes clear, because one cannot comment upon or respond to what one doesn’t know.

*It is in the hearing itself  
that the interaction  
of several key fairness  
concerns becomes clear,  
because one cannot  
comment upon or  
respond to what one  
doesn’t know.*

Aerial view of Lido Island, Newport Beach, California



## Recommendations to Address Issues of Transparency and Fairness

For the public to develop and maintain confidence in the Commission's work, the Commission must be, and must appear to be, as transparent as practicable, and must treat all participants, including members of the public, fairly. To have a fair hearing, participants need to feel, prior to the Commission decision, that they have been heard: that they have been allowed to present the facts that they wanted to present, to make the essential points that they wanted to make, and to respond to the points that others were making that they think were mischaracterizations. If, at the end, they are upset about the decision, a fair and transparent process would minimize their frustration with the procedure that led to that decision and would result only rarely in allegations of bad faith. It would also result in a more complete and accurate factual record for the decision.

As previously discussed, complaints about the Commission's process have focused upon fairness in access to decision-makers, fairness in access to the information upon which the decisions are made, and fairness in the availability of time to obtain, evaluate, and respond to information in the record provided by others, particularly in the last days before a Commission decision, and at the public hearing. With this in mind, the Commission should consider seriously how to increase and ensure transparency, accountability, effective public participation, and the perception of fairness in its administrative process. The question then is: what are the elements of the Commission's quasi-judicial process that (a) are within the Commission's control and subject to change by the Commission itself; and (b) can make the process more transparent and fair for all parties?



The Commission can improve the fairness and appearance of fairness in its quasi-judicial proceedings by:

- (1) fully committing to electronic filing and record keeping;
- (2) increasing fairness in access to decision-makers;
- (3) closing the record for written submissions and *ex parte* communications sufficiently in advance of the hearing to allow all participants the opportunity to understand, evaluate, and respond at the hearing to the submitted information;
- (4) “channeling” permit proceedings;
- (5) “staging” permit hearings;
- (6) better managing the time constraints of the PSA; and
- (7) better managing the actual hearing process.

### ***1. Developing Electronic Filing and Record Keeping***

Government agencies are frequently at the back end of innovation, and for a variety of reasons the Coastal Commission has not been an early adopter even among California governmental agencies. It still does all of its filing, and much of its record keeping and redistribution of information, by handling paper. Other agencies and courts have adapted to develop systems for electronic receipt, management, and distribution of documents. The Commission should similarly work to ensure that all documents in the administrative record, regardless of source, are available to all members of the public in electronic form as they are received or generated. This will ensure that persons have the ability to receive, understand, analyze, and respond to information in the record, and to articulate their interests in a timely manner.

Filing, maintaining, and distributing information on paper is the traditional method in legal systems, and the Commission needs to maintain this system for the foreseeable future, at least in parallel with providing for electronic filing and distribution of documents. Documents in print also are beneficial for the participation of individuals who do not have regular access to computers and the ability to communicate electronically. But while this method is necessary and has some advantages, it is not conducive to making the information in an administrative record quickly and easily available to the public.

The Commission has begun to change this situation by consciously adapting to the age of electronic data and communications. No longer do Commissioners and staff carry boxes and briefcases filled with staff reports to Commission meetings. They now fairly routinely use computers at the hearings, and they reference needed information electronically. More importantly, the Commission has begun to make serious efforts to adopt a system in which documents in the administrative record of its quasi-judicial proceedings are electronically filed, stored, and made available to the public.

In recent years Commission staff has been developing and implementing a project, the Coastal Data Management System (CDMS), the goal of which is to make available to the Commissioners, the staff, and the public a consolidated electronic database of documents, records, and maps related to its historic and ongoing proceedings. According to a report to the Commission in May 2017, staff have nearly completed the historic record back to 1981. Staff are also further developing the ability to make available recently submitted documents in ongoing proceedings. However, the public portal to access record data on the web is not yet complete.

