
MOVING CEQA AWAY FROM
JUDICIAL ENFORCEMENT: PROPOSAL
FOR A DEDICATED CEQA AGENCY
TO ADDRESS EXCLUSIONARY
USE OF CEQA

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INTRODUCTION

The California Environmental Quality Act (“CEQA”) requires local governments to review and disclose all adverse environmental impacts arising from discretionary approvals of private development, public plans, legislation, ordinances, and projects.¹ CEQA requires decisionmakers to evaluate environmental concerns before approving a project.² Notably, CEQA applies to local government approvals of development projects, making CEQA compliance pivotal for all substantial building projects.

California is one of the few states that has such a comprehensive environmental review requirement.³ CEQA is a unique environmental statute because it is enforced solely through public participation and private right of action and, thus, is completely self-executing.⁴ The California Resources Agency states that “[p]ublic agencies are entrusted with compliance with CEQA and its provisions are enforced, as necessary, by the public through litigation and the threat thereof.”⁵ There is no unified government body with appropriate scientific and policy expertise enforcing and overseeing CEQA. CEQA requires local governments to avoid or

1. CAL. CODE REGS. tit. 14, § 15002(a)(4) (2019); 1 RONALD E. BASS & ALBERT I. HERSON, CALIFORNIA ENVIRONMENTAL LAW & LAND USE PRACTICE § 20.02, LexisNexis (database updated Sept. 2019).

2. See BASS & HERSON, *supra* note 1, § 20.02 (citing *Mountain Lion Found. v. Fish & Game Comm’n*, 939 P.2d 1280 (Cal. 1997); *Sierra Club v. State Bd. of Forestry*, 876 P.2d 505 (Cal. 1994); *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 764 P.2d 278 (Cal. 1988); *Bozung v. Local Agency Formation Comm’n*, 529 P.2d 1017 (Cal. 1975)).

3. David Sive & Mark A. Chertok, “Little NEPAS” and Their Environmental Impact Assessment Processes, in AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION ALI-ABA COURSE OF STUDY, 920, 925–27 (AM. LAW INST. 2011).

4. See CAL. CODE REGS. tit. 14, § 15201; BASS & HERSON, *supra* note 1, § 20.08.

5. *Frequently Asked Questions About CEQA*, CAL. NAT. RESOURCES AGENCY, <http://resources.ca.gov/ceqa/more/faq.html> [https://perma.cc/E8E7-KEH2].

mitigate environmental impacts if feasible.⁶ If members of the public think that a local government did not follow proper CEQA procedures, they can comment on environmental review documents and pursue litigation if local governments fail to remedy legitimate concerns.⁷

Although CEQA plays an important role in protecting communities from significant adverse environmental impacts, its self-executing nature allows it also to be used as a tool to halt or impede development for the wrong reasons. While many CEQA disputes are based on legitimate environmental concerns, CEQA litigation is also used to prevent development for discriminatory or nonenvironmental reasons.⁸ CEQA litigation is an attractive vehicle for this purpose due to overly broad standing requirements, unpredictable judicial results, extreme remedies, and attorney's fees awards.⁹ Projects impeded by CEQA litigation include multifamily residential projects, homeless housing, health clinics, youth centers, and a multitude of other quasi-public uses.¹⁰ Since CEQA lacks uniform standards, local governments and developers must resort to costly overcompliance and guess work when confronted with the threat of litigation. To remedy the problem of CEQA abuse and unpredictability, this Note proposes moving away from judicial enforcement of CEQA and creating a state or regional agency dedicated to regulation, enforcement, and adjudication of CEQA.

Part I of this Note reviews CEQA processes, the history of exclusionary and discriminatory land use policies, and evidence of CEQA's misuse for discriminatory and nonenvironmental reasons. Part I of this Note explores why CEQA is such an attractive tool for people to oppose development projects for exclusionary or nonenvironmental reasons and concludes that the judicial system is unsuitable for primarily enforcing CEQA. Part II proposes a dedicated agency that would handle adjudication, enforcement, and legislation under CEQA and discusses how the agency may fit into the broader environmental review process.

6. *Id.*

7. CAL. CODE REGS. tit. 14, § 15804(c); *see also CEQA*, CAL. NAT. RESOURCES AGENCY, http://resources.ca.gov/ceqa/flowchart/lead_agency/Draft_EIR.html [<https://perma.cc/NAF8-W76H>].

8. Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 HASTINGS ENVTL. L.J. 21, 41 (2018).

9. *See id.* at 41–43.

10. *See, e.g., Jensen v. City of Santa Rosa*, 233 Cal. Rptr. 3d 278, 280 (Ct. App. 2018) (youth center); *Respect Life S.S.F. v. City of South San Francisco*, 223 Cal. Rptr. 3d 202, 206 (Ct. App. 2017) (health clinic); Hernandez, *supra* note 8, at 49 (multifamily housing); *CEQA Was Designed To Protect the Environment, Not To Fight Housing for Homeless People*, L.A. TIMES (May 31, 2018, 4:10 AM), <http://www.latimes.com/opinion/editorials/la-ed-psh-ordinance-lawsuit-20180531-story.html> [<https://perma.cc/Z2K4-YFNR>] (homeless shelters).

I. BACKGROUND

A. THE CEQA PROCESS

CEQA, enacted in 1970, requires state and local agencies to identify significant environmental impacts of their actions and to avoid or mitigate those impacts if feasible.¹¹ CEQA defines “environment” broadly, including “land, air, water, minerals, flora, fauna, noise, [and] objects of historic or aesthetic significance.”¹² To further the goal of environmental protection, agencies prepare technical environmental documents, such as the Environmental Impact Report (“EIR”), Negative Declaration, or Mitigated Negative Declaration (“MND”), to inform the public and its responsible officials of the environmental consequences of their decisions before they are made.¹³ Drafting these documents requires hiring specialists, engineers, and attorneys to ensure the documents meet all legal standards, as inadequate environmental documents can be grounds for a judge to void an agency decision to approve a project.

A public agency (usually local government decisionmakers) must comply with CEQA when it undertakes an activity defined by CEQA as a “project.”¹⁴ A “project” is an activity undertaken by a public agency or a private activity that must receive some discretionary approval from a local government agency that may cause either a direct physical change in the environment or a reasonably foreseeable indirect change in the environment.¹⁵ Most private and public development projects are subject to CEQA since development permits and land use entitlements usually involve discretionary decisions by local governments unless the development is by right or is subject to ministerial approval.¹⁶ Therefore, CEQA is inseparable from land use planning and development, and its impact is profound in

11. See CAL. PUB. RES. CODE § 21002 (West 2019); Assemb. B. 586, 2019–20 Leg., Reg. Sess. (Cal. 2019); CAL. CODE REGS. tit. 14, § 15041(a); BASS & HERSON, *supra* note 1, § 20.02.

12. PUB. RES. § 21060.5.

13. *Id.* §§ 21102, 21105, 21151, 21604; Ass’n for Prot. of Env’tl. Values v. City of Ukiah, 3 Cal. Rptr. 2d 488, 491 (Ct. App. 1991) (quoting City of South Gate v. L.A. Unified Sch. Dist., 229 Cal. Rptr. 568, 572 (Ct. App. 1986)); CAL. CODE REGS. tit. 14, § 15071(e); see also 4 MILLER AND STARR CALIFORNIA REAL ESTATE DIGEST 3D § 1.2, Westlaw (database updated Sept. 2019).

14. See BASS & HERSON, *supra* note 1, § 20.02.

15. PUB. RES. § 21065; CAL. CODE REGS. tit. 14, § 15378; 8 MILLER AND STARR CALIFORNIA REAL ESTATE § 26:4 (4th ed.) [hereinafter MILLER & STARR], Westlaw (database updated Dec. 2019); *When Does CEQA Apply?*, OFF. HISTORIC PRESERVATION, https://ohp.parks.ca.gov/?page_id=21723 [<https://perma.cc/CC2E-V84G>].

16. See PUB. RES. § 21080(a), (b)(1); Prentiss v. City of South Pasadena, 18 Cal. Rptr. 2d. 641, 644–45 (Ct. App. 1993); MILLER & STARR, *supra* note 15, § 26:7.

shaping California's development patterns and structure.¹⁷

CEQA's primary goals are to improve the disclosure of potential environmental impacts to the public and involve the public in government actions that could cause adverse environmental impacts. CEQA strongly emphasizes procedural compliance through preparation of environmental documents. Noncompliance may result in judicial invalidation of agency decisions.¹⁸ Judicial invalidation results in substantial delays, requiring project proponents to reassess problem areas and restart the approval and disclosure process from the beginning.

The CEQA process involves three steps. First, an acting agency (Lead Agency)¹⁹ conducts a preliminary review to determine if CEQA applies to an activity. Second, if the Lead Agency determines that an activity is a "project" under CEQA and that the activity is not subject to a CEQA exemption, it must conduct an Initial Study to determine whether the project may have a significant effect on the environment.²⁰ The third step is the preparation of environmental documents—either a Negative Declaration or an EIR depending on the results of the Initial Study. If there is no "substantial evidence [of] . . . a significant effect on the environment," the Lead Agency prepares a Negative Declaration.²¹ If the Initial Study indicates that the project may have a significant impact, the Lead Agency prepares an EIR.²² Preparing an EIR can take more than a year and can contain more than 10,000 pages of technical analysis in areas of air quality, water, soil, geography, aesthetics, historical resources, and more.²³ Preparing an EIR has two stages: a Draft EIR and Final EIR, which includes revisions and takes into account public comments and other considerations. On the other hand, Negative Declarations declare that a project would cause a less than significant impact

17. "They began to accept and even anticipate [CEQA's] requirements, with many developers routinely 'pre-mitigating' their proposed projects to achieve compliance and avoid (or attempt to avoid) dreaded CEQA litigation battles, which were bloody, costly and could last for years, imperiling the very viability of the development." Arthur F. Coon, *CEQA Wars: The Developer Strikes Back (In Federal Court)*, MILLER STARR REGALIA (Aug. 19, 2019), <https://www.ceqadevelopments.com/2019/08/19/ceqa-wars-the-developer-strikes-back-in-federal-court> [<https://perma.cc/4PCJ-DMGZ>].

