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# CEQA

# Turns Forty

## The More Things Change, The More They Remain The Same

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## I. INTRODUCTION

Taking stock of CEQA as it turns forty provides an opportunity to examine the extent to which it has changed or progressed since it was assessed by noted commentators in 1993 at its twenty-first anniversary. At that time, the statute had been the subject of approximately 200 published decisions. At this point at it turns 40, CEQA is the subject of approximately 600 published decisions.<sup>1</sup> Invariably, the assessment of CEQA is in the eye of the beholder. Those who support the petitioners' side continue to complain that the environmental protection contemplated by CEQA [*see, e.g.*, Pub. Resources Code, §§ 21000-21002] still does not go far enough. Those who plan public or private sector projects complain that the balancing of environmental and societal needs also contemplated by CEQA has not been sufficiently honored. The oft-cited overriding principle governing CEQA from its inception is that it is "to be interpreted... to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.

Often overlooked is that included in the statutory language is legislative intent regarding provision of housing and, impliedly, public services for residents:

all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage, **while providing a decent home and satisfying living environment** for every Californian [Pub. Resources Code §21000(g) (emphasis added)].

In addition, CEQA's goal includes the directive to:

Ensure that the long-term protection of the environment, **consistent with the provision of a decent home and suitable living environment** for every Californian, shall be the guiding criterion in public decisions [Pub. Resources Code §21001(d) (emphasis added)].

These Legislative intentions make public agencies, private developers, as well as environmental groups all stakeholders in CEQA who continue to disagree about its implementation and what reforms are needed as it turns 40. Have the additional 400 plus cases decided since 1993 improved CEQA from being a "muddy and manipulable law" as Don Collins, General Counsel for the California Building Industry Association, assessed in "CEQA Turns Twenty-One: Broken, But Will It Be Fixed?" *Land Use Forum*, Vol. 2, No. 2 (Spring 1993)? Have Tina Thomas' hopes that abusive CEQA litigation would be halted by the courts and that CEQA reform could occur that would streamline environmental documentation been realized? Tina A. Thomas, "CEQA Turns Twenty-One: In Defense of CEQA," *Land Use*

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<sup>1</sup> This figure was supplied by Stephen L. Kostka in a personal communication.

*Forum*, Vol. 2, No. 2 (Spring 1993).

From the perspective of project proponents, most of whom support CEQA's goals, the balance envisioned by CEQA between analyzing project impacts and protecting the environment to the extent feasible [*see* Pub. Resources Code §§21002, 21081; CEQA Guidelines §15093] remains elusive. Despite the explosion of cases, there remains a great deal of uncertainty in the law regarding what agencies need to do to comply with CEQA. This uncertainty increases both the cost and time it takes to effectuate CEQA compliance. Moreover, CEQA has become an effective tool to block projects that opponents deem undesirable for reasons that may be unrelated to the environmental impacts, including economic reasons. The delay resulting from the need to prepare lengthy EIRs in anticipation of legal challenges and the litigation that invariably follows approval of controversial projects has had negative consequences for both the public and private sectors of the state. This article will discuss a number of these concerns that had been raised about CEQA when it turned twenty-one and whether reform to ameliorate ongoing concerns might be feasible.

## II. UNCERTAINTY IN CEQA COMPLIANCE

As Tina Thomas noted, “Ambiguity provides would-be petitioners with footholds on which to build their theories. When the courts or statutes provide black-and-white answers, lawsuits do not get filed.” Tina A. Thomas, “CEQA Turns Twenty-One: In Defense of CEQA,” *supra* at 104. In the last 17 years, despite the predictions of Tina Thomas and other commentators, the additional 400 published CEQA opinions have not increased certainty or decreased litigation challenging CEQA compliance. *See* Tina A. Thomas, “CEQA Turns Twenty-One: In Defense of CEQA,” *supra* at 105 (“As the courts, the legislature, and the Office of Planning and Research address this and other ambiguities, the number of petitioner footholds will diminish, and the rules that agencies must follow to discourage litigation will become ever clearer.”). Instead, uncertainty remains in key areas that Ms. Thomas examined such as what is a project under CEQA, a critical determination based on which environmental analysis commences. New regulations add to the uncertainty. This section identifies and briefly discusses four examples of uncertainty: (1) the definition of “project” under CEQA triggering environmental review; (2) feasibility determinations; and (3) new regulations governing analysis of greenhouse gas (GHG) emissions.

### A. What is a Project Under CEQA?

A discretionary project under CEQA requires evaluation of its environmental impacts under CEQA unless it is exempt. CEQA defines a project as the “whole of the action” which should be analyzed at the first “essential step culminating in an action that may affect the environment.” *Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ.* (1982) 32 Cal.3d 779, 797; *see Bozung v. Local Agency Formation Commission* (1975) 13 Cal. 3d 263,282; CEQA Guidelines §15378. However, when a project comes into existence for purposes of analysis under CEQA has been the subject of many cases since 1993. These cases often maintain uncertainty as to when environmental review must commence.

In 2007 alone, four appellate cases addressed the issue of when an agency action constituted a project that required CEQA review before approval. In *Concerned McCloud Citizens v. McCloud Community Services District* (2007) 147 Cal.App.4th 181, the McCloud Community Services District entered into an agreement with Nestle Waters North America for the sale of 1,600 acre-feet of per year of spring water that was expressly contingent on numerous conditions including locating a suitable site for a bottling plant, designing of a new separate collection and delivery system, and obtaining all discretionary permits which included CEQA documentation. Because of the contingencies in the agreement, the court of appeal held that by entering into the agreement, the District had not committed itself to a definite course of action or approved a project under CEQA and no CEQA compliance was required prior to approval of the agreement. In *County of Amador v. City of Plymouth* (2007) 149 Cal.App.4th 1089, the court of appeal invalidated a municipal services agreement between the City and the Ione Band of Miwok Indians that had not undergone CEQA review because the agreement required the City to vacate a portion of a city road to provide access to the proposed casino and obligated the city to make infrastructure improvements and thus committed the City to a definite course of action. In *Friends of the Sierra Railroad v. Tuolumne Park and Recreation District* (2007) 147 Cal.App.4th 643, the District sold land containing an unused, historic railroad right of way, a long, narrow strip of land, to the Tuolumne Band of MeWuk Indians without conducting environmental review. Because the land's use would remain the same after the purchase and future development was unspecified and uncertain, the court of appeal found CEQA compliance would be premature. The Supreme Court subsequently granted review of the fourth decision, *Save Tara v. City of West Hollywood* (2007) 147 Cal.App.4th 1091.