Thus, while the CDMS project is still incomplete, and is still short of a true electronic filing

and recordkeeping system, the agency has made substantial progress. As development of the CDMS project continues, one important goal must be to make available to the public all of the documents in the administrative record, regardless of source, as they are being accumulated or generated, so that all interested persons have the ability to access, understand, analyze, and respond to information in the record, and to articulate their interests in a timely manner. For most submissions, utilizing staff time to scan submitted documents should neither be desirable nor necessary. Rather the key to this goal will be developing and deploying a system for receiving and indexing information electronically, similar to docketing systems used by courts and other agencies. Achievement of this goal will substantially increase the public perception of a fair and transparent process, and will improve access to the process for communities that are not able to expend resources to attend meetings or to go regularly to agency offices to examine paper documents. It will also have the salutary benefit of reducing the burden and cost of responding to Public Records Act requests.

## ***2. Increasing Fairness in Access to Decision-Makers***

Three of the problems identified above relate to access to decision-makers. It is difficult to assess fairness objectively in this regard. Access to Commissioners and Commission staff is gained in a number of ways, and unequal access, or the perception of unequal access, does not necessarily equate to lack of fairness. Because, as previously discussed, the nature of the pre-hearing process requires extensive contact between the applicant and the staff, it is not likely that access to staff for members of the public will be equal during this dialogue. It is nonetheless important for staff to be accessible to the public during this period as well, to facilitate public input.

Access to Commissioners is another matter, however. In more formal quasi-judicial proceedings, as in judicial matters, individual parties or their representatives have no substantive off-the-record access to the decision-makers. All substantive communications must be made on the record, with all parties present, or having the ability to have knowledge of the full communication. This was arguably, though not always actually, the case with respect to communications with Coastal Commissioners prior to the 1992 Coastal Act amendments regarding *ex parte* communications. The Coastal Commission permit process is different, for the reasons discussed above, from that of more formal judicial and quasi-judicial processes. It is evaluative in nature. In addition, six of the twelve voting Commissioners are elected public officials, whose public tasks involve frequent informal communications with their own constituents from their elective districts. This may have provided some of the rationale for the 1992 amendments that legalized and formalized *ex parte* communications, recognizing their existence and providing a process for reporting their content.

Nonetheless, a perception of unfairness now pervades the use of *ex parte* communications. There are two bases for this perception. One is that experienced professional agents regularly appear before the Commission and have developed much closer personal relationships with Commissioners over time, and build upon these personal relationships in their advocacy. The frequency and familiarity of such contact is not lost upon those who do not have a similar personal basis for their own conversations, whether because they appear only infrequently before the Commission, cannot afford to travel to every meeting, or do not attend social or professional gatherings with Commissioners outside of meetings. The differential access is especially acute and salient to members of environmental justice communities, who may have limited economic means or political power. They may not even know of the possibility of having *ex parte* communi-



Hikers near Big Sur, California

cations, much less have the ability and the comfort to initiate and conduct such communications.

Second, the reporting of *ex parte* communications often rather obviously does not do justice to the content of the actual communications.<sup>46</sup> “Full disclosure,” required by the terms of California Public Resources Code § 30324(b)(1)(C), is a “complete, comprehensive description of the content of the *ex parte* communication.” In practice, however, disclosure is often performed perfunctorily in a minute or less, or in several summary sentences in written form. This cannot be a complete comprehensive description of any substantive conversation. If a Commissioner reports, for example, that they “met on this specific date and this particular place with John Smith, who discussed the wetlands present on the site,” this reveals nothing about what actually transpired in that communication. For oral reporting of these communications at a Commission meeting some self-editing may be understandable, in the sense that meetings are long and tiring, and no one really wants to have them made longer. But this rationale does not apply to written reports of communications that occurred more than seven days prior to the hearing. The perception of unfairness remains, and lack of full disclosure of *ex parte* communications contributes to it.

In the past several years, some Commissioners have stopped having *ex parte* communications, after the press negatively covered the practice in the context of several highly controversial permit proceedings. This may be the best, or at least most fair, solution to the problem. There is no requirement that a Commissioner have *ex parte* communications. But some Commissioners continue to believe that these informal conversations, when pictures and exhibits can be examined and personal questions can be answered at leisure, are beneficial.