18. PUB. RES. § 21168.9(a)(1); *see also* BASS & HERSON, *supra* note 1, § 23.05; MILLER & STARR, *supra* note 15, § 26:7.

19. The Lead Agency can be an agency with scientific expertise, but no agency would be competent in all topics covered by an EIR.

20. CAL. CODE REGS. tit. 14, § 15064(h)(2).

21. PUB. RES. § 21080(c)(1); *see also* CAL. CODE REGS. tit. 14, §§ 15063(b)(2), 15064(f)(e), 15070(b) (2019); MILLER & STARR, *supra* note 15, § 26:4.

22. PUB. RES. § 21151; CAL. CODE REGS. tit. 14, §§ 15063(b)(1)(A); MILLER & STARR, *supra* note 15, at § 26:4.

23. *See Landmark Village (Newhall Ranch Phase 1)*, L.A. COUNTY DEP'T REGIONAL PLAN., <http://planning.lacounty.gov/lmv> [<https://perma.cc/V6TA-XVYA>].

and are shorter documents with a simpler process. Negative Declarations with added mitigation measures are referred to as MNDs and are longer than Negative Declarations.

CEQA allows members of the public to participate in the government decisionmaking process.²⁴ CEQA requires public notice prior to the approval of any development projects that would adversely impact air quality, noise, water, aesthetics, or other environmental factors.²⁵ Public participation is considered to “play[] a key role in the implementation and enforcement of CEQA.”²⁶

For a Negative Declaration, there is a twenty-day minimum public comment period, during which the public can voice concerns about the project and its impact.²⁷ The Lead Agency may use these comments to revise the Negative Declaration by adding mitigation measures or changing the project.²⁸ On the other hand, there is a thirty-day minimum comment period for the Draft EIR.²⁹ If the Final EIR contains significant new information, it must also be recirculated for public comment.³⁰ These public comment periods allow the public to review all aspects of project construction and operation and the impact the project will have on their property and health.³¹ The agency must evaluate all public comments and prepare written responses. For example, if a neighbor comments about the significant noise impact of a proposed building’s construction, the agency could respond that mitigation measures, such as the type of wall material used, would ensure that noise impacts would be less than significant. If the Draft EIR does not sufficiently deal with this issue, changes would be made to the Final EIR with additional mitigation measures (for example, different wall material) to address the issue. If a feasible mitigation measure is not incorporated after the comment period, the project may be vulnerable to legal action.

In addition to procedural compliance, CEQA has substantive components requiring public agencies to protect the environment in certain

24. CAL. CODE REGS. tit. 14, § 15201; BASS & HERSON, *supra* note 1, § 20.08.

25. PUB. RES. § 21060.5.

26. BASS & HERSON, *supra* note 1, § 20.08.

27. CAL. CODE REGS., tit. 14, §§ 15073(a), 15105(b).

28. *Id.* § 15073.5.

29. *Id.* § 15105(a).

30. PUB. RES. § 21092.1; CAL. CODE REGS. tit. 14, § 15088.5 (2019); MILLER & STARR, *supra* note 15, § 26:14.

31. *See e.g.*, CHRISTOPHER A. JOSEPH & ASSOCIATES, FINAL ENVIRONMENTAL IMPACT REPORT: HOLLYWOOD COMMUNITY PLAN AREA, at IV-3 to IV-37 (2006).

circumstances or to explain why they have not done so.³² CEQA specifically establishes a duty “for public agencies to avoid or minimize environmental damage where feasible.”³³ A Lead Agency “should not approve a project . . . if there are feasible alternatives or mitigation measures available would substantially lessen” the project’s significant environmental effects.³⁴ If the Lead Agency determines that it is not feasible to avoid or substantially reduce the negative environmental impacts identified in an EIR, it must explain the economic, social, or other considerations that render other alternatives infeasible to approve the project.³⁵

CEQA is primarily enforced through litigation filed by interested members of the public.³⁶ Lawsuits may involve the evaluation of EIR adequacy,³⁷ the need for EIRs instead of MNDs or Negative Declarations,³⁸ or the appropriateness of CEQA exemptions.³⁹ A project can be challenged for a broad variety of reasons from causing excess traffic to inadequately mitigating greenhouse gas emissions.⁴⁰

B. HISTORY OF EXCLUSIONARY ZONING

Before analyzing CEQA’s exclusionary tendencies, it is important to discuss ways zoning was historically used for economic and racial discrimination. CEQA draws parallels to zoning because CEQA limits certain types of development in certain areas based on environmental criteria, just as traditional zoning is designed to separate uses and to exclude certain uses from certain zoning districts.⁴¹

In the landmark case *Village of Euclid v. Ambler Realty Co.*, a town

32. CAL. CODE REGS. tit. 14, § 15021; *see also* PUB. RES. § 21002; *Laurel Hills Homeowners Ass’n v. City Council of Los Angeles*, 147 Cal. Rptr. 842, 845–46 (Ct. App. 1978).

33. CAL. CODE REGS. tit. 14, § 15021(a).

34. PUB. RES. § 21002; *see also Laurel Hills*, 147 Cal. Rptr. at 844–45; CAL. CODE REGS. tit. 14, § 15021(a)(2).

35. CAL. CODE REGS. tit. 14, § 15093(b).

36. *Frequently Asked Questions About CEQA*, *supra* note 5.

37. *See e.g.*, *Ctr. for Biological Diversity v. Cal. Dep’t of Fish & Wildlife*, 361 P.3d 342, 363–64 (Cal. 2015) (concluding that an EIR was inadequate due to a lack of substantial evidence indicating that the project’s GHG emissions would not have a significant impact and the inclusion of biological mitigation measures that relocated a protected species).

38. *E.g.*, *Friends of the Coll. of San Mateo Gardens v. San Mateo Cty. Cmty. Coll. Dist.*, 218 Cal. Rptr. 3d 91, 103 (Ct. App. 2017) (concluding an MND was inadequate and allowing the developer to prepare a new MND if the environmental effects were insignificant due to mitigation measures).

39. *CREED–21 v. City of San Diego*, 184 Cal. Rptr. 3d 128, 147, 149 (Ct. App. 2015) (concluding a CEQA exemption was appropriate).

40. *See Ctr. for Biological Diversity*, 361 P.3d at 345–46.

41. PATRICK J. ROHAN & ERIC DAMIAN KELLY, *ZONING AND LAND USE CONTROLS* § 3.01(1), LexisNexis (database updated Nov. 2019).

enacted a zoning ordinance that excluded apartment houses, retail stores, and shops, creating residential districts limited to single family homes.⁴² The U.S. Supreme Court ruled that the exclusion was a valid use of the local government's police power, stating that the desirability of the neighborhood is greatly diminished by the presence of apartment houses.⁴³ The Court upheld this in part because the

coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed.⁴⁴

This decision allowed zoning to be primarily of local concern and legitimately promoted economic segregation.⁴⁵ All of the factors mentioned by the Court in *Euclid* are also considered in the CEQA analysis in EIRs.⁴⁶

Euclidean zoning is also known as cumulative zoning and, by its very nature, segregated people by income and situation in life. In this scheme, “higher uses” were protected from “lower uses” but not vice versa.⁴⁷ Single family housing was considered the highest use, and no industrial, multifamily housing or commercial use could be built in single family residential districts.⁴⁸ However, the higher use of single family housing could be built in the “lower use” industrial districts.⁴⁹ Low-income individuals and families were forced into cheaper housing built in industrial or commercial districts. Prior to World War II, economic segregation led to separation of low-income areas from suburban areas, which typically had better living condition.⁵⁰

There are various ways zoning is used as an exclusionary tool without direct, unconstitutional discrimination by race or ethnic background.

42. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 380–81 (1926).

43. *Id.* at 394–97.

44. *Id.*

45. ROHAN & KELLY, *supra* note 41, § 3.01(1).

46. See CAL. PUB. RES. CODE § 21060.5 (West 2019).

47. See ROHAN & KELLY, *supra* note 41, § 39.03.

48. *Id.*

49. *Id.*

50. *Id.*

Exclusionary zoning measures usually are considered reasonable based on legitimate justifications. Typical measures create barriers to low-income minority groups, by raising housing prices in areas zoned for single family residential use.⁵¹ The most commonly used method of exclusionary zoning is to have a large minimum lot size requirement to raise the price of each home and exclude more affordable multifamily housing in the area.⁵² These practices are considered legitimate because they conveniently coincide with the local government's goal of "low density," among other reasons, such as limiting traffic and noise and protecting health and property values.⁵³ Local governments may also impose costly requirements for subdivisions that are needed for more affordable housing.⁵⁴ Residents may also use referenda or initiatives to block zoning changes that would break down the established order.⁵⁵ As described later, CEQA can also be used to discriminate and exclude based on the pretext of traffic, greenhouse gas ("GHG"), noise, and other environmental reasons.

II. PROBLEM ANALYSIS

While various aspects of CEQA incentivize abuse for exclusionary and nonenvironmental reasons, the root of the problem lies in CEQA's highly technical nature, lack of uniform standards, and inadequate judicial resources and expertise to tackle complex environmental issues. Within the litigation context, unpredictability derives partly from the inconsistent application of the "substantial evidence" or the "fair argument" standards, which are applied in evaluating adequacy of environmental documents. The lack of uniform standards for subject areas, such as GHG emissions, leads to unpredictability, especially as local governments attempt assorted methodologies to find a particular solution that may withstand judicial review. Concurrently, developers risk having their project approvals stalled or invalidated despite having invested substantial resources to comply with CEQA.