- ***Save Tara v. City of West Hollywood*** (2008) 45 Cal.4th 116. City residents challenged a Conditional Agreement for Conveyance of Property between the city and a developer regarding a proposed low income senior housing and park project before complying with CEQA. The Supreme Court found that the city's approval of the agreement constituted an "approval" even when the agreement included a CEQA compliance condition. The Supreme Court adopted the following standard to evaluate when an agency's favoring of or assistance to a project ripens into a "commitment" requiring CEQA compliance: an agency has granted an "approval" of a project when it enters into an agreement that when "viewed in light of all the surrounding circumstances, commits the public agency as a practical matter to the project." [*Id.* at 132.] The analysis relied on facts such (a) as the city's commitment to lend the developer \$500,000 (without conditioning it on CEQA compliance) to be used, among other things, for environmental reports and governmental fees, (b) delegation to the city manager of the decision regarding whether the city had complied with the agreement's CEQA compliance condition, (c) imposition of a contractual "reasonableness" standard on the city manager's decision about CEQA compliance; (d) lack of clarity regarding whether the city, without breaching the contract, could reject the project altogether after completing CEQA review, (e) public officials' statements confirming the city's commitment to the project.

With mixed results, other cases have grappled with the *Save Tara* factors (and some new factors) in the case-specific *Save Tara* test regarding whether an agency action constitutes a "project" under CEQA.

- ***Riverwatch v. Olivenhain Municipal Water Dist.*** (2009) 170 Cal.App.4th 1186. The court held the agreement between a landfill developer and a water district to purchase recycled water for daily use at the landfill *constituted part of the landfill project under CEQA* because the agreement committed the water district to deliver recycled water to the landfill operator, to construct improvements necessary to load water onto trucks, and to deliver water to over a 60-year term.
- ***Sustainability Transportation Advocates of Santa Barbara v. Santa Barbara County Association of Governments*** (2009) 179 Cal.App.4th 113. The court found the association’s decision to approve an investment plan and place a transportation-related sales-tax measure on the ballot *was not a project under CEQA* because the association’s descriptions of the projects in the investment plan were general enough to allow exploration of various alternatives and mitigation measures during CEQA review, the plan conditioned construction on CEQA review, the plan could be amended, and the funding represented only a portion of the funding necessary to implement the project.

These cases illustrate that projects under CEQA, by definition, are fact specific which makes judicial creation of bright line tests challenging. With *Save Tara*, the Supreme Court provided an illustrative list of facts that courts may consider when analyzing an agency’s action “in light of all the surrounding circumstances.” But the Court did not create certainty which would discourage subsequent litigation.

## **B. Feasibility Determinations**

CEQA allows an agency to reject an alternative during the scoping process if it is not potentially feasible [CEQA Guidelines §§15126.6(a), (c); *Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1165], reject an alternative analyzed in an EIR if it is not actually feasible [Pub. Resources Code §21081(a)(3); CEQA Guidelines §15126.6(c); *California Native Plant Soc. v. City of Santa Cruz* (2009) 177 Cal.App.4<sup>th</sup> 957, 981], and to decline to impose mitigation that is not feasible. Pub. Resources Code §21081(a)(3). CEQA defines “feasible” as capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, legal, and technological factors. CEQA Guidelines §15364; Pub. Resources Code §21061.1. What constitutes financial feasibility, what type of evidence is required to demonstrate that, and where such evidence must appear – EIR or administrative record – remain uncertain.

For example, Ms. Thomas noted that evidence regarding infeasibility need only find support in the administrative record, citing *Sierra Club v. County of Contra Costa* (1992) 10 Cal.App.4<sup>th</sup> 1212, 1222. This is consistent with CEQA. The court in *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1503 stated that CEQA does not require an EIR to discuss the economic feasibility of a project, because it is informational document about environmental information. The decision makers then evaluate that information and make feasibility determinations in the context of a statement of overriding considerations based on substantial evidence in the entire record. *See* Pub. Resources Code §21081(a)(3).

For example, the following represent standards for demonstrating financial infeasibility of a project alternative from the case law:

- What is required is “evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project.” *Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1181
- When the cost of an alternative exceeds the cost of the proposed project “it is the magnitude of the difference that will determine the feasibility of this alternative.” *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 599.
- “[T]here is no analysis of the total cost of doing business and the prices a competitor can charge” and court asks if “a reasonable profit can be made despite increased capital costs.” *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 884.

CEQA’s imperatives to analyze environmental impacts and mitigate those impacts where feasible are paramount and critical to achieving legislative objectives, and unsupported contentions that mitigation or alternatives are too expensive so as to be infeasible cannot be countenanced. At the same time, however, the lack of a consistent standard for economic infeasibility makes it difficult for agencies to rely on this statutory provision. It also untenable to place agencies and courts in the position of evaluating how much profit a private company can make on any given project. This information minimally implicates proprietary and often confidential business plans. Arguably, a lead agency could never reject as economically infeasible mitigation for a public project since taxes or fees could always be increased to pay the cost. While theoretically possible, in these economic times, such an approach would be unworkable. The net effect is to render the statutory provision allowing agencies to reject economically infeasible alternatives or mitigation measures unusable.

### **C. Uncertainty Created by New Regulation: Analyzing Greenhouse Gas Emissions Under CEQA**

New regulation always introduces a degree of uncertainty until courts address potential ambiguities in the regulatory language. The guidance recently issued pursuant to Senate Bill 97 (SB 97) on the CEQA requirements for analysis of GHG emissions of proposed projects combined with the actions of various regional air quality management districts exemplify such uncertainty, here, regarding required analysis of a proposed project’s GHG emissions.