The Legislature recently considered bills to prohibit *ex parte* communications or to change the method of reporting these communications, but none have yet passed. Absent such a legislative measure, it is unlikely that anything further can be done to fully curtail this practice;

<sup>46</sup> Some Commissioners have conscientiously attempted to properly report their *ex parte* communications, but this has been the exception rather than the rule.



*The Commission might consider whether to amend its regulations to make failure to properly report an ex parte communication a ground for revocation of a permit; or it might seek legislation to make that failure a ground for reconsideration of a permit.*

whether or not to engage in *ex parte* communications will continue to be subject to individual Commissioner choice. However, to the extent that individual Commissioners choose to engage in *ex parte* communications, they also should choose to embrace complete, comprehensive disclosure of those communications, as the law requires.

Further, the Commission should consider changes to its regulations that might more specifically manage the process for conducting and reporting *ex parte* communications. It could require full acknowledgment and proper reporting of these communications and it could define proper processes for reporting. It also could, consistent with the Act, define when these communications could and could not occur; for example, by setting a cutoff point for conducting *ex parte* communications. This would help with the problem of late submitted information and reporting, enabling a fair opportunity to respond. Finally, the Commission might also consider amending its regulations not only to formalize these reporting processes but also to create incentives for proper reporting within its quasi-judicial process. In this regard, for example, the Commission might consider whether to amend its regulations to make failure to properly report an *ex parte* communication as required by California Public Resources Code § 30324(b)(1)(B) a ground for revocation of a permit; or it might seek legislation to make that failure a ground for reconsideration of a permit.<sup>47</sup>

### **3. Closing the Record in Advance for Written and Ex Parte Communications**

As discussed earlier, the Commission's regulations, particularly at 14 CCR § 13060, permit the submittal of information to the Commission up to the close of the public testimony portion of the Commission's hearing. This creates a significant fairness problem for participants. It also raises environmental justice concerns, particularly for those unable to attend a hearing or unfamiliar with the Commission's decision-making process, and it creates difficulties for Commissioners and staff to properly evaluate that information and fulfill their CEQA obligations. The benefits, if any, accrue to those who are able to use the system to their advantage. It is one thing to testify by responding to a previous speaker's presentation or a participant's written submission; it is quite another to "testify" by submitting a complex prepared packet of proposed amended motions, conditions and findings at the last minute.

The Commission should amend its regulations to set a cutoff point for the submission of new factual or written information into the record, not just in its staged hearings, as discussed separately, but in all of its proceedings, so that those with opposing views get a chance to respond. If a participant or an applicant wants to submit something new (e.g., a biological report), and the Commission thinks it is worthwhile to receive the information, it should continue the matter to provide an opportunity for the other participants to evaluate the report and respond. If Commissioners elicit testimony after the public testimony portion of the public hearing is closed, opponents or the applicant, as appropriate, should be given an opportunity to respond on the record. If the applicant wants to modify its project, for example to find a "middle ground" between its original proposal and the staff recommendation or the position of project opponents, this may be entirely appropriate, but it should only be permit-

<sup>47</sup> Grounds for revocation of a Commission issued permit are specified in 14 CCR § 13105. The Commission's existing authority to reconsider permit decisions is strictly limited by the terms of California Public Resources Code § 30627.

ted in the context of a withdrawal and resubmittal of the application, so that full review and public comment is permitted.

It should be noted that this is a general recommendation to deal with a pervasive problem. The key is to focus upon fairness for all participants. No party or participant should have a procedural advantage. All participants should have timely access to all of the information upon which the Commission will base its decision, and the opportunity properly to respond to or comment upon that information. The Commission, in turn, should have before it all of the information and opinion appropriate to make its decision. New procedures, properly designed for the new age of information technology, will effectuate these goals, rather than limit them.

#### ***4. Channeling Permit Proceedings***

Most permit applications are straightforward, and are processed promptly and without controversy. Further attempts to streamline these proceedings, or to channel other permit applications into the existing Commission procedures for expeditious processing, would free up staff time for more complex and controversial matters, which involve fundamentally different and more complicated factual and legal issues than matters such as single-family homes.<sup>48</sup> (Examples of such complex matters include Banning Ranch, Bolsa Chica, the Edge project in Malibu, and Lawson's Landing.)