These problems originate before writs reach the judicial system. The lack of uniform standards derives from the disconnect among regulation,

51. See *id.* § 3.01 n.23 (quoting Michael S. Holman, *Removing the Bar of Exclusionary Zoning to a Decent Home*, 32 OHIO ST. L.J. 373, 381–82 (1971)).

52. *Id.*

53. *Browning v. Cobb Cty.*, 383 S.E.2d 126, 128 (Ga. 1989); *People ex rel. Skokie Town Housing Builders, Inc., v. Vill. of Morton Grove*, 157 N.E.2d 33, 35 (Ill. 1959); *Lamb v. City of Monroe*, 99 N.W.2d 566, 571 (Mich. 1959); *Buskey v. Town of Hanover*, 577 A.2d 406, 410 (N.H. 1990); ROHAN & KELLY, *supra* note 41, § 3.01.

54. See ROHAN & KELLY, *supra* note 41, § 3.01 n.29.

55. *Id.* § 3.01 n.31.

enforcement, and adjudication in a regulatory scheme as technical and complex as CEQA. Currently CEQA is regulated by the Governor's Office of Planning and Research that publishes CEQA guidelines.⁵⁶ The guidelines are applied and enforced by local governments and the public (by threat of litigation) and adjudicated by the judicial system. Most other complex and technical environmental disputes are handled by special administrative agencies, independent of city or local government and staffed with specialized scientists, engineers, lawyers, and other experts.⁵⁷ Neither the judicial system nor generalized local government entities seem to have the expertise to adequately evaluate nuanced issues of environmental science and policy. This is especially the case considering the CEQA guidelines do not contain specific technical methodologies and are too general to be helpful in a nuanced scale.

This Part explores various aspects of the CEQA dispute adjudication process and explains why such aspects incentivizes CEQA abuse. Ultimately, this Part argues that the judicial system is not the proper entity for resolving the majority of CEQA disputes.

A. CEQA LITIGATION STANDING

Like challenging many other administrative decisions, a CEQA lawsuit is a mandamus action.⁵⁸ A person or entity with a beneficial interest in the relief sought can usually bring a CEQA lawsuit.⁵⁹ For example, a neighbor who would suffer significant noise impacts due to a construction of a concert hall has proper standing to sue. However, beneficial interest standing is satisfied even if the lawsuit's motivation is primarily economic.⁶⁰ There is also a public interest exception to the standing requirement, where a plaintiff lacking beneficial interest may have standing to bring a "citizen suit" to

56. CAL. PUB. RES. CODE § 21083 (West 2019); CAL. CODE REGS. tit. 14, § 15000 (2019); *CEQA: The California Environmental Quality Act*, GOVERNOR'S OFF. PLAN. & RES., <http://opr.ca.gov/ceqa> [<https://perma.cc/9CU8-VS9U>].

57. *E.g., About*, S. COAST AIR QUALITY MGMT. DISTRICT, <http://www.aqmd.gov/nav/about> [<https://perma.cc/NN53-U9EH>]; *Commissioners & Alternates*, CAL. COASTAL COMMISSION, <https://www.coastal.ca.gov/roster.html> [<https://perma.cc/2KZY-5HEM>]; *Governing Board*, S. COAST AIR QUALITY MGMT. DISTRICT, <http://www.aqmd.gov/nav/about/governing-board/board-members> [<https://perma.cc/TS26-6XW3>]; *Our Mission*, CAL. COASTAL COMMISSION, <https://www.coastal.ca.gov/who-we-are.html> [<https://perma.cc/V6HW-RUU6>].

58. BASS & HERSON, *supra* note 1, § 23.01.

59. *See* CAL. CIV. PROC. CODE § 1086 (West 2019).

60. *See* *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1014–15 (Cal. 2011).

enforce laws in the public interest;⁶¹ however, the plaintiff may be denied standing if it is against public policy. Another requirement for filing a CEQA lawsuit is for prospective plaintiffs to exhaust all administrative remedies.⁶² Plaintiffs usually meet this requirement by raising objections during the comment period, attending public hearings to object to a project, appealing to the agency's decisionmaking body, or pursuing other administrative remedy procedures that local ordinances provide.⁶³ Any issue not raised by the plaintiff during the hearing is not preserved for judicial review.⁶⁴

Many proponents of CEQA reform criticize its relaxed standing and exhaustion requirement, which incentivizes filing CEQA lawsuits simply to harass projects for exclusionary or economic purposes. For example, Hernandez argues that the current CEQA procedural system allows for CEQA lawsuits to be filed anonymously by anyone "pursuing any agenda, . . . even if the project causes no harm to the environment or public health."⁶⁵ Because the "beneficial interest" requirement includes economic interest, plaintiffs of a CEQA lawsuit may have standing even if they have a claim that a new project would bring in more competition to their businesses.⁶⁶ Further, the plaintiff's proximity to the project site is sufficient to create a presumption that the plaintiff will be adversely affected by the project and, therefore, have standing.⁶⁷ This allows community members to bring CEQA lawsuits even if their reason for doing so is not environmental but exclusionary. Although their claims under CEQA have little merit, project delays and litigation costs cause great difficulty, especially for projects without deep pockets.

Public interest standing under CEQA lets almost anyone file a CEQA lawsuit, regardless of whether the party is directly impacted by the project. Arthur F. Coon demonstrates how the broad "public interest" standing

61. *Citizens Ass'n for Sensible Dev. of Bishop Area v. Cty. of Inyo*, 217 Cal. Rptr. 893, 897 (Ct. App. 1985); *see also Save the Plastic Bag Coal.*, 254 P.3d at 1011–12, 1014 n.5.

62. *Benton v. Bd. of Supervisors*, 277 Cal. Rptr. 481, 485 (Ct. App. 1991).

63. CAL. PUB. RES. CODE § 21177(a)–(b) (West 2019); BASS & HERSON, *supra* note 1, § 23.02(2); *see e.g.*, *Cal. Native Plant Soc'y v. City of Rancho Cordova*, 91 Cal. Rptr. 3d 571, 590–98 (Ct. App. 2009); *Citizens for Open Gov't v. City of Lodi*, 50 Cal. Rptr. 3d 636, 645–46 (Ct. App. 2006); *Tahoe Vista Concerned Citizens v. Cty. of Placer*, 96 Cal. Rptr. 2d 880, 892 (Ct. App. 2000); *McPherson v. City of Manhattan Beach*, 93 Cal. Rptr. 2d 725, 732–33 (Ct. App. 2000); *E. Peninsula Educ. Council, Inc. v. Palos Verdes Peninsula Unified Sch. Dist.*, 258 Cal. Rptr. 147, 159–60 (Ct. App. 1989).

64. PUB. RES. § 21177(a).

65. Hernandez, *supra* note 8.

66. *See Save the Plastic Bag Coal.*, 254 P.3d at 1015.

67. *Bozung v. Local Agency Formation Comm'n*, 529 P.2d 1017, 1022–23 (Cal. 1975).

requirements can be abused.⁶⁸ In his article, Coon describes one of his experiences in which a CEQA bounty hunter, under the name of a charitable organization, would file lawsuits taking advantage of CEQA's lax public interest standing.⁶⁹ In his experience, the organization's attorneys refused to discuss the merits and proposed a large cash settlement to dismiss its action. The organization explained that "its business model [was] based on settling CEQA lawsuits for money," which was then used for "environmental justice" causes.⁷⁰ It also had a list of previous settlements, some approaching half a million dollars that it used like "comparable sales."⁷¹ When the defendants proceeded on the case and filed a dispositive motion, the organization voluntarily dismissed its entire action with prejudice.⁷² While Coon's experience ended with early dismissal, it is possible that developers and agencies may suffer significant delay and expense from multiple motions and appeals.⁷³ This leads to significant pressure to settle these cases and unfortunately incentivizes "bounty hunter" environmental organizations to file these spurious claims.

Coon's anecdote demonstrates that broad standing allows for litigation to harass projects even if plaintiffs do not have an interest in the environmental impacts caused by the project. Relaxed public and beneficial interest standing incentivizes use of CEQA litigation as an exclusionary tool to block affordable housing, homeless housing, and other public and quasi-public facilities.⁷⁴ Projects lacking funding are especially vulnerable to the delays caused by the lawsuit and attorney's fees, which add significant costs to the project and without a settlement may constitute a hurdle in completing the project. Even for adequately funded projects, the very fact that a CEQA lawsuit is filed acts as an injunction against development of the project because many lenders would refuse to disburse funds for projects with a pending CEQA lawsuit because the project could be thwarted completely if

68. Arthur F. Coon, *Standing Against Environmental Injustice: Some Thoughts on Facing the Need for CEQA Litigation Reform*, MILLER STARR REGALIA (July 18, 2017), <https://www.ceqadevelopments.com/2017/07/18/2699> [<https://perma.cc/J6DN-42ZB>].