SB 375’s CEQA streamlining provisions introduce just such uncertainty. At the end of 2009, pursuant to its mandate under Senate Bill 97, the California State Resources Agency finalized changes to the CEQA Guidelines regarding the analysis and mitigation of GHG emissions (Guidelines). These new Guidelines provide basic guidance, but leave unanswered the critical question – what level of emissions constitutes a “significant impact” under CEQA?<sup>2</sup> To

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<sup>2</sup> New Guideline section 15064.4(a) states that lead agencies should make a good-faith effort to estimate the GHG emissions resulting from a project, but the lead agency has discretion to determine whether to use a quantitative,

fill the gap, three air districts have developed guidance to assist lead agencies in reaching a significance determination: South Coast Air Quality Management District, San Joaquin Valley Air Pollution Control District, and the Bay Area Air Quality Management District.<sup>3</sup> The state's Air Resources Board has not adopted a uniform statewide threshold. This conflicting guidance by expert agencies leaves lead agencies (which often lack deep expertise) grappling with the question of which threshold to adopt. Varying standards across the state make it difficult for state-wide businesses such as Home Depot and Costco and many homebuilders to maintain economies of scale by continuing to use their standard building types. Analyzing these standard buildings with different methodologies and thresholds will likely result in different GHG mitigation or may require redesign of buildings for different jurisdictions. This may result in different costs for the same level of GHG emissions. Ultimately, however, no agency or project proponent knows exactly what it must do to comply with these standards to avoid litigation liability regarding GHG emissions. This uncertainty is likely to be addressed and resolved only through appellate decisions. Hence, as with all uncertainties in the law, the net result will be greater delay and increased costs – the bane of project proponents.

### III. EXAMPLES OF ABUSES OF CEQA

Ms. Thomas identified abuses of CEQA 17 years ago, primarily related to use of CEQA

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qualitative, or performance-based approach, or any combination of the three, when assessing project emissions. Guidelines §15064.4. For a more detailed discussion of the changes made to the CEQA Guidelines pursuant to SB 97, see Alexander “Sandy” Crockett, Beth Collins-Burgard, and Matt Vespa, *Another Hot Year: Analyzing Greenhouse Gas Impacts Under CEQA*, State Bar Environmental Executive Committee, Environmental Law News (Spring 2010).

<sup>3</sup> In December 2008, the South Coast Air Quality Management District adopted an interim GHG threshold for stationary sources of 10,000 metric tons of CO<sub>2</sub> equivalents per year (MT/year), which only applies when the district is the lead agency. See South Coast Air Quality Management District, A Resolution of the Governing Board of the South Coast Air Quality Management District approving the Interim Greenhouse Gas Significance Threshold To Be Used by the AQMD for Industrial Source Projects, Rules and Plans When It Is the Lead Agency for Projects Subject to the California Environmental Quality Act (CEQA).

On December 17, 2009, the San Joaquin Valley Air Pollution Control District adopted the same threshold for all types of development projects. The district's approach is derived from AB 32's goal of reducing GHG emissions to 1990 levels by 2020, which would require statewide emissions to be reduced by approximately 29 percent below CARB's 2020 “business as usual” projections for California. See CARB Climate Change Scoping Plan (Dec. 2008) at ES-1.

On June 2, 2010, the Bay Area Air Quality Management District adopted thresholds with two alternatives for determining significance for residential/commercial projects: a bright-line threshold of 1,100 MT/year and a sliding-scale threshold of 4.6 MT/yr per capita (which is in essence a performance standard). For industrial projects, the threshold is emissions greater than 10,000 MT/yr of CO<sub>2</sub> equivalents. Bay Area Air Quality Management District, Resolution, June 2, 2010, available at [http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/Board%20Resolution%20Adopting%20CEQA%20Thresholds\\_6\\_2\\_10.ashx](http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/Board%20Resolution%20Adopting%20CEQA%20Thresholds_6_2_10.ashx); see also Bay Area Air Quality Management District, *Air Quality Guidelines* (June 2010), available at [http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/BAAQMD%20CEQA%20Guidelines\\_June%202010.ashx](http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/BAAQMD%20CEQA%20Guidelines_June%202010.ashx); Bay Area Air Quality Management District, *Adopted Air Quality CEQA Thresholds of Significance* (June 2, 2010), available at [http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/Adopted%20Thresholds%20Table\\_6\\_2\\_10.ashx](http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/Adopted%20Thresholds%20Table_6_2_10.ashx). For more information about the air district guidance, see Crockett et al., *supra* note 2.

litigation for improper purposes, which remain today and continue to cause delay of and increased costs for projects. Other uses of CEQA procedure to cause unnecessary delay also exist. Example of each are described below.

#### **A. Who has Standing to Bring a CEQA Suit?**

Tina Thomas set forth several examples of abusive CEQA litigation that prompted some commentators to suggest that higher standing hurdles should be erected in the path of would-be petitioners. Ms. Thomas formulated three categories of cases that constituted abusive CEQA litigation: (1) anti-competitive litigation brought by businesses; (2) citizens suits by groups pursuing social and economic agendas unrelated to environmental protection; and (3) suits by “NIMBY” neighbors seeking to delay or derail projects. Although the cases Ms. Thomas cited did not identify and discuss standing issues expressly, Ms. Thomas concluded that the courts denied petitioners’ requested relief because their claims did not fall within CEQA’s intended purpose, to protect the environment. To support her conclusion regarding the first category, Ms. Thomas points to an opinion describing petitioner as a “disappointed developer . . . cloaking himself in . . . environmental concerns under CEQA” and stating that as a result the petition was denied. *Mann v. Community Redevelopment Agency* (1991) 233 Cal.App.3d 1143, 1148, fn.2. With respect to the second category, Ms. Thomas pointed to the rejection of an attempt to force closure of a high school where the court noted that such a decision involved “educational policy with political and social overtones” and was one that only secondarily might impact the environment under CEQA. *Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 759. In support of her third category, Ms. Thomas cites a laundry list of cases, including a claim that an EIR rather than a negative declaration for a 1.74 acre construction yard project on vacant commercial property [*Leonoff v. Board of Supervisors* (1990) 222 Cal.App.3d 1337] and construction of a single family home in an otherwise fully developed subdivision [*Association for Protection of Environmental Values v. City of Ukiah* (1991) 2 Cal.App.4th 720].

Ms. Thomas pointed to a judicial backlash against abuse of CEQA litigation and cites *Citizens of Goleta Valley v. Board of Supervisors* (1992) 52 Cal.3d 553 (*Goleta II*) and *Long Beach Savings and Loan Association Redevelopment Agency* (1986) 188 Cal.App.3d 249, as examples, and anticipated this backlash would be extended by the courts. In both cases, the court rejected petitioner’s challenges and expressly criticized them for using CEQA to thwart and delay project approval and implementation. Thomas opined that such judicial reactions would obviate the need for legislative action, which she believed would create a “‘cure’ worse than ‘the disease.’” (Tina A. Thomas, “CEQA Turns Twenty-One: In Defense of CEQA,” *supra* at 106.) She also wondered whether the *Goleta II* decision, in which the court stated CEQA review must not be used as “an instrument for the oppression and delay of social, economic, or recreational development and enhancement,” might be construed by the lower courts as an apparent invitation to examine the motives of CEQA petitioners. (*Id.*) This has not happened.