Channeling, in this sense, means creating a process that allows the Commission staff, as early as practicable before a matter is filed, to separate applications by their degree of difficulty, essentially separating the simple, straightforward, and uncontroversial from the difficult, complex, and controversial. It is a form of triaging. The Commission already does this to some extent, but it should consider designing a more formal channeling process for even greater efficiency. Commission staff currently utilizes mechanisms such as the administrative calendar, the consent calendar, and other procedural tools to streamline consideration of simple and uncontroversial decisions. Further, the Executive Director presently has sufficient authority to treat complex and controversial permit decisions in a different manner than either those that are streamlined, or those that are handled in the more regular manner.

However, while it may not be not legally necessary to amend the regulations to develop and implement a formal channeling process for complex matters, for better public acceptance of any changes, and for clarity regarding their rationale, structure, and intended effect, the Commission should consider amendments to several of its existing regulations, and perhaps a new regulation. This would better serve the Commission's public interests of transparency and accountability. Specific and formal channeling procedures would allow for better coordination and a more transparent and fair process for complex Commission matters. Although the channeling process should allow the Executive Director to designate matters for processing as complex permits at any time, one significant benefit would be a more careful application review prior to filing. Complex permit proceedings for controversial proposed development are precisely the matters that can and do most benefit from careful pre-filing review. The process that is designed for complex permits could also allow for staged hearings, and closure of the record prior to the hearing, as will be discussed below. Such adaptations also would help with transparency and fairness.

<sup>48</sup> Even single-family homes can be complex and controversial; for example, they may be affected by sea level rise impacts during the expected future life of the development on the parcel.



Seastars in the Monterey, California kelp forest

## 5. Staged Hearings

Complex and controversial proceedings present special problems. They usually involve a complicated factual record, which continues to evolve during the dialogue among the Commission staff, the applicant, and the various other interested parties and members of the public. For example, scientists may disagree regarding whether something is a wetland, or about its delineation, leading to repeated site assessments and technical reports. They also may disagree about whether certain habitat constitutes an Environmentally Sensitive Habitat Area (ESHA), or what an appropriate buffer should be, or the extent of the mitigation to be required for an impact, the severity of which is disputed. There may be disagreements about the feasibility of alternatives or mitigation measures being considered. New evidence may continue to be developed throughout the review process regarding these issues, and then that evidence must be evaluated in the context of the applicable policies of Chapter 3 of the Coastal Act, or of the certified LCP. When the public has complained about last minute information submittals, late addenda, or inadequate time to respond, it is most frequently their experience in these kinds of scientifically or factually complex proceedings that has led to these complaints. Moreover, difficult judgments about implementing and balancing Coastal Act policies and values in making a decision or in developing project conditions may require an especially nuanced and detailed understanding of the facts about what resources are at stake and how a decision will affect them. The Commission might consider addressing this issue by staging hearings in two phases: fact-finding and decision-making.

Since many difficulties with the Commission's administrative and hearing process are driven by disputes about the facts, it may make sense to first establish the facts, and only then to argue about how those facts translate into policy decisions. Accordingly, one potential solution is to close the factual record prior to the hearing at which the parties make their arguments and the Commission makes its adjudicative decision. Unlike the recommendations in the previous sections, to prohibit late-submitted written communications and late *ex parte* communications, which apply to all pro-



*A staged process could both clarify the factual record for the Commission in advance of the hearing at which it makes its decision, and avoid the “late hits” (last minute or on-the-record submissions of new factual material, and/or proposed alternative conditions and findings) that have caused so much difficulty for the Commissioners, staff, participants, and the public.*

ceedings, this recommendation is intended to facilitate processing the most complex and controversial matters by utilizing a two-stage hearing, based somewhat upon the model used by the courts and by agencies such as the CPUC and the CEC, but without the need to formalize the process to the extent utilized in those proceedings. The first stage would involve consideration of the factual record, and the second stage would involve decision-making based on that record and any other relevant considerations (with a limited opportunity for new factual submissions).