69. *See id.*

70. *Id.*

71. The organization used the previous settlement values to assess the amount it would settle for in future instances. This method resembles the "comparable sales" approach in real estate valuation. *Id.*

72. *Id.*

73. *Id.*

74. Arthur F. Coon, *CEQA Standing Reform: Could Statutory Standing Requirements Feasibly Be Tightened To Bar Anti-Competitive Lawsuits Motivated by Economic Rather than Environmental Concerns?*, MILLER STARR REGALIA (Dec. 12, 2012), <https://www.ceqadevelopments.com/2012/12/12/ceqa-standing-reform-could-statutory-standing-requirements-feasibly-be-tightened-to-bar-anti-competitive-lawsuits-motivated-by-economic-rather-than-environmental-concerns> [<https://perma.cc/W64K-S2K4>]; Coon, *supra* note 68; *see* Hernandez, *supra* note 8, at 30–32, 41.

the lawsuit is lost.⁷⁵

Despite the problems, a notable argument for relaxed standing for CEQA lawsuits is that it would enable environmental protection. The environmental justice goal of CEQA aims to prevent situations in which an environmentally abhorrent project is developed in a disadvantaged neighborhood whose members may not be politically or economically powerful enough to prevent anticipated pollution to its air or water quality.⁷⁶ CEQA “bounty hunters” may help low- and moderate-income families halt the construction of a factory that impacts adjoining residential uses.

Public interest standing was used for a good cause in an example cited in a CEQA report published by the Planning and Conservation League Foundation.⁷⁷ Between 1998 and 2002, “cousins with dairies in the Chino Valley, applied to build two 14,400 cow dairies on adjacent pieces of property in Kern County.”⁷⁸ The County approved these proposals by using a Negative Declaration to avoid full CEQA review, finding “that there would be no potential adverse environmental impact.”⁷⁹ The Center on Race, Poverty & Environment along with the Sierra Club brought a suit against the County for approving the dairies.⁸⁰ After “the courts ruled three times in favor of the environmental organizations,” a new EIR was prepared that showed a significant impact in air quality from particulate matter, ammonia, methane, and other pollutants.⁸¹ Through this suit, dairies gained local and statewide notoriety, which ended the “by right” policy for dairies in Kern County.⁸² Issues unknown or not cared about by the local community might be noticed by advocacy groups or sometimes even “bounty hunter” organizations. While frivolous lawsuits with little merit may only aim to harass projects, broad public interest standing can be beneficial in protecting communities from adverse environmental impacts they are unaware of.

75. Hernandez, *supra* note 8, at 44 (quoting E. Clement (Clem) Shute, Jr., *Reprise of Fireside Chat Yosemite Environmental Law Conference October 24, 2015*, ENVTL. L. NEWS, Spring 2016, at 1, 3).

76. Cf. KAMALA D. HARRIS, CAL. DEP’T OF JUSTICE, ENVIRONMENTAL JUSTICE AT THE LOCAL AND REGIONAL LEVEL LEGAL BACKGROUND 1, 4 (2012) (quoting CAL. GOV’T CODE § 65040.12(e) (West 2019)), https://oag.ca.gov/sites/all/files/pdfs/environment/ej_fact_sheet_final_050712.pdf [<https://perma.cc/63NM-J49U>] (stating that CEQA focuses on social effects and treating all people fairly).

77. Caroline Farrell, *Mega-Dairies & Agricultural Air Pollution*, in PLANNING & CONSERVATION LEAGUE FOUND., EVERYDAY HEROES PROTECT THE AIR WE BREATHE, THE WATER WE DRINK, AND NATURAL AREAS WE PRIZE 27, 27 (2005), https://www.pcl.org/media/prior-c/CEQA-Everyday-Heroes-full_report.pdf [<https://perma.cc/NS4P-YDQY>].

78. *See id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 28.

There is also a good argument that CEQA lawsuits should be permitted to be filed anonymously so that a person enforcing CEQA is not subject to retaliatory lawsuits filed by the developer or other parties in interest. While the Anti-Strategic Lawsuit Against Public Participation statute, which prevents retaliatory lawsuits to silence protests,⁸³ exists to downplay this concern, anonymity achieved by suing under an association provides heightened protection for relatively powerless citizens suing developers, who are likely to be more influential.

On balance even though relaxed requirements for standing may partially incentivize spurious lawsuits that delay and harass development projects, public interest standing may be necessary for the enforcement of CEQA in the current system. Instead of implementing a minor reform of having a higher barrier for standing, it would be preferable to make dispute resolution under CEQA more predictable by creating more uniform standards and thereby disincentivizing frivolous lawsuits in the first place. As described in Section II.B, unpredictability primarily exists because the majority of CEQA disputes are handled by the judicial system, which is unfit for dealing with complex issues of science and policy.

B. UNPREDICTABILITY OF JUDICIAL OUTCOMES: NEED FOR UNIFORM STANDARDS OF REVIEW FOR EIRS, EXEMPTION CLAIMS, AND NEGATIVE DECLARATIONS

Judicial review of those approvals is by administrative mandamus.⁸⁴ In a CEQA lawsuit challenging an EIR, the court decides if the agency abused its discretion by asking whether there is substantial evidence to support the administrative agency's decisions in rendering approval of a final EIR.⁸⁵ The substantial evidence test, applied under CEQA, requires enough relevant information that a "fair argument" can be made to support a finding of adverse environmental impact.⁸⁶ Substantial evidence includes facts, reasonable assumptions based on facts, and expert opinions supported by facts.⁸⁷ The EIR also needs to show that the agency made an objective, good faith effort at full disclosure without being held to a standard of absolute perfection.⁸⁸ However, even though the law gives deference to agency

83. CAL. CIV. PROC. CODE § 425.16 (West 2019).

84. *Id.* § 1094.5; BASS & HERSON, *supra* note 1, § 23.01.

85. *Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 361 P.3d 342, 347 (Cal. 2015).

86. CAL. CODE REGS. tit. 14, § 15384(a) (2019).

87. CAL. PUB. RES. CODE §§ 21080(e), 21082.2(c) (West 2019); CAL. CODE REGS. tit. 14 §§ 15064(f)(5), 15384(b).

88. *See Residents Ad Hoc Stadium Comm. v. Bd. of Trustees*, 152 Cal. Rptr. 585, 593 (Ct. App. 1979).

findings, a study of CEQA lawsuit outcomes shows that agencies lose nearly half of CEQA lawsuits.⁸⁹ This statistic shows that, at least for the projects challenged under litigation, there is a great deal of uncertainty as to whether local governments have in fact complied with CEQA. This is unsurprising because a typical local government agency making CEQA decisions is comprised of elected officials that are not experts in environmental policy or science.

More than other CEQA characteristics, the unpredictability of CEQA judicial decisions incentivize its abuse for exclusionary and nonenvironmental purposes. This unpredictability manifests itself when judges determine the adequacy of environmental documents or review agency determinations that projects are exempt under CEQA. While the CEQA guidelines suggest directions on how to prepare EIRs and MNDs, they rarely give guidance on specific methodologies needed to determine adverse significant impact.⁹⁰ The combination of vague agency standards and inconsistently applied judicial standards generates uncertain outcomes.⁹¹ Given that an EIR can span more than thousands of pages and can, at times, include technical analysis of more than fifteen topic areas, even the most well-drafted environmental document can be invalidated due to a judicial disapproval of a small portion.⁹²

The problem of unpredictability of CEQA is best demonstrated by a judicial decision related to GHG impacts.⁹³ In 2010 the California Department of Fish and Wildlife and the United States Army Corps of Engineers prepared a joint EIR for a development plan in Newhall Ranch that included commercial and business uses, schools, golf courses, parks, community facilities, over 20,000 dwelling units, and a designation of 40 percent of the land for open space.⁹⁴ The EIR considered whether the project's emissions would impede the State's compliance with the statutory emission reduction mandate established by Assembly Bill ("AB") 32, which

89. Hernandez, *supra* note 8, at 42.

90. For example, in determining significant impacts from GHG emissions, the guidelines vaguely state that a "lead agency shall make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project." CAL. CODE REGS. tit. 14, § 15064.4(a). Nowhere does it describe the actual calculation methodology or what standard to use to evaluate what constitutes a significant impact.

91. See ELISA BARBOUR & MICHAEL TEITZ, PUB. POLICY INST. OF CAL., CEQA REFORM 15–18 (2005), https://www.ppic.org/content/pubs/op/OP_405EBOP.pdf [<https://perma.cc/H9C4-U6EW>].

92. See *Landmark Village (Newhall Ranch Phase 1)*, *supra* note 23.

93. For this decision, see generally *Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 361 P.3d 342 (Cal. 2015).

94. *Id.* at 346.

set the statewide goal of reducing GHG emissions to 1990 levels by 2020.⁹⁵

The EIR performed its GHG analysis by modeling its methodology on the California Air Resources Board (“CARB”) Scoping Plan.⁹⁶ The Scoping Plan describes the approach to achieving the statewide goal set by AB 32.⁹⁷ This approach requires a 29 percent reduction of GHG emissions compared to the “business as usual” emission projection.⁹⁸ Business as usual “represent[s] the emissions that would be expected to occur in absence of any GHG . . . reduction[] actions.”⁹⁹ Taking this method of analysis as a model, the project analyzed its business as usual emissions and determined that the actual implemented project emissions would be 31 percent below the business as usual estimate.¹⁰⁰ The EIR concluded that because the project exceeded the goals set by the CARB Scoping Plan, it would be consistent with AB 32 and GHG impacts would not be significant.¹⁰¹

The California Supreme Court first determined the unresolved issue of whether AB 32’s emissions-reduction goals provided an appropriate significance threshold for GHG emissions.¹⁰² The court upheld the use of the AB 32 standard, noting that one could reasonably argue that the project would not cause significant impact by measuring its effect on the state’s efforts to meet its long-term goals through comparing the measurement against an “absolute numerical threshold.”¹⁰³ The court stated that the project’s impact would not be cumulatively considerable if it “help[ed] to solve the cumulative problem of [GHGs] as envisioned by California law.”¹⁰⁴

However, to the dismay of the defendants, the court found that the EIR’s finding that the project’s emissions would not be significant under the AB 32 threshold was “not supported by a reasoned explanation based on substantial evidence.”¹⁰⁵ The court stated that the GHG analysis was inadequate because there was “no substantial evidence that . . . [a] *project-level* reduction of 31 percent in comparison to business as usual [was] consistent with achieving

95. *Id.* at 347.