Since Ms. Thomas authored her article in 1993, few of the over 400 published CEQA cases address CEQA standing issues, but the ones that do have conflicting outcomes. As a result, standing remains an issue – parties continue to bring actions based on motives unrelated to environmental protection. Some courts have recognized and blocked such improper uses of

CEQA, for example where a competitor brought an economically motivated challenge under the guise of seeking environmental protection.

- ***Waste Management of Alameda County, Inc. v. County of Alameda*** (2000) 79 Cal.App.4th 1223. A waste disposal company that had been required by the regional water quality control board to comply with CEQA challenged the regional board's authorization of a nearby landfill competitor's acceptance of designated waste without conducting a CEQA analysis. The court found that petitioner was pursuing its own economic and competitive interests rather than any demonstrable interest in the environmental concerns that are the essence of CEQA. The court held that petitioner's commercial and competitive interests were not within the zone of interests of CEQA which was intended to preserve and protect the environment, and petitioner could not establish a "beneficial interest" for purposes of CEQA standing. In rejecting petitioner's attempt to gain standing as a citizen's action, the Court held that a corporation must demonstrate why it should be accorded the attributes of a citizen since a corporation is generally expected to act out of concern for its corporate interests [*id.* at 1237-1238] and articulated the following factors to be considered in the standing analysis: (a) demonstrated interest in or commitment to the right being asserted, (b) whether the entity is comprised of or represents individuals who would be beneficially interested in the action, (c) whether beneficially interested individuals would find it difficult or impossible to seek vindication of their own rights, and (d) whether prosecution of the action as a citizen's suit by a corporation would conflict with other competing legislative vehicles. [*Id.* at 1238.] The court found that Waste Management could not demonstrate these factors. *Id.* at 1238-1240.
- ***Regency Outdoor Advertising, Inc. v. City of West Hollywood*** (2007) 153 Cal.App.4th 825. The court found an outdoor advertising corporation had no beneficial interest and hence no standing to challenge the city's zoning amendments on "tall wall signs" under CEQA since it was pursuing commercial and competitive interests. *Id.* at 829. The court concluded that while the amendment affected the corporation commercially and competitively more than it affected the general public, the amendments did not have greater environmental effects on the corporation than on other businesses or property owners. *Id.* at 831-832. The court also rejected the corporation's argument that it had standing to bring a citizen's suit under CEQA on the basis that it had a continuing interest in the environmental effects of billboards, as evidenced by the four lawsuits it had filed under CEQA. *Id.* at 833. The court deferred to the trial court's finding that petitioner used CEQA challenges to advance its competitive and commercial interests against competitors, and held that the corporation could not bring a citizen suit under CEQA. In a somewhat scathing critique, the court stated "[t]o dispel the aura of self-interest masquerading as environmentalism, some evidence is likely to exist of a party's engagement in environmental issues where it had nothing to gain financially. The trial court found Regency's gaggle of lawsuits was not such evidence." *Id.*

Other courts have concluded that organizations represented the public's interests as a

whole and allowed to CEQA suits to proceed.

- ***Burrtec Waste Industries, Inc. v. City of Colton*** (2002) 97 Cal.App.4th 1133. Petitioner challenged a city's issuance of a conditional use permit (with a mitigated negative declaration), allowing a competitor trash company to operate a solid waste facility. Although petitioner had an economic interest in the case, the court found that the petitioner had standing because sufficient evidence supported the trial court's finding that petitioner's alleged express beneficial interest was not rank commercialism but rather the need for public notice under CEQA which it challenged as insufficient. *Id.* at 1138. Moreover, the court found that the record established Burrtec had "a genuine and continuing concern for environmental matters and for compliance with the CEQA process" as demonstrated by its monitoring of environmental compliance and that of other waste companies. *Id.* at 1139.
- ***Environmental Protection Information Center v. Department of Forestry & Fire Protection*** (2008) 43 Cal.App.4th 1011. The Supreme Court allowed a labor union to maintain a citizen's action (also characterized as the public interest exception to the beneficial interest requirement) in its challenge to a timber plan on CEQA grounds. Applying the factors articulated in *Waste Management*, the court found standing because a public right and public duty were at stake, the union had demonstrated continuing interest in and commitment to sustainable economic development and environmental quality (including timber harvesting), the union had over 12,000 qualifying members in California who would have trouble participating in litigation due to its size and complexity, and the union's participation presented no conflict with competing legislative policies. *Id.* at 480.

Even 19 years ago, Ms. Thomas noted citizen groups formed to challenge projects under CEQA did not always have environmental motives. Such groups mounting CEQA challenges have proliferated and are not limited to the NIMBY's Ms. Thomas identified. Some competitors or unions, apparently fearing they would not have standing to pursue an economic agenda have utilized unincorporated citizens groups to evade scrutiny. A recently published Wall Street Journal article details the nationwide challenges faced by Wal-Mart and other large-scale project proponents as a result of antidevelopment campaigns funded by competitors who hired Saint Consulting Group to secretly organize and run the anti-development campaign and funnel funds for the litigation. Zimmerman, *Rival Chains Secretly Fund Opposition to Wal-Mart*, Wall Street J. (Jun. 7, 2010); see also Zimmerman and Martin, *Wal-Mart Tries to Unmask Opponents*, Wall Street J. (Sept. 22, 2010). The articles explains that under such arrangements, consultants' fees are paid by competitors and in turn the consultants employ various political campaign tactics, including petition drives, phone banks and websites, to build support for or against controversial projects. Efforts often involve one of the consultant's employees dropping into town using an assumed name to create or take control of local opposition to a project. The consultants hire lawyers to initiate litigation and outside consultants to criticize the project. The operatives often pay the legal bills and other fees through the competitor. Unions also sometimes pay a portion of the consultant's fees. However, as one antidevelopment campaign consultant notes, clients in defense campaigns do not want their identities disclosed because it opens them up to adverse

publicity and the potential for lawsuits. The article also notes that this kind of activity is protected by the First Amendment and the Noerr-Pennington doctrine, which allows a company that reasonably expects to win a lawsuit or zoning battle to pursue legal action, but prohibits competitors from using the process just to interfere with a competitor's business. Safeway apparently hired Saint to organize over 30 campaigns against Wal-Mart stores in California alone. Zimmerman and Martin, *Wal-Mart Tries to Unmask Opponents*, Wall Street J. (Sept. 22, 2010). Such tactics invariably stall development and cost the would-be host city millions in lost property taxes. *Id.*