At one time in its past the Commission more commonly held two-stage hearings, but the process went out of fashion, and the regulations that pertained to the two-stage process were repealed. The Commission can still hold multiple hearings informally, and occasionally does so,<sup>49</sup> but it might be better practice to reconstruct a formal two-stage mechanism into the Commission’s regulatory structure. The Commission can lawfully develop a regulation to do so.

Under such a mechanism, the Commission could have a full hearing focused on the factual basis for its decision at one meeting, after submission of all available information bearing on the factual record. At the initial hearing, the Commission could consider reports and studies, so that if there is a dispute, the matters in dispute could be specifically identified for both the Commission staff and all interested persons. The Executive Director could choose to make a tentative recommendation, to give the Commission, the applicant and the public a sense of the direction of staff’s thinking. The Commission would not make a final decision at this hearing, but would be fully engaged in the hearing process, including discussion of the application of the standard of review to the facts of the development proposal, to help clarify the exact decision points and the need, if any, for additional facts.

Before the second hearing, all parties would continue to have the opportunity to submit additional information regarding factual matters, perhaps focused or even limited by the concerns and decision points raised at the first hearing; but the factual record would close at a fixed time prior to the second hearing, ideally prior to issuance of the staff recommendation. The arguments about the facts at the second stage could be structured so that all written material also would be submitted prior to the second hearing, though after the deadline regarding factual material. The second hearing would then focus specifically upon what findings would be made and what actions, including specific permit condition language as appropriate, would be taken. A staged process could both clarify the factual record for the Commission in advance of the hearing at which it makes its decision, and avoid the “late hits” (last minute or on-the-record submissions of new factual material, and/or proposed alternative conditions and findings) that have caused so much difficulty for the Commissioners, staff, participants, and the public. The goal of the process would be greater clarity and fairness for all, and a more efficient decision-making process for the Commission.

## 6. Managing Time Constraints

The Permit Streamlining Act generally requires that the Commission make a final decision on a permit application within 180 days of the date the application is accepted as complete and filed. That deadline may be extended once, for up to 90 days, upon the mutual consent of the applicant and the Commission. The PSA’s requirements have impeded Commission consideration of the full record in some cases. The Commission can address this problem by improving its policies and practices to ensure that applications are not accepted as complete and filed until all relevant information is included.

<sup>49</sup> The Commission retains a vestige of the two-stage hearing process in 14 CCR §§ 13057(d) and 13090(c).

Absent a change in the PSA,<sup>50</sup> the most important thing that the Commission could do on its own involves obtaining all information that it needs to review any application before accepting it for filing. The need to obtain additional information from the applicant is the primary impediment to timely preparation of Commission staff reports. A commitment to the practice of securing complete information prior to filing is critical, precisely because the time limits in the PSA do not begin to run until the permit application has been filed.<sup>51</sup> The Commission already has several regulations that list what is necessary for it to accept a permit application for filing, including 14 CCR § 13052, regarding required prior approvals of other agencies (the information from which helps the Commission in its review), and 14 CCR § 13053.5, detailing the specific information to be included with the permit application form.

Unfortunately, these regulations, in practice, are ineffective at ensuring that applications are complete. First, the Commission's existing regulations are not sufficiently complete, specific, and up to date to ensure that applications contain all necessary information. Second, the regulations are sometimes not properly implemented and enforced. Review and possible amendment of these regulations, together with a firm agency commitment not to file permits until complete information has been provided, will reduce the burden of processing significant new information in the face of impending time deadlines. These changes will also help to provide the time flexibility necessary for other suggested changes in the process, particularly staged hearings, that will help to address transparency and fairness issues.

## 7. *Improving the Hearing Process*

If the factual record is established prior to final Commission deliberation, or if the facts are not in dispute, then the actual public hearing becomes more manageable. As described above, the Commission uses an “advocate, respond, then rebut” model, with the applicant taking the lead to introduce and advocate for a change in the status quo, other interested parties (including members of the public) responding in support of or opposition to the proposal, and the applicant (usually) having a short period to respond to comments received. Commission staff then responds to the points made by the applicant and other participants, both to fulfill its required CEQA obligations and to make any changes to its recommendation or clarifications to the record or to its position that it deems necessary and appropriate, before the matter goes to the Commission for its decision. In complex proceedings this process can result in disjointed, ineffective public comments. Encouraging and facilitating cooperation among aligned parties at the hearing can help to address this challenge.