96. *Id.* at 347–48.

97. *Id.*

98. *Id.*

99. *Id.* at 348 (first alteration in original) (citation omitted).

100. *Id.* at 349.

101. *Id.*

102. *Id.* at 349–53.

103. *Id.* at 350–51 (citation omitted).

104. *Id.*

105. *Id.* at 345–46.

A.B. 32's *statewide* goal of a 29 percent reduction from business as usual."¹⁰⁶ The reasoning was that the two methodologies were in completely different contexts and adjustment would be necessary if the contexts were changed.¹⁰⁷ The court noted that "[d]esigning new buildings and infrastructure for maximum energy efficiency and renewable energy use is likely to be easier . . . than achieving the same savings" statewide, which includes older buildings that would need to be retrofitted.¹⁰⁸ Therefore, the emission reduction may need to be greater for new development to compensate for existing less efficient facilities that "continue to exist and emit."¹⁰⁹ While the court made several suggestions for agencies to create climate action plans and thresholds that would better substantiate GHG impact, it gave little guidance for individual projects absent these government studies and programs.¹¹⁰

The contrast between the majority and the two dissenting judges in the case demonstrates how broad and uncertain the substantial evidence standard is, especially in the context of such a complicated topic relating to GHG impacts. Justice Corrigan pointed out that the argument made by the court was an "amorphous . . . ground for invalidating a carefully prepared . . . EIR" because the majority demanded a project-level reduction greater than reductions California sought to achieve statewide, without identifying just how much better the projects must be.¹¹¹ He also noted that, if the new projects needed to be more efficient to account for older, less efficient facilities, the developer would be inappropriately required to mitigate impacts caused by other projects.¹¹² Justice Chin in his dissent pointed out that "many experts from many different agencies have scrutinized this project" and "[d]espite their efforts, there [was] no scientific consensus as to how large a reduction at the project level [was] needed to establish consistency with [AB] 32's statewide goal."¹¹³ Given these circumstances, Justice Corrigan argued that "the [L]ead [A]gency had discretion to conclude that a . . . reduction exceeding the statewide goal by two percentage points was" appropriate under the deferential substantial evidence standard.¹¹⁴

This case demonstrates the complexity of CEQA documents and how

106. *Id.* at 354.

107. *Id.* at 355.

108. *Id.* at 354.

109. *Id.* (citation omitted).

110. *Id.* at 357.

111. *Id.* at 365 (Corrigan, J., concurring in part and dissenting in part).

112. *Id.*

113. *Id.* at 365–66 (citing Justice Chin's dissenting opinion for this point).

114. *Id.* at 366.

an EIR may be invalidated under the substantial evidence standard even if a Lead Agency and the developer perform the best available analysis. Climate change is one of the more difficult subjects to tackle on a project-level basis because it is global in scope. No project alone causes climate change since the combined global carbon dioxide emissions cumulatively cause climate change. Given such complexity, the issue of how to determine significant GHG impacts is best evaluated by policymakers and scientists vastly more familiar with the topic. Even though, under the substantial evidence standard, the EIR needs to show that the agency merely made an objective, good faith effort at full disclosure and the agency is not held to a standard of absolute perfection,¹¹⁵ there seems to be little consensus on what a “good faith” effort is.

The court’s decision invalidated the prevailing methodology for GHG significance determination without an adequate replacement. While judges disapprove methodologies in EIRs, they usually do not suggest a concrete alternative. This is because judges can only review agency decisions to the extent that the agency prejudicially abused its discretion.¹¹⁶ While this restriction makes sense because judges are not scientists or policymakers, such opinions create even more uncertainty. Developers and agencies have no choice but to try different methods of analysis and determine by trial-and-error which method withstands judicial review.

The Newhall Ranch project, after much delay, was finally approved in 2017; Newhall Ranch developed thirteen measures in a detailed reduction plan to achieve “Net Zero Emissions” and offset 100 percent of the project’s GHG emissions.¹¹⁷ While Newhall Ranch had adequate funding to use such an extreme method, smaller projects cannot afford to purchase carbon credits and create such a comprehensive reduction plan. Instead, developers may need to resort to guesswork until a local agency decides to embark on the complicated project of creating a project-level GHG standard. As of 2019, the City of Los Angeles, the largest city in California, lacks such a climate

115. See *Residents Ad Hoc Stadium Comm. v. Bd. of Trustees*, 152 Cal. Rptr. 585, 593 (Ct. App. 1979).

116. CAL. PUB. RES. CODE § 21168.5 (West 2019); *Sierra Club v. Cty. of Fresno*, 431 P.3d 1151, 1159 (Cal. 2018).

117. CAL. DEP’T OF FISH & WILDLIFE ET AL., *NEWHALL RANCH RESOURCE MANAGEMENT AND DEVELOPMENT PLAN AND SPINEFLOWER CONSERVATION PLAN*, at 2.1-24 to 2.1-35 (2017), <http://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=145706> [<https://perma.cc/CW8Y-AMQY>] (discussing the thirteen mitigation measures and the ability of those measures to offset all GHG emissions); Notice of Determination and Decision from California Department of Fish and Wildlife to Governor’s Office of Planning and Research (June 14, 2017), <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=145820&inline> [<https://perma.cc/RM6X-7G53>] [hereinafter Notice of Determination and Decision] (approving the Newhall Ranch Project).

action plan. Unstandardized, uncertain CEQA topic areas, such as GHG impacts, are most likely the subject of lawsuits attempting to delay or exclude development projects.¹¹⁸

C. UNPREDICTABILITY OF CEQA JUDICIAL OUTCOMES: NEGATIVE DECLARATION, MND, OR EIR?

One of the main struggles for developers going through the CEQA process is determining whether they need to prepare a Negative Declaration, MND, or EIR. This decision has two dimensions in terms of cost efficiency. On the outset, an EIR is much more expensive than a Negative Declaration or MND. An EIR typically takes significantly more than a year to complete and can contain more than 10,000 pages of technical analysis in areas of air quality, water, soil, geography, aesthetics, historical resources, and more.¹¹⁹ It is also followed by an extensive public comment and review period.¹²⁰ A Negative Declaration or MND costs less because the required level of technical analysis is lower and the circulation period for public review and comments is smaller.¹²¹ However, choosing an MND makes the project substantially more vulnerable to CEQA lawsuits. An invalidated Negative Declaration usually means that a development is delayed until the project gets reapproved with a redrafted EIR.¹²² Exemptions are clearly the cheapest alternative, but exemptions can also be challenged under litigation.¹²³

For Negative Declarations and exemptions, the “fair argument” test is applied, under which the court determines whether any substantial evidence in the record supports a fair argument that a project may have a significant impact on the environment.¹²⁴ It is much easier to challenge a Negative Declaration than an EIR since there is much less deference to the agency’s determination.¹²⁵ The test evaluating Negative Declarations looks for the fair argument against the agency decision instead of applying a balancing test

118. See e.g., *Sierra Club v. Cty. of Fresno*, 6 Cal. 5th 502, 527 (2018) (evaluating the adequacy of an agency’s air quality impact determination methodology); *Ctr. for Biological Diversity*, 361 P.3d at 348–58 (evaluating an agency’s GHG significance calculation); *Jensen v. City of Santa Rosa*, 233 Cal. Rptr. 3d 278, 286–91 (Ct. App. 2018) (determining which party’s noise averaging method should inform whether an EIR was necessary).

119. See *Landmark Village (Newhall Ranch Phase 1)*, *supra* note 23.

120. PUB. RES. § 15088.

121. Kenneth Bley, *Beware of Planners Bearing Gifts*, COX, CASTLE, NICHOLSON LLP (Jan. 20, 2015), <https://landuse.coxcastle.com/beware-planners-bearing-gifts> [<https://perma.cc/6FZN-DPPB>].

122. See BASS & HERSON, *supra* note 1, § 23.05.

123. *Bus Riders Union v. L.A. Cty. Metro. Transp. Agency*, 101 Cal. Rptr. 3d 385, 388 (Ct. App. 2009) (challenging an exemption).

124. *No Oil, Inc. v. City of Los Angeles*, 529 P.2d 66, 70 (Cal. 1974).

125. *Cty. Sanitation Dist. No. 2 v. Cty. of Kern*, 27 Cal. Rptr. 3d 28, 51–52 (Ct. App. 2005).

incorporating a rebuttable presumption in favor of the agency decision.¹²⁶ Given this fact, most projects with any doubts about environmental impact would prepare the much costlier EIR because it is easier for individuals or organizations to challenge Negative Declarations successfully. In addition to the fair argument test, exemptions are also subject to the unusual circumstance exception, which can be used by individuals or organizations to challenge exemptions.¹²⁷

In fact, agencies lose more than half of lawsuits challenging exemptions and Negative Declarations.¹²⁸ Such unpredictability of judicial review, in this regard, incentivizes otherwise low impact development projects to conservatively pick the costly EIR, rather than the MND, in fear of litigation. With the housing crisis in California,¹²⁹ needless increases in land use entitlement costs should be minimized. There needs to be a more certain way for developers to determine the level of environmental analysis needed for development projects than going through the courts.

D. JUDGES WITH CEQA TRAINING

Additionally, CEQA litigation is unpredictable because not all judges are equally proficient in CEQA. In addition to the chance that a meritorious defendant could end up with a judge who does not know about CEQA, section 170.6 of the California Civil Procedure Code allows a party who timely files an “affidavit of prejudice” to disqualify a judge, without any showing of cause.¹³⁰ The affidavit of prejudice is not contestable, and the disqualification of the judge is automatic.¹³¹ Plaintiffs abusing CEQA could attempt to find a judge who is unfamiliar with CEQA, bringing more unpredictability to CEQA lawsuits. This is another reason why the courts should not be the primary venue for resolving CEQA disputes.