These tactics raise questions about CEQA standing – if it is unclear who is actually bringing a CEQA challenge, how can responding parties determine whether petitioners have standing and are entitled to maintain the CEQA challenge? Under California Supreme Court and appellate case law, it is clear that opposition groups that are wholly supported by project proponent competitors seeking to advance only economic interests would not have standing to sue under CEQA. *See Citizens of Goleta Valley v. Board of Supervisors* (1992) 52 Cal.3d 553 (*Goleta II*); *Long Beach Savings and Loan Association Redevelopment Agency* (1986) 188 Cal.App.3d 249. However, given the First Amendment privacy protections for freedom of association that extend to private organizations confronted with compelled disclosure of their members [*see, e.g., Vogel v. County of Los Angeles* (1967) 68 Cal.2d 188; *Britt v. Superior Court* (1978) 20 Cal.3d 844], there are significant barriers to conducting discovery in order to determine the true identities of project opponents if they are nonprofit organizations and unincorporated associations. In *Save Open Space Santa Monica Mountains v. Superior Court* (2000) 84 Cal.App.4th 235, the court balanced the constitutional right of associational privacy against the compelling need for discovery where there first was an evidentiary showing that the litigation was pursued on behalf or at the direction of non-party litigants. The court in that case determined that information regarding donations to the organization's litigation fund was crucial to the opposing party's fee request and held that the information was discoverable based on documents initially disclosed in connection with an application for private attorney general fees. Based on the June, 2010 Wall Street Journal article, Wal-Mart propounded discovery in several pending CEQA cases and had its discovery motions granted in at least one. Zimmerman and Martin, *Wal-Mart Tries to Unmask Opponents*, Wall Street J. (Sept. 22, 2010).

The court in *Save Open Space* emphasized that the consequences of disclosure of a donor list may, under other circumstances, be properly characterized as profound and lead to a chilling effect. *Save Open Space* at 255. This language creates a strong possibility that future courts applying the same balancing test will determine similar discovery requests violate the privacy rights of associations absent an evidentiary showing such as the one Wal-Mart was able to make based on investigative journalists' work. Hence, the ability to conduct discovery to unmask the identify and funding sources of project opponents who lack standing to challenge the project likely will remain limited.

## **B. Exhaustion Requirements**

One of the benefits CEQA accords the public is the ability to comment on and participate in the decision-making process. Pub. Resources Code §§21091, 21092.1; CEQA Guidelines §§15087, 15088, 15089; *Laurel Heights Improvement Ass'n v. Regents of Univ. of California*

(1988) 47 Cal.3d 376, 392 (CEQA process “protects not only the environment but also informed self-government). To enable lead agencies to respond to comments and correct any error short of litigation, CEQA also requires potential litigants to exhaust their administrative remedies before the agency by raising all legal and factual issues they contest as a jurisdictional prerequisite to maintaining a CEQA action.<sup>4</sup> Pub. Resources Code §21177; *Sierra Club v. California Coastal Com.* (2005) 35 Cal.4th 839, 864, n. 20; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199.

Language in Public Resources Code section 21177(a) and (b) which allows for public comment either during the public comment period provided by CEQA “or prior to the close of the public hearing on the project...” has rendered the opportunity for public comments ripe for abuse. CEQA provides specific comment periods on publicly circulated environmental documents – at least 20 or 30 days for negative declarations and at least 30 or 45 days for EIRs depending on whether the document must be submitted to the State Clearinghouse [Pub. Resources Code §21091 (a) and (b)], and those statutory periods may be extended by the lead agency. CEQA Guidelines §15088. Section 21091 requires consideration and preparation of responses only to those comments receiving during the public notice period. However, in response to a “document dump” at the public hearing on project approval, the court in *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1200-1201 found such submission consistent with section 21177 and noted that “If the decision making body elects to certify the EIR without considering comments made at this public hearing, it does so at its own risk.” *Id.* Project opponents often take advantage of this language to delay project approval by submitting lengthy, detailed comment letters and extensive documentation at the public hearing. It is nearly impossible to address such documentation and comments during the hearing which must be continued to the next public meeting or special session to allow the agency to address the new objections for the decision maker or risk not creating responses and substantial evidence for the administrative record in subsequent litigation.

The *Bakersfield* court noted that “allowing project opponents to raise objections after close of the public comment period for the draft EIR allows them to ‘sandbag’ project proponents and delay certification ‘ad infinitum’ should be presented to the Legislature, for it is a complaint about the design of the CEQA process.” *Id.* at 1201. To date, numerous attempts at a legislative solution have been rebuffed.

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<sup>4</sup> Note that there is no uniformity in the case law regarding the specificity required to exhaust administrative remedies on issues. Compare *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 616; *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535; *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1394; *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 910; *Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 282; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 791; *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 594; *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1447 all requiring specificity or the exact issue to be raised and finding generalized comments do not suffice for exhaustion with *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 890; *McPherson v. City of Manhattan Beach* (2000) 78 Cal.App.4th 1252, 1264; *Save Our Residential Environment v. City of W. Hollywood* (1992) 9 Cal.App.4th 1745; *Citizens Ass’n for Sensible Development v. County of Inyo* (1985) 172 Cal.App.3d 151, 163 all holding that exhaustion requirement satisfied with less specificity if issue raised in some form.

#### IV. UNCERTAINTY AND ABUSIVE LITIGATION LEADS TO GREATER COSTS AND DELAYS

The costs associated with CEQA compliance have blossomed over the past decade as a result of uncertainty, abusive CEQA litigation by neighborhood and other interest groups hoping to block projects or gain settlement funds,<sup>5</sup> and some courts' applying increasingly stringent standards when evaluating EIRs. In response, EIRs and administrative records continue to lengthen (some exceed tens of thousands of pages),<sup>6</sup> as lead agencies and project proponents address new regulations and provide more detail to create defensible documents.<sup>7</sup> Longer EIRs take more resources and time to draft and review. This has led to increasing the amount of time it takes to process and finalize EIRs, often resulting in even more cost to private project proponents who pay the agency's costs even when they do not prepare the EIR and pay the agency's litigation costs. Developers' costs are not limited to the cost of the litigation itself; private project proponents bear carrying costs on their property while they cannot make use of it. Delay of public projects likewise results in significant cost increases and can hinder bond financing and lead to rate increases.<sup>8</sup>

Courts have acknowledged these costs and the significant threat delay poses to development projects: "In CEQA cases, time is money. A project opponent can 'win' even though it 'loses' in an eventual appeal because the sheer extra time required for the unnecessary appeal (with the risk of higher interest rates and other expenses) makes the project less commercially desirable, perhaps, even to the point where a developer will abandon it or drastically scale it down." *County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 6. In this environment, all told, the CEQA process, even without the uncertainty of new regulation, can cost public and private sector project proponents millions of dollars and may cost them the entire project. As the examples below illustrate, litigation challenging projects can last for years.