For most hearings, the process described above is adequate. However, for more factually or legally complicated hearings, participants other than the applicant can get short-changed by time limits for their testimony, particularly if they do not organize themselves in advance. The applicant in complex and controversial matters usually gets a large block of time (15-30

50 The Legislature could amend the PSA to allow for further extensions of its time limits for these complex and evolving proceedings. In this context, an extension of even 60 or 90 days after a change in the project description for which the permit is sought would be of enormous benefit to Commission staff and to the public process. The development community would likely oppose any legislative changes to the PSA. It is conceivable that a proposed amendment might get support if it were clearly and specifically limited either to specific types of permits (e.g., complex projects that require extensive review of coastal resource impacts not fully examined by the lead agency) or to specific events in the process (e.g., late changes in the development proposal) that would trigger extensions of the time limits.

51 There are separate time deadlines that apply to the Commission's review of the completeness of the information provided with the permit application. See CAL. GOV'T CODE § 65943. These also can be problematic.



Oil rig off Ventura, California coast

minutes) for its presentation, and can organize that presentation to utilize the time available to deal appropriately with the multiple issues that may be involved. Opponents, on the other hand, who frequently only get three minutes to speak, and sometimes less, may be focused upon particular issues that differ one from another, and unless they have worked together previously, may not know one another well enough to coordinate. One change that might make the hearing process more efficient and informative would be to include in the Commission's procedures some form of notice or process that encourages this coordination.

This circumstance also supports a staged proceeding, in which opponents and other participants can present written comments regarding all of the facts in the record, providing a meaningful mechanism and opportunity for Commissioners to consider their input.

But recognizing this problem is one thing; solving it is quite another, because there may be no unifying organization among various "points of view" among members of the public who have cared enough to present testimony at the hearing and because at a complex and controversial hearing there may be hundreds of people wanting to speak. At times in the past, the Chair has, at the beginning of the hearing, called upon the opponents to organize themselves and their presentation, offering a block of time within which to present their testimony. This is a valuable technique, and sometimes it has worked. But there is no "one size fits all" solution. Some individuals or groups need more time than others to properly present their testimony. Often, reasonable flexibility about time limits is the best way to allow participants to feel that the hearing process has been fair.

## ***8. Proposed Non-Regulatory Changes***

Many of the changes recommended in this article can be made informally, without going through a full regulatory process. Perhaps the most important example of such a change would be completion and full implementation of the Commission's system for electronic filing and



record-keeping. Full implementation would substantially alleviate many of the complaints associated with inadequate and unfair information flow prior to the Commission hearing on a matter. The information being utilized by the Commission would be both more transparent and more accessible. In addition, completion of the system would reduce the time now necessarily used by staff to respond to information requests, freeing up more time for critical work.

Equally important to transparency would be a commitment by Commissioners who participate in *ex parte* communications to complete comprehensive reporting of those communications. Some Commissioners in the past have expressed concerns that detailed reporting of these communications would unduly extend the length of already long hearings. While this is undoubtedly the case, the Legislature, as part of its legalization of *ex parte* communications in the first place, has required complete and comprehensive disclosure.

Several points of emphasis within the scope of Commission staff's informal practices also should prove beneficial. Staff has been working for some time to further emphasize the expeditious treatment of those proceedings that do not require extensive processing, and it should continue to do so; but it also should work to identify as early as possible those matters that will require extensive processing, that are complex and controversial. Ideally these complex matters should be identified before they are filed, and their processing should be channeled from that point. Although no permit should be accepted for filing until complete information is received, it is these complex matters in particular that the staff should focus their attention upon to ensure that all necessary information and reports have been identified, requested, and received prior to the matter being filed. An additional benefit of requiring full information prior to filing is that early processing will help to prevent hearings from being scheduled by necessity just before the PSA deadline, removing the flexibility that the Commission or staff might otherwise have to continue a matter for further deliberation.