126. CAL. PUB. RES. CODE §§ 21168, 21168.5 (West 2019); *Sierra Club v. Cty. of Sonoma*, 8 Cal. Rptr. 2d 473, 478–81 (Ct. App. 1992) (citation omitted) (“[An agency] decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.”); BASS & HERSON, *supra* note 1, § 23.04(2)(b).

127. *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, 61 Cal. Rptr. 2d 447, 471–73 (Ct. App. 1997); CAL. CODE REGS. tit. 14, § 15300.2(c) (2019).

128. Hernandez, *supra* note 8, at 42.

129. Noah Buhayar & Christopher Cannon, *How California Became America's Housing Market Nightmare*, BLOOMBERG (Nov. 6, 2019), <https://www.bloomberg.com/graphics/2019-california-housing-crisis> [<https://perma.cc/Q5FU-RHSE>].

130. CAL. CIV. PROC. CODE § 170.6 (West 2019).

131. *Id.*

E. EXTREME REMEDIES

If the court finds that an agency violated CEQA under any of the tests above, the court could void the agency approval of the project, which may require the project to go back through the CEQA process from the beginning.¹³² The court could also order that the developer halt all project activities, including construction related to the action.¹³³ As a practical matter, projects are halted or delayed during the entirety of a CEQA lawsuit, since a developer would have trouble obtaining funding or loans for a project subject to a CEQA lawsuit.¹³⁴ A developer would also be hesitant to invest further in a project with an uncertain outcome, as CEQA lawsuits may make the entire project infeasible.

Since courts have little expertise regarding nuanced CEQA policies, they have no choice but to vacate the entire project and have local government agencies rewrite the documents to survive judicial review. But the issue is that local governments are also not CEQA experts. Therefore, controversial projects may go through several loops of their CEQA documents being invalidated, sometimes delaying projects for more than five years.¹³⁵ The remedy is extreme because an otherwise valid EIR may be invalidated for deficiencies in only one of its sections, with little guidance from the courts on how to fix such deficiencies.¹³⁶ Such an inefficient outcome is also a reason why the majority of CEQA disputes should not be handled by trial courts.

F. ATTORNEY'S FEES

One of the main incentives to file a CEQA lawsuit is that successful petitioners are eligible for attorney's fees under the public interest statute, even when the suit was filed for primarily nonenvironmental reasons. In *Heron Bay Homeowners Association v. City of San Leandro*, the Heron Bay Home Owners Association filed a lawsuit under CEQA, complaining that an

132. CAL. PUB. RES. CODE § 21168.9(a)(1) (West 2019); BASS & HERSON, *supra* note 1, § 23.05.

133. PUB. RES. § 21168.9(a)(2).

134. Christian Britschgi, *How California Environmental Law Makes It Easy for Labor Unions To Shake Down Developers*, REASON (Aug. 21, 2019, 10:00 AM), <https://reason.com/2019/08/21/how-california-environmental-law-makes-it-easy-for-labor-unions-to-shake-down-developers> [https://perma.cc/X8BZ-HVC7] (“If they sue and lose, they still held up financing for the project, but will never be liable for attorney fees for the other side.”).

135. For an example of a case that took over five years until a determination was made, see Case Access for Case Number BS131347, SUPERIOR CT. CAL., <http://www.lacourt.org/casesummary/ui/index.aspx?casetype=familylaw> [https://perma.cc/4ZME-QJMH] (search “BS131347” in search bar); see also Notice of Determination and Decision, *supra* note 117.

136. *Sierra Club v. Cty. of Fresno*, 431 P.3d 1151, 1163 (Cal. 2018).

EIR was appropriate for a hundred foot tall wind turbine, not an MND as approved by the City of San Leandro.¹³⁷ The plaintiffs prevailed and sought award of attorney's fees under section 1021.5 of the California Civil Procedure Code, which authorizes award of attorney's fees to the prevailing party in a case that enforces an important right affecting public interest.¹³⁸ The court awarded part of the fees since the plaintiffs primarily brought the suit because the turbine would adversely affect home property values.¹³⁹ The court said the suit was also motivated by nonpecuniary concerns for the project's "impact on wildlife, aesthetics, health, and noise levels."¹⁴⁰ Since all CEQA lawsuits will always have an environmental component by definition, it is always possible for prevailing parties in a CEQA lawsuit to obtain attorney's fees. This incentivizes plaintiffs to file even more CEQA lawsuits for nonenvironmental reasons. Combined with the unpredictability of judicial review, attorney's fees make CEQA litigation an attractive vehicle for plaintiffs to impede and harass projects for the wrong reasons.

G. CEQA LITIGATION STATISTICS

The way CEQA excludes land uses designed to serve ethnic and racial minorities or lower income families is similar in principal to exclusionary zoning. CEQA litigation is used to oppose multifamily, residential or affordable housing facilities under the pretext of minimizing noise, traffic congestion, and air pollution; protecting parking, health, and safety; or other environmental matters.¹⁴¹ Relaxed standing requirements lead to excessive filing of CEQA lawsuits. Unpredictable judicial outcomes incentivize CEQA's use for exclusionary purposes. The expense of defending or preventing CEQA litigation is a barrier to constructing affordable housing in certain neighborhoods.¹⁴²

In *California Environmental Quality Act Lawsuits and California's Housing Crisis*, Jennifer Hernandez analyzed and categorized CEQA lawsuits from 2013 to 2015.¹⁴³ The dataset includes both unpublished and published cases. Hernandez previously analyzed CEQA lawsuits from 2010 to 2012, and the trends did not change significantly in the years 2013 to

137. *Heron Bay Homeowners Ass'n v. City of San Leandro*, 227 Cal. Rptr. 3d 885, 887–88 (Ct. App. 2018).

138. *Id.* at 893–903; *see also* CAL. CIV. PROC. CODE § 1021.5 (West 2019).

139. *Heron Bay*, 227 Cal. Rptr. 3d at 890–99, 902–03.

140. *Id.* at 898.

141. *See infra* Section II.H.

142. *See Hernandez, supra* note 8, at 21, 32, 57.

143. *Id.* at 35–34.

2015.¹⁴⁴

This study's data shows that 87 percent of all CEQA lawsuits filed between 2013 to 2015 contest infill projects. This is unsurprising because infill locations are in existing built up neighborhoods—thus, impacting more residents surrounding the new projects. Opposition to projects is greatest in fully developed urban areas where affordable housing and other quasi-public facilities, such as homeless housing and healthcare facilities, are greatly needed.¹⁴⁵ From all CEQA lawsuits during this period, 49 percent of the lawsuits challenged high density apartment or condominium housing projects while 13 percent of the lawsuits were directed at single family homes.¹⁴⁶ During the three-year period, “13,946 housing units and a 200-bed homeless shelter were targeted by CEQA lawsuits in the Los Angeles region.”¹⁴⁷

Hernandez also points out that “[Los Angeles] CEQA housing lawsuits disproportionately target new housing in whiter, wealthier, [and] healthier communities.”¹⁴⁸ The study used the California Environmental Protection Agency's map that designates disadvantaged communities with “higher poverty and unemployment rates, lower educational attainment levels, higher populations of non-English speakers, higher rates of asthma and other health conditions associated with pollution, and nearby sources of pollution such as freeways and contaminated factories.”¹⁴⁹

Logically, these disadvantaged areas should be the areas with more CEQA lawsuits (areas with more environmental health issues), but 78 percent of challenged housing units were located outside of these communities.¹⁵⁰ “[M]ost CEQA lawsuits were filed in West [Los Angeles] and in pockets of wealthier communities elsewhere in the [state].”¹⁵¹ These statistics draw some parallels with exclusionary zoning, where multifamily housing was prevented by individuals and organizations in certain districts to exclude minorities.¹⁵²

Despite convincing statistical and anecdotal evidence of the exclusionary uses of CEQA, it is also important to note the bigger picture. A

144. *See id.* at 23, 26–29.

145. *See id.* at 27, 33.

146. *Id.* at 29.

147. *Id.* at 30.

148. *Id.* at 32.

149. *Id.* (citation omitted).

150. *Id.*

151. *Id.* at 33.

152. *See supra* Section I.B.

statistical study commissioned by the Rose Foundation found that fewer than one out of every hundred projects were subject to CEQA litigation.¹⁵³ Given this it is farfetched to attribute the majority of housing and exclusionary problems in California to CEQA litigation. Environmental law professor Eric Biber states that the projects litigated under CEQA reflect the landowner resistance to new development near them “and those political fights would occur,” with or without CEQA.¹⁵⁴

The relatively low rate of CEQA litigation is still a problem. Given the dire need for affordable housing, youth centers, and public housing, CEQA should not be left as a tool to be easily used by individuals and organizations for exclusion. Even projects that are not subject to CEQA litigation are impacted by CEQA, as additional costs are often incurred due to fear of CEQA litigation (for example, wastefully conservative uses of EIRs, consultants, and attorneys). Many projects do not come into fruition because of the regulatory hurdles that CEQA has created.¹⁵⁵ The data does not imply that CEQA litigation cannot easily be abused for exclusionary purposes.¹⁵⁶ The goal should be for the government to reform CEQA to maximize environmental protection while preventing abuse for exclusionary purposes.