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<sup>5</sup> See e.g. G. Lefcoe, "The Regulation of Superstores: The Legality of Zoning Ordinances Emerging from the Skirmishes Between Wal-Mart and the United Food and Commercial Workers Union," 58 *Ark. L. Rev.* 833, 877 (2006) (estimating cost of EIR preparation for ordinance at approximately \$200,000); A. Kouyoumdjian, "Environmental Protection; Environmental Impact Reports," 25 *Pac. L. J.* 658 n. 26 (even in 1994, cost of EIR preparation could exceed \$1 million).

<sup>6</sup> See Newhall Ranch Resource Management and Development Plan and the Spineflower Conservation Plan EIS/EIR (April 2009), available at <http://www.dfg.ca.gov/regions/5/newhall>; Village at Playa Vista Environmental Impact Report (No.ENV-2002-6129-EIR) (August 2009), available at <http://cityplanning.lacity.org/eir/PlayaVista/PlayaVistaFrontpg.htm>.

<sup>7</sup> While CEQA petitioners commonly complain about the length (and therefore the cost) of administrative records, "any reduction in its contents is *presumptively* prejudicial to project proponents... who will be saddled with the task of pointing to things in the record to refute asserted inadequacies in the EIR." *County of Orange, supra* at 13 (emphasis in original); *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 373 (Reversal of project approval is the severe consequence of providing the court with a record that does not demonstrate the agency's compliance with CEQA).

<sup>8</sup> See *Allis-Chalmers v. City of Oxnard* (1980) 105 Cal.App.3d 876, 883, where the court stated, "It is a fact of common knowledge that the mere existence of a lawsuit usually prevents the sale of bonds and the raising of the funds required to do the work of improvement for which the special assessment has been levied. Cf. *City of Plymouth v. Superior Court* (1970) 8 Cal.App.3d 454, 465. The short statutes of limitations such as section 10400 are essential to the consummation of the proceedings and to provide assurance to bond buyers that their investment will be reasonably safe and secure."

## A. Real World Examples of Delay

### 1. Private Sector Project

A proposed single family residential project in Orange County is a prime example of the delay and indefinite postponement of projects that can result from strong CEQA opposition. The 222 acre undeveloped property was originally purchased by California Quartet, Ltd. in 1993 with a final map for 705 mobile homes recorded on the property based on an EIR prepared in the 1970s. *Vedanta Society of Southern California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517. The property is located in Trabuco Canyon next to St. Michael's Abbey and Vedanta Society's Ramakrishna Monastery. *Id.* In 1996, California Quartet resurrected the 705-unit mobile home development for which the county required a subsequent EIR. *Id.* The Orange County Planning Commission certified the final subsequent EIR in December 1997. In considering the appeal of that certification, the county Board of Supervisors tied 2-2 and deemed the tie to be a denial of the appeal and the EIR certified. *Id.* at 523-524. While the first superior court CEQA challenge to the EIR was pending, California Quartet sought and the Board approved a grading permit for a 299 single family residential project (a lesser density alternative analyzed in the Final Subsequent EIR) based on an addendum. This too was challenged by the neighboring religious organizations and three environmental groups, the cases consolidated and ultimately ruled upon by the court of appeal in 2000 in *Vedanta Society of Southern California v. California Quartet, Ltd.*, 84 Cal.App.4th 517. The court held that the tie vote did not serve to uphold EIR certification and voided both the EIR and the addendum prepared in reliance on it.<sup>9</sup>

The project then was analyzed in a new addendum that the County proposed to approve in connection with recertification of the EIR. When petitioners objected, the County ultimately prepared a new revised subsequent EIR for the 299 unit project. Upon certification of the 283 unit alternative, petitioners challenged this redone EIR. *See County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1. In the course of this new CEQA litigation, the court of appeal decided three separate original writs of mandate. *See, e.g., County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1; *California Quartet, Ltd. v. Superior Court* (2003) 2003 WL 1461166 (4<sup>th</sup> Appellate District, Division 3). The underlying CEQA litigation was settled. As a result of the litigation and settlement process, the developer missed commencing the project during the favorable real estate market, and to date, the project still has not been built.

### 2. Public Sector Project

Delay also deleteriously impacts public projects. The CALFED Bay-Delta project is a prime example. After spending six years to formulate the project and conduct environmental review, in 2000 lead agency California Resources Agency certified the CEQA portion of the CALFED Bay-Delta Programmatic EIR/EIS. *In re Bay Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1152, 1160. The

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<sup>9</sup> The superior court's subsequent award of attorneys' fees to petitioners was overturned on appeal in *Vedanta Society of Southern California v. California Quartet, Ltd.* (2002), previously published at 103 Cal.App.4th 1200. The Supreme Court granted review and the appeal was fully briefed when it was dismissed upon motion of the parties in 2004 after subsequent CEQA litigation was settled.