## 9. Proposed Regulatory Changes

Nonetheless, in order fully to change the process in the manner that is proposed in this article, the Commission should also review its existing permit processing regulations. These regulations form the basis not only for the Commission's full review of coastal development permits, but also for much of its process of gathering information and conducting hearings in federal consistency matters.<sup>52</sup> Further, although the regulations for LCP submittals prescribe a separate process for Commission review, the manner in which the Commission conducts hearings for LCP submittals is similar to that of permits and consistency matters.<sup>53</sup> In actual Commission practice, all of its quasi-judicial hearings are conducted in a similar manner. Thus, for the most part changes in one part of the quasi-judicial process regarding information gathering and public proceedings should be reflected in the other quasi-judicial processes as well, subject to fine tuning for each particular type of proceeding.

This article has discussed the possibility of establishing procedures for a staged hearing for a complex matter. Conducting staged hearings in the manner previously discussed would require a reconsideration of when the administrative record is closed for new factual material (under 14 CCR § 13060), and a designed process for these staged hearings. One problem with using the present process in a "staged" manner is that there is no point at which the record is

<sup>52</sup> CAL. CODE REGS. tit. 14, §§ 13052-13096.

<sup>53</sup> See CAL. CODE REGS. tit. 14, §§ 13518-13542.

“closed.” Whether and when to close the factual record or otherwise to limit communications prior to making the decision is one of the key concepts that the Commission should examine.

However, in those circumstances where late submitted information is permitted and new information is accepted into the record, allowing time in the review and scheduling process for a continuance in response to these late submitted communications would be of great benefit, because a continuance is the proper response to communications submitted without time for the Commission or other interested parties to respond properly. Existing regulations provide some flexibility to deal with continuances and late submitted communications. But the Commission should also consider weighing the benefits and costs of closing the record to written communications at some point prior to the public hearing at which the decision is to be made, and developing procedures to make all written communications available to all participants prior to that hearing. Completion and implementation of an electronic filing and record keeping system, with all filed documents immediately electronically available to the public, would greatly help with this.

Different considerations apply to the different situations following from the late submission of information from the applicant, as contrasted with that from other interested parties or members of the public. The applicant is largely in control of the process. It controls the scope and timing of the information submitted in support of its application. Nothing prevents it from submitting necessary information early in the process, and in fact the process is designed based upon the assumption that this information will be supplied with the application. The applicant may face late submitted information (biological reports, for example) from project opponents or members of the public. But the applicant usually has more flexibility to secure time to respond. Under the Commission’s existing regulations, the applicant has the right to one continuance, and may also, if it chooses and the Commission agrees, extend the PSA deadline or withdraw and resubmit the application.

If there is a material change in the project for which approval is sought, 14 CCR § 13072 provides the Commission some tools to manage that process; the Commission should review whether those tools are adequate to provide it with the flexibility that it needs to ensure a fair process, and make changes as needed. For example, the Commission might consider whether any material change in the project description just prior or subsequent to staff review and issuance of the staff report might better be processed pursuant to a withdrawal and resubmittal of the application,<sup>54</sup> rather than in a scramble to adapt to the redesigned proposal that burdens all participants, including the Commission and its staff. While the Commission has done this informally in the past, by agreement with the applicant at the hearing, it should consider whether formalization of its authority in a regulation would provide a better management tool for this situation.

However, in most situations where there are late submitted communications or late changes in the project, the matter is complex or controversial, and should be processed pursuant to a different set of rules than are ordinary projects. The Commission should develop separate regulations for processing these complex and controversial projects, because most of the proceedings that have resulted in perceptions of lack of fairness or of transparency have been projects of this kind.

<sup>54</sup> Under its existing regulations, the decision to withdraw and resubmit is entirely within the discretion of the applicant. On the other hand, the Commission can choose not to accept the new information and instead to vote on the application as it existed prior to the material change(s) to the project, on the basis that the material change(s) have not been properly evaluated and subjected to public review and comment.



Any focus upon these complex proceedings should also include a review of the requirements of 14 CCR §§ 13052 and 13053.5 of the Commission's regulations, regarding preliminary approvals by other agencies and information to be included with the permit application, respectively, to update those provisions to present circumstances. The Commission should also review its process for channeling proceedings, not only to promote the early designation of complex proceedings but also to determine whether additional streamlining of less controversial matters can be achieved.