H. CASE EXAMPLES DEMONSTRATING CEQA’S USE FOR EXCLUSIONARY PURPOSES

1. Youth Centers

In *Jensen v. City of Santa Rosa*, a nonprofit youth support organization, Social Advocates for Youth (“SAY”), proposed and the City of Santa Rosa approved the conversion of a closed hospital into a sixty-nine-bed facility to house sixty-three young adults and provide counseling, education, and job training.¹⁵⁷ The facility would also include a health and wellness center for ages five to twenty-four and activities for residents, including a pottery studio, half-court basketball area, and a garden.¹⁵⁸ The facility, called the Dream Center, was to provide services to physically, sexually, or

153. JANET SMITH-HEIMER ET AL., *BAE URBAN ECON., CEQA IN THE 21ST CENTURY*, at 22–23, 22 tbl. 3 (2016).

154. Ben Bradford, *Is California’s Legacy Environmental Law Protecting the State’s Beauty or Blocking Affordable Housing?*, CALMATTERS (July 5, 2018), <https://calmatters.org/articles/is-californias-legacy-environmental-law-protecting-the-states-beauty-or-blocking-affordable-housing> [https://perma.cc/4TK6-S7JF].

155. *Cf. Hernandez, supra* note 8, at 68–70 (discussing numerous projects that were stalled by CEQA).

156. *See supra* Section II.

157. *Jensen v. City of Santa Rosa*, 233 Cal. Rptr. 3d 278, 280 (Ct. App. 2018).

158. *Id.*

emotionally abused children; homeless youth; and others “unable to afford housing or find employment.”¹⁵⁹

The approval of the project by a Negative Declaration was challenged by two neighbors who argued that the project would bring adverse noise impacts.¹⁶⁰ The project was challenged on technical arguments, attacking the noise study methodology performed by the engineering firm for the Dream Center, and was brought up to appeal.¹⁶¹ The neighbors’ attorneys claimed that if a different noise averaging method was used, the impact on the environment would be significant.¹⁶² While SAY won the lawsuit because the plaintiff failed to hire proper experts for their claims,¹⁶³ it still needed to go through the costly litigation process up to the appellate level, and its project was delayed. This lawsuit demonstrates the attempted use of CEQA’s unpredictable results from lack of uniform standards in order to halt “undesirable development.” The lawsuit began because of CEQA’s lack of prevailing standards for noise analysis. If there were a single, unambiguous standard, litigants would be discouraged from pursuing the issue in the first place.

2. Health Clinics

In *Respect Life South San Francisco v. City of South San Francisco*, a Conditional Use Permit was approved by the city, allowing a developer to convert an existing downtown office building into a Planned Parenthood clinic.¹⁶⁴ The only physical changes to the building were “interior alterations, minor exterior repairs, and a new sign.”¹⁶⁵ The plaintiff, Respect Life, filed a writ stating that the ensuing protests from right to life groups would cause significant traffic and parking, health, and safety impacts, requiring an EIR.¹⁶⁶ Respect Life argued that there was a fair argument for significant environmental impact that they themselves could cause.¹⁶⁷ The defendants prevailed but only after costly litigation that dragged on to the appellate court.¹⁶⁸ Given these facts, the lawsuit was not environmentally motivated and, instead, was exclusionary in purpose, which points at the ability of

159. *Id.* at 281.

160. *Id.* at 280.

161. *Id.* at 286, 288.

162. *Id.* at 288.

163. *Id.* at 290–91.

164. *Respect Life S.S.F. v. City of South San Francisco*, 223 Cal. Rptr. 3d 202, 206 (Ct. App. 2017).

165. *Id.*

166. *See id.* at 211–12.

167. *See id.*

168. *Id.* at 213.

plaintiffs to utilize the relaxed standing requirement of CEQA.

3. Affordable Housing

In *605 Middlefield, LLC v. City of Redwood City*, Redwood City approved an affordable housing project with six stories in Silicon Valley.¹⁶⁹ The developer, Habitat for Humanity Greater San Francisco, was a nonprofit focused on creating affordable housing.¹⁷⁰ The plaintiff, an attorney living in a two-story home behind the lot, filed a writ proceeding stalling the project.¹⁷¹ Due to the delay, the cost of constructing the project has risen from \$13 million to \$17 million.¹⁷² According to the CEO of Habitat for Humanity, “[t]he delay in this process . . . cost [the nonprofit] several million dollars . . . that [it] could be putting toward another housing development.”¹⁷³ While the lawsuit was settled,¹⁷⁴ the construction was halted for the duration of the lawsuit because “[l]osing a CEQA case can force a project to restart the [entire] approval process from [the beginning].”¹⁷⁵ If the reapproval process requires too much time or money, it may be better for nonprofits with limited funds to find a different area to build instead. This lawsuit demonstrates how CEQA functions as an attractive vehicle for individuals and organizations to halt, delay, and harass development projects for minor flaws.

I. THE MAJORITY OF CEQA DISPUTES SHOULD NOT BE HANDLED BY THE COURTS

With low standing requirements, low filing fees, and the possibility for attorney’s fees, CEQA is a very attractive tool to impede development, even for nonenvironmental reasons. These problems exist because CEQA disputes are handled by an incompatible judicial system. Some CEQA plaintiffs file lawsuits at the trial court level, on the chance that unpredictable results will play in their favor, and then appeal them to have another chance at the lottery. Even if the defendant wins at the trial court level, plaintiffs with unmeritorious claims can still appeal because of the high degree of

169. Petition for Writ of Mandate at 1, *605 Middlefield, LLC v. City of Redwood City*, No. 17CIV02727 (Cal. Super. Ct. June 20, 2017); Bradford, *supra* note 154.

170. Petition for Writ of Mandate at 3, *supra* note 169; Bradford, *supra* note 154.

171. Petition for Writ of Mandate at 2, *supra* note 169; Bradford, *supra* note 154.

172. Bradford, *supra* note 154.

173. *Id.*

174. *Holland & Knight Achieves Favorable Settlement for Habitat for Humanity in Legal Battle over Proposed Affordable Housing Development*, HOLLAND & KNIGHT (July 26, 2018), <https://www.hkclaw.com/en/news/pressreleases/2018/07/holland--knight-achieves-favorable-settlement-for> [https://perma.cc/YNV7-UNDC].

175. Bradford, *supra* note 154.

unpredictability. On top of it all, plaintiffs may even obtain attorney's fees if they win, even if they are suing for obviously nonenvironmental reasons.

Certainty of outcomes would discourage plaintiffs from wasted efforts of filing frivolous lawsuits, regardless of how relaxed the standing requirement is, and would make defendants less likely to settle, since they would be more certain they could win faster on the merits. And for outcomes to be more certain, CEQA disputes need to be primarily handled by an entity more capable of dealing with CEQA's nuanced issues of science and policy. At the very least, CEQA disputes should not be handled by the trial court and should go straight to the appellate level to lessen CEQA's potential to massively delay projects by challenges in two courts.

III. SOLUTION

A. A DESIGNATED CEQA AGENCY

The heart of the problem concerning CEQA abuse is the unpredictability created by CEQA's primary reliance on a judicial system ill-equipped to rule on issues of highly technical environmental science and policy. Piecemeal reform to CEQA litigation procedures would fail to address the issue. While CEQA litigation reform can narrow standing to those who have environmental, noneconomic interest in the lawsuit, this would simply create a situation in which plaintiffs would circumvent this requirement by referring to only environmental reasons for bringing a CEQA lawsuit. Making changes to the substantial evidence standard would not remedy the issue of unpredictability because any standard would still be ruled by a judicial system without resources to give an accurate, technically sophisticated ruling.

A better solution would need to bring more predictability to CEQA lawsuits to disincentivize filing frivolous claims in the first place. The current CEQA process leads to unpredictable judicial outcomes due to a lack of uniform standards. As described above, it is the Lead Agency that approves the project that also certifies CEQA documents, like the EIR.¹⁷⁶ The Lead Agency is typically the city council or the county board of supervisors, both of whom are not CEQA experts.¹⁷⁷ On the other hand, the Governor's Office of Planning and Research ("OPR") and California's Natural Resource Agency respectively promulgate CEQA guidelines and

176. See *supra* Section I.A.

177. CAL. PUB. RES. CODE §§ 21063, 21067 (West 2019).

regulations that explain and interpret CEQA.¹⁷⁸ In its website, the California Natural Resources Agency explicitly mentions that it “does not enforce CEQA, nor does it review for compliance with CEQA the many state and local agency actions which are subject to CEQA. Resources Agency legal staff cannot provide advice to private citizens or other public agencies regarding CEQA compliance or implementation.”¹⁷⁹ The OPR website mentions that it “provides technical assistance to state and local . . . agencies” in regard to CEQA, but OPR does not enforce any of its guidelines.¹⁸⁰ Separation between the state-level agency that promulgates rules and the local governments that apply the law creates the lack of uniformity. In addition, CEQA litigation is used by the public to enforce CEQA, adding another degree of fragmentation. This creates a system where CEQA documents are shaped by various interpretations among local jurisdictions with periodic caselaw adding prohibitions or clarifications.

A state-level or regional agency with dedicated expertise in regulating, enforcing, and adjudicating CEQA would lead to more predictable outcomes under CEQA. As environmental documents become more complex, the local government’s certification or approval does not guarantee success in defending a CEQA lawsuit. In comparison, the South Coast Air Quality Management District (“SCAQMD”), a regional air quality agency in Southern California, promulgates rules on air quality, enforces these rules by issuing permits, and adjudicates any disputes arising out of enforcement.¹⁸¹ The agency is equipped with scientists, engineers, and planners to advise the board in the process, so the results of adjudication and enforcement are more predictable, consistent, and technically defensible.¹⁸² On the other hand, the judicial system is more unpredictable because individual judges are politically selected and may make varying policy judgements based on their own personal viewpoints.¹⁸³ CEQA, which is an umbrella regulation that handles more than ten technical environmental subject areas and complex

178. *Frequently Asked Questions About CEQA*, *supra* note 5.

179. *CEQA: The California Environmental Quality Act*, CAL. NAT. RESOURCES AGENCY, <http://opr.ca.gov/ceqa> [<https://perma.cc/EWB7-BYRN>].

180. *Id.*

181. *About*, *supra* note 57; *see generally* S. COAST AIR QUALITY MGMT. DIST., RULES AND PROCEDURES OF THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT HEARING BOARD (2019), <http://www.aqmd.gov/docs/default-source/default-document-library/hearing-board/hbrules.pdf> [<https://perma.cc/J83M-PXKV>] [hereinafter S. COAST RULES & PROCEDURES] (describing SCAQMD’s hearing procedures).

182. *See generally* S. COAST AIR QUALITY MGMT. DIST., TELEPHONE DIRECTORY (2019), <http://www.aqmd.gov/docs/default-source/default-document-library/phone-directory.pdf> [<https://perma.cc/RH5H-V8JX>] [hereinafter S. COAST TELEPHONE DIRECTORY] (listing the phone numbers of those who work SCAQMD).

183. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM* 218–19 (2001).

procedural rules, is just the area that necessitates adjudication, enforcement, and legislation by a specialized, dedicated agency. This Part of the Note will describe how such an agency may function under the CEQA system in terms of enforcement and adjudication.

1. Independent Review and Certification

On the enforcement side, the CEQA agency would certify certain types of EIRs prepared by the Lead Agency through independent review and analysis. The CEQA hearing board would review the Lead Agency's substantive claims and perform its own assessment. The agency would not certify all CEQA documents since most small, uncontroversial projects can pass through the CEQA process without opposition.

Whether the CEQA agency would independently review and certify an EIR can be determined by adopting the procedure used by the Canadian Ad Hoc Environmental Review Panel. In *Stopping the Runaway Train of CEQA Litigation: Proposals for Non-Judicial Substantive Review*, C. Aylin Bilir proposed that CEQA could incorporate the Canadian methodology (repealed in 2019)¹⁸⁴ to determine whether a project requires independent environmental review.¹⁸⁵ Bilir proposed that “whether a project warranted such review could be established either by statutory definition . . . with listed projects like [the Canadian system] or by [a] mechanism[] [allowing] agencies or the public to request additional review.”¹⁸⁶ The Lead Agency would ask the CEQA agency for certification for projects that the Lead Agency deems most controversial and is likely to be subject to dispute. Bilir also explained that “CEQA approval[s] relying on findings of overriding consideration should [always] be subject to additional . . . review” because such a decision requires significant balancing between the project's environmental impact with its benefits, which involves much uncertainty and subjectivity.¹⁸⁷ He also believed that such independent review is pivotal in public works projects “in which the lead agency is directly charged with both creating and approving the EIR.”¹⁸⁸

After the public comment period, the CEQA agency hearing board “would be able to review both the scope and methods of analysis[] and

184. Canadian Environmental Assessment Act, S.C. 2012, c 19, s 52 (repealed 2019).

185. C. Aylin Bilir, *Stopping the Runaway Train of CEQA Litigation: Proposals for Non-Judicial Substantive Review*, 35 ENVIRONS ENVTL. L. & POL'Y J. 145, 163–67 (2012).

186. *Id.* at 168.

187. *Id.*

188. *Id.*

request that an agency's assessment fill gaps or clarify for assumptions."¹⁸⁹ This aims to have an EIR that considers public comment and incorporates such concerns in any revisions or certifications. The agency would also "verify[] technical data and forecasting" to ensure there are no "optimistic, politics-based inaccuracies" at final certification.¹⁹⁰ "If the CEQA [agency] did not have the expertise required for [the] . . . project," it would hire consultants for independent peer review.¹⁹¹ This process would provide ways to obtain substantive review of environmental analysis, presenting options of expert peer review that do not exist in the current CEQA process.

An independent review by a CEQA agency would increase outcome predictability if the certifying CEQA agency both adjudicated CEQA disputes and promulgated CEQA guidelines and rules. As a unified authority for CEQA legislation and interpretation, the opinion of such an agency would first have very high credibility and be unlikely to have major vulnerabilities. Also, given that the agency would have a staff of engineers, scientists, and planners, the environmental analysis reviewed, edited, and certified by the agency would likely be substantively accurate as well.

The CEQA agency would also take responsibility for ensuring that commitments to mitigation measures are followed through by the developer.¹⁹² While CEQA already requires this, through the establishment of a monitoring or reporting program for mitigation measures,¹⁹³ having a dedicated agency enforce the measures would streamline enforcement and follow-through. The CEQA agency may have a team of inspectors with technical backgrounds, just like other environmental agencies, such as the SCAQMD.¹⁹⁴ A developer not following through with mitigation measures would result in a notice of violation and fees, which would be enforced by the CEQA agency.

2. Legal Dispute Adjudications

The adjudication process for the CEQA agency would proceed similarly to hearing processes in environmental agencies, such as the SCAQMD.¹⁹⁵ A SCAQMD hearing proceeds in a very similar manner to a judicial proceeding

189. *Id.* at 169.

190. *Id.* at 168.

191. *Id.*

192. *Id.* at 164–65 (citing Canadian Environmental Assessment Act, S.C. 2012, c 19, s 52 (repealed 2019)).

193. CAL. PUB. RES. CODE § 21081.6 (West 2019).

194. *See* S. COAST TELEPHONE DIRECTORY, *supra* note 182.

195. *See generally* S. COAST RULES & PROCEDURES, *supra* note 181 (detailing SCAQMD's hearing processes).

with service of process, pleadings, motions, and briefs.¹⁹⁶ The petitioner in a SCAQMD hearing can be the SCAQMD itself, filing a petition to order abatement or for a revocation of a permit, but the CEQA reviewing board would allow a private right of action for interested parties who are opposed to agency decisions for environmental reasons.¹⁹⁷ In the CEQA agency proceeding, the respondents could be the Lead Agency and the developer. Note that the CEQA agency would adjudicate CEQA disputes for environmental documents that did not go through CEQA agency independent review and certification. It would make little sense for the CEQA agency to adjudicate on the merits of the document that it certified. Such precertified environmental documents would be subject to judicial review at the appellate level, with the court giving great deference to the CEQA agency.

A specialized hearing board would mean more certainty and less delay caused by CEQA disputes. A review board dedicated to CEQA adjudication would be able to adjudicate in a faster time period and would also be able to give more specific mandates and recommendations to bring a project into compliance. The SCAQMD, for example, is adequately equipped to adjudicate on permit appeals because it employs a large staff of sophisticated engineers, scientists, and policy analysts in its agency to advise the hearing board on air quality rules, regulations, and scientific methodology.¹⁹⁸ In addition, the SCAQMD hearing board is specialized in air quality matters, so it can adjudicate compliance issues much more effectively. Like so, the CEQA agency would employ engineers, scientists, and planners for this purpose. The hearing board members should be selected based on CEQA regulatory and scientific competency.

The specialized board would bring a substantial level of predictability, as opposed to the judicial system. In the judicial system, the judges are only able to rule based on an amorphous “substantial evidence” standard because judges are not specialists in scientific matters. Therefore, judges mostly rely on analyses by experts hired by both plaintiffs and defendants, which can be far from unbiased. Since an independent review board would be equipped with its own set of experts or third-party consultants, it would give an unbiased and more technically sophisticated opinion. In addition, the board could also create additional CEQA rules based on problems that arise as it adjudicates and enforces CEQA and responds to other environmental

196. *Id.* at 2-1 to 2-3, 5-1 to 5-3, 6-1.

197. *Id.* at 2-1, 12-1 to 12-2; *Hearing Board*, S. COAST AIR QUALITY MGMT. DIST., <http://www.aqmd.gov/nav/about/hearing-board> [<https://perma.cc/J8KG-MCR4>].

198. *See* S. COAST TELEPHONE DIRECTORY, *supra* note 182.

regulations, such as AB 32.

A dedicated CEQA agency should be able to avoid the extreme remedy of vacating entire CEQA documents and, instead, give suggestions and mandates to bring CEQA documents into compliance. One of the reasons CEQA litigation is an attractive vehicle for individuals and organizations to oppose development projects is its extreme remedy of invalidating CEQA documents for minor deficiencies. Judges can only invalidate EIRs instead of giving specific mandates because of their lack of expertise to fill in EIR gaps. A state or regional agency board would have the qualifications and resources to give specific mandates and recommendations to bring a project into compliance. Instead of undergoing the costly CEQA process from the beginning because of a flaw in one portion of an extensive EIR, the developer could follow suggestions given by the board and bring an EIR into compliance.

Unpredictability will also be diminished if there is a state-level agency because all the hearing board members will have similar protocols, standards, and training. This would be unlike the judicial system, in which trial court judges may have varying levels of CEQA expertise and may interpret the substantial evidence test very differently. That said, having regional agencies would bring similar benefits while allowing for more region-specific rules. For instance air quality management districts are separated by regions—the SCAQMD in Southern California and the Bay Area Air Quality Management District¹⁹⁹ in Northern California.

Appeals from the CEQA agency should follow the process of the Agricultural Labor Relations Board (“ALRB”).²⁰⁰ The Agricultural Labor Relations Act created the ALRB, which has adjudicative and enforcement powers to prevent unfair labor practices.²⁰¹ In terms of disputes, a determination of a charge of unfair labor practice timely filed with the ALRB is reviewed by the court of appeals and not subject to review by a writ of administrative mandamus to the superior court.²⁰² The trial court is circumvented in order to bring speedy resolution to labor disputes.

In fact California AB 900 already demonstrated the possibility of expedited judicial review of CEQA projects.²⁰³ AB 900 allows for expedited

199. *About the Air District*, BAY AREA AIR QUALITY MGMT. DISTRICT, <https://www.baaqmd.gov/about-the-air-district> [https://perma.cc/