programmatic project was designed to address competing uses of the Bay-Delta including the remediation of water quality, providing adequate mitigation for habitat and endangered species, securing the levees to prevent future breaches, and providing for continued export of water through the Bay-Delta. The EIR was challenged by counties, agencies, and agricultural landowners and eight years of CEQA litigation ensued. The superior court denied the writ of mandate, in 2005 the court of appeal reversed and found violations of CEQA, and in 2008, the California Supreme Court finally issued its decision and found that the final EIR complied with CEQA. *In re Bay Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143. The United States and state of California were reluctant to spend any money on project implementation while litigation was pending, especially in light of the adverse court of appeal decision. Instead, they conducted research and studies on the Delta water quality and ecosystem during the eight years of litigation. Between 2000 and 2005, CALFED spent almost \$3 billion and a portion of that money was spent on increasing “the body of scientific knowledge about the Delta with the goal of integrating real-time Delta operations with sound science.” CALFED Bay-Delta Program Fact Sheet, Program Status Update, June 2005 available at [http://calwater.ca.gov/content/Documents/CALFED\\_ProgramStatus\\_June\\_2005.pdf](http://calwater.ca.gov/content/Documents/CALFED_ProgramStatus_June_2005.pdf). The extensive scientific research efforts put into studying the Delta are evident on CALFED’s Bay-Delta Program website. However, no physical project implementation was undertaken. In 2006, six years after EIR certification and after the adverse court of appeal decision, the Bay Delta Conservation Plan (BDCP) was established and essentially replaced the CALFED program’s project, because the programmatic EIR could not be used for tiering and implementation of the original project which was never implemented. CALFED describes the BDCP as an agreement among state, federal, regional, and stakeholder groups for funding assurances, cooperation, and coordination for integrated implementation of aspects of the CALFED Bay-Delta Program. [CALFED Bay-Delta Program website, [http://calwater.ca.gov/calfed/about/Delta\\_Solutions.html](http://calwater.ca.gov/calfed/about/Delta_Solutions.html).] The completed BDCP is expected to cover a subset of species and habitats within CALFED’s purview and provide a mechanism with which to address improvements. *Id.* In 2008, the Delta Habitat Conservation and Conveyance Program (DHCCP) was established. Bay Delta Conservation Plan website, <http://baydeltaconservationplan.com/bdcp/EIREISInfo.aspx>.] The DHCCP is a partnership between the California Department of Water Resources and the Bureau of Reclamation to evaluate the ecosystem restoration and water conveyance alternatives identified by the BDCP. *Id.* DHCCP activities include an environmental review of the proposed BDCP and a joint EIR/EIS is now underway. *Id.* Undoubtedly, it too will be challenged under CEQA further delaying a needed Bay-Delta fix.

## **B. CEQA’s Tiering Measures as Potentially Ameliorating Delay**

In her 1993 assessment of CEQA, Ms. Thomas expressed hope that CEQA’s tiering provisions might be explicated so that could be utilized more frequently and streamline CEQA compliance. *See, e.g.*, CEQA Guidelines §§ 15152, 15168, 15169; Pub. Resources Code §§21068.5, 21157. The case law has not kept pace with this hope.

There remains a dearth of case law on the requisite content and procedures necessary to prepare CEQA documents at the various levels of tiering. For example, the Supreme Court decision *In re Bay Delta Programmatic Environmental Impact Report Coordinated Proceedings*

(2008) 43 Cal.4th 1143, 1160 is one of the very few cases that address the sufficiency of the level of detail of analysis in a program EIR. There, the PEIR was challenged on the ground that the level of detail regarding the potential sources of water required for the proposed projects was insufficient and the EIR was deficient because it failed to analyze in sufficient detail the environmental impacts of taking water from those specific sources. The Supreme Court rejected this challenge and found that such detailed analysis was not required at the programmatic stage.

While utilization of tiering, in theory, may reduce the preparation time for CEQA documents, these provisions have not successfully reduced overall delay in project approval or reduced challenges because of such uncertainty in the law, and resourceful project opponents gear their challenges to the issues presented by the tiering statutes and Guidelines. For example, in *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, the tiered project was successfully challenged on the ground that the activity was outside the scope of the program reviewed in the program EIR. Similarly, 17 years later, in *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, petitioner alleged that tiering was not available, as the specific project – a warehouse/distribution center -- was a different project than the specific plan analyzed in the project-level EIR, and that the specific impacts of the center had not been analyzed in that EIR. See also *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310 (Supreme Court held not the same project); *Save Our Neighborhood v. Lishman* (2006) 149 Cal.App.4th 1288 (Public Resources Code section 21166 did not apply to a submittal by a different project applicant that proposed revisions to a previously approved motel, restaurant, lounge, gas station, convenience store and carwash project because the second proposal constituted a new project).<sup>10</sup> Interestingly, Ms. Thomas’ 1993 article states that the propriety of project specific development within a specific plan area was decided in *Sierra Club v. County of Sonoma* (1992) 6 Cal.4th 1307 [Tina A. Thomas, “CEQA Turns Twenty-One: In Defense of CEQA,” *supra* at 107.], but as evidenced above, these issues are anything but decided.

### C. SB 375 – Does the Statute Offer Effective CEQA Streamlining Incentives?

Although generally thought of as a measure to reduce transportation-related greenhouse gas (GHG) emissions through regional land use planning, SB 375 includes CEQA-based incentives for project developers. Specifically, for certain high-density transit-oriented projects, SB 375 provides CEQA incentives ranging from a complete CEQA exemption to a more streamlined CEQA analysis.

Under SB 375, a Transit Priority Project (TPP) is strictly defined. For example, a TPP must include at least 50 percent residential, have a minimum density of at least 20 dwelling units per acre, and be within one-half mile of a major transit stop or “high-quality transit corridor” (defined as a corridor with fixed-route bus service every 15 minutes or less).<sup>11</sup> SB 375 mandates

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<sup>10</sup> For this reason, newly enacted bills AB 231 and SB 1456 may streamline some CEQA approvals but will likely still result in litigation challenges that require fairly extensive administrative records to supply substantial evidence to support the findings required by the bill’s tiering provisions and to support agency findings regarding the inapplicability of Public Resources Code 21166. By way of example, the administrative record in the *Health First* litigation was 77 volumes.

<sup>11</sup> Pub. Res. Code § 21155(b).

that certain regional metropolitan planning organizations to create a Sustainable Communities Strategy (SCS) to meet regional GHG emissions targets.<sup>12</sup> An SCS is intended to align regional transportation, housing, and land use plans to reduce the amount of vehicle miles traveled and thus attain the regional GHG reduction target.

A proposed project can be *exempted* from CEQA if it (1) is consistent with the SCS, (2) qualifies as a TPP, and (3) complies with eight environmental criteria and seven land use criteria and serves the community's affordable housing or open space needs. The criteria are stringent. For example, environmental criteria provide that the proposed project site cannot contain wetlands or riparian areas, cannot have significant value as wildlife habitat, and buildings within the proposed project must be 15 percent more energy efficient than required by the California Code of Regulations.<sup>13</sup> Similarly, the land use criteria require, for example, that the project site cannot exceed eight acres, cannot include any single building more than 75,000 square feet, cannot include more than 200 residential units, must be within one-half mile of a rail transit station or a ferry terminal in a Regional Transportation Plan or within a quarter mile of a high-quality transit corridor in a Regional Transportation Plan.<sup>14</sup> For obvious reasons, very few (if any) projects will ever qualify for SB 375's much acclaimed CEQA exemption, and even if a project did qualify, the administrative record to support the agency findings for such an exemption would be extensive.