Finally, the Commission should consider carefully how to make the process of information flow fairer in the context of legislatively permitted *ex parte* communications. Some Commissioners have chosen not to engage in such communications, but others still have them. If such communications continue, then the problem the Commission needs to address is how to make the information communicated in this fashion readily and timely available in the administrative record, so that there is a fair opportunity to respond. The Commission should consider whether to adopt a regulation to limit *ex parte* communications at some specified time prior to the hearing. The Commission also should consider whether a regulation can be adopted to formalize a process that would make the legislative requirement of a "complete comprehensive description of the content" of the communication more clear and enforceable, so that it is followed. The Commission might also consider whether the failure to report such communications in the manner that the Legislature has required should be a cause for revocation of a permit, or seek authority to reconsider a permit under such circumstances, to give more teeth to the requirement, and to attempt to prevent a recurrence of the situation that arose in the *Spotlight* case.

In amending its regulations, the Commission will have to contemplate the possibility of different procedures for different types of submissions (e.g., permits, appeals, local coastal programs, federal consistency matters) that are to varying degrees subject to different legal requirements and that present particular process problems. This fine-tuning is necessary and perfectly understandable and is precisely what should occur as part of the regulatory process. There is a tension in this process in several dimensions; among, for example, the goals of open



and informal proceedings that may encourage and facilitate full public participation; of a clearly delimited quasi-judicial proceeding that provides known procedures in advance that can more properly assure certainty and equal treatment for all participants; and of an effective and efficient decision-making process for the Commission. The Commission's task is to find the proper balance among such goals for each of the quasi-judicial processes in which it engages to ensure maximum fairness for all participants.

## Conclusion

This article has identified weaknesses in the Commission's process that have led to perceptions of lack of fairness and transparency. Some of these problems stem from constraints imposed by statutes, such as CEQA, the PSA, or the Coastal Act. While changes to those laws are beyond the authority of the Commission to address, it can make strategic decisions to apply them in a way that better promotes transparency and fairness. Many problems can be addressed by the Commission through a careful review of its regulations and its more informal practices.

First, the Commission can modernize its process for gathering, processing, and distributing the information in its administrative records. Information technology has changed substantially since the Commission's current process was devised and its current regulations written. The Commission's processes, both formal and informal, should be updated to acknowledge and reflect those technological changes. Problems such as fairness in access to information in the record, late submittal of factual information or of project changes, late issued addenda, and staff's ability to respond properly to comments received can all be addressed through revisions to the Commission's regulations, a more careful application of those regulations, and a commitment to electronic filing, availability, and distribution of information.

Second, new regulations can be drafted to better manage complex and controversial applications, such as by creating a process for channeling and staging complex hearings. Regulations can also address how to improve fairness by creating deadlines for submission of written information and for conducting *ex parte* communications at some point prior to the hearing, to put all participants on an equal informational plane prior to the opening of the hearing.

Finally, adjustments to informal practice, as well as to the Commission's regulations, can reduce the perceptions of unfairness that result from brief and incomplete reporting of *ex parte* communications or the unequal distribution of time in hearings.

This article's recommendations are consistent with the general statements of findings and declarations regarding fairness and public participation expressed by the Legislature in California Public Resources Code §§ 30006 and 30320. Process improvements that increase fairness and public participation also would further the Commission's implementation of the related goals of AB 2616 and the Commission's recently adopted Environmental Justice Policy. They are not intended to be a list of final answers. Rather, the intent is to focus attention upon a set of problems related to the Commission's processes and procedures, and to suggest ways to improve those processes and procedures. The details remain to be discussed, considered, and resolved through dialogue between the Commission, its staff, and participants; and many new ideas will come from that dialogue. Broadly speaking, however, the Commission's action upon these recommendations would substantially improve and increase the fairness, transparency, and accountability of, and opportunities for effective public participation in, its quasi-judicial processes.

# Pritzker Briefs

## PRITZKER ENVIRONMENTAL LAW AND POLICY BRIEFS

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