SB 375 also offers CEQA review through two new CEQA documents: a Sustainable Communities Environmental Assessment and a shorter, minimized EIR. If a project is consistent with the SCS, qualifies as a TPP, and incorporates all feasible mitigation measures, performance standards, or criteria set forth in prior applicable EIRs, the proposed project can use one of these new documents. The Sustainable Communities Environmental Assessment can be used in lieu of the traditional negative declaration or mitigated negative declaration, but the standard of review for this new CEQA document would be more lenient – the “substantial evidence” standard. However, if the lead agency must prepare an EIR (because there will be significant unmitigated impacts from the proposed project), a qualifying project can be studied through a shorter EIR that only addresses the significant or potentially significant effects of the proposed project, and the EIR need not analyze off-site alternatives to the project.<sup>15</sup> Projects using these documents also can qualify for streamlined CEQA review. With streamlined CEQA review, any findings or other determinations related to the CEQA document are not required “to reference, describe or discuss: (1) growth inducing impacts; or (2) any project specific or cumulative impacts from cars and light-duty truck trips generated by the project on global warming or the regional transportation network.”<sup>16</sup> If the agency prepares an EIR, it “shall not be required to reference, describe, or discuss a reduced residential density alternative to address the effects of car and light-duty truck trips generated by the project.”<sup>17</sup>

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<sup>12</sup> Gov. Code § 65080(b)(2)(B).

<sup>13</sup> Pub. Res. Code § 21155.1(a)(1)-(8).

<sup>14</sup> Pub. Res. Code § 21155.1(a)(1)-(8).

<sup>15</sup> Pub. Res. Code § 21155.2(c)(2).

<sup>16</sup> Pub. Res. Code § 21159.28(a).

<sup>17</sup> Pub. Res. Code § 21159.28(b).

Finally, any project that is consistent with the SCS, is *not* a TPP, but is 75 percent residential and incorporates mitigation from applicable prior environmental documents, also can qualify for streamlined CEQA review.<sup>18</sup>

Although it is a bit early to tell, as no metropolitan planning organization has yet adopted an SCS, realistically speaking, for three key reasons, as written, very few projects will likely be able to use these streamlined CEQA compliance approaches. First, based on the statutory language, few projects will be able to qualify for the new CEQA incentives. Second, compliance with these regulations will require additional, new documentation and again, great uncertainty exists regarding the detail and quantity of evidence that courts might require to support the agency's findings. Third, and probably most importantly, due to the enormous uncertainty surrounding how courts may interpret these new regulations and requirements, huge litigation risks confront any agency or developer that attempts to use one of these CEQA carrots.

## V. PROSPECTS FOR CEQA REFORM

Many of the more troubling issues discussed above likely lie beyond potential reform. Governor Schwarzenegger convened the CEQA stakeholders in 2005 to attempt comprehensive CEQA reform. Some of the issues discussed then are included in this paper. However, no legislative proposals resulted because there was no agreement. The last major legislative enactments occurred in 1992-1994 and consisted largely of agreed upon proposals to streamline CEQA litigation. *See, e.g.*, legislative history discussed in *Leavitt v. County of Madera* (2004) 123 Cal.App.4<sup>th</sup> 1502, 1520-21. Given the level of controversy and divergent views of project opponents and proponents regarding the viability of various CEQA sections, comprehensive legislative CEQA reform remains unlikely. Some strides, however, could be made through the judiciary.

First, some courts have applied increasingly stringent requirements and standards when reviewing EIRs. Courts are scouring these documents, which can be thousands of pages long with technical appendices, and criticizing the documents for even small inconsistencies or errors. The basic CEQA principles, detailed in the CEQA Guidelines, include the following:

- EIRs should “provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences”;
- The evaluation of impacts need not be exhaustive;
- The sufficiency of the EIR’s analysis must be reviewed in light of what is reasonably feasible;
- A court should look for adequacy and completeness in an EIR, not for perfection;
- Agencies can make reasonable forecasts in completing the impact analysis; and
- Disagreements among experts do not invalidate an EIR.

CEQA Guidelines §§15144-15145, 15151; *accord Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4<sup>th</sup> 20, 26 (CEQA “does not mandate perfection, nor does it require an analysis to be exhaustive,” only that an EIR “reflect a good faith effort at full disclosure”).

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<sup>18</sup> Pub. Res. Code 21159.28(a).

Based on these general principles, courts have held that an EIR should, when looked at as a whole, provide a reasonable, good faith disclosure and analysis of environmental impacts. *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 424. An EIR that is deficient in one respect may nevertheless be adequate when viewed in its entirety. *Al Larson Boat Shop, Inc. v. Board of Harbor Comm'rs* (1993) 18 Cal.App.4th 729, 748.

Third, and related, when analyzing EIRs, courts should defer to the agency: the substantial evidence standard applicable to evaluating EIRs is a standard that is deferential to the lead agency. *See Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4<sup>th</sup> 412, 435; *Western State Petroleum Ass'n v. Superior Court* (1995) 9 Cal.4<sup>th</sup> 559, 572-574.<sup>19</sup>

Fourth, Courts should clarify the evidence required to show economic infeasibility and do so in a manner that enables agencies and private project applicants to demonstrate it.

Fifth, courts could more readily permit discovery in CEQA cases to reveal the true identity and backers of project opponents and then strictly enforce standing requirements in CEQA cases where Petitioners harbor only economic, anti-competition, or other non-environmental concerns.

Finally, and most importantly, appellate courts should publish more cases where EIRs are upheld. An informal survey conducted over several years indicated that cases in which the EIR was found deficient were more likely to be published than cases in which the EIR (or other environmental document) were upheld. Such cases provide crucial guidance for agency's preparation of EIRs and enable them to successfully defend them in court. It is far easier to point out to a judge how the project EIR at issue is similar to an EIR that was upheld than to distinguish it from one that did not comply with CEQA.

## VI. CONCLUSION

CEQA is one of the most important, the most influential, and certainly the most litigated environmental statute in California. The basic idea – that decision-makers must be informed about and consider environmental impacts when making decisions – remains a good one. Unfortunately, the problems and abuses identified 19 years ago remain largely unchanged. And as we celebrate CEQA turning 40, any wide-spread legislative fix appears unlikely. Courts can take some important steps to clarify the law and eliminate uncertainty and litigation abuses, and publish cases upholding EIRs for guidance. These steps will help agencies comply with this important statute and lessen litigation abuses to some extent which will allow projects that comply with CEQA to proceed more expeditiously.

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<sup>19</sup> “Under CEQA, an EIR is presumed adequate, and the plaintiff in a CEQA action has the burden of proving otherwise.” *Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1617; *accord Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 530; *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 723; *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 740, 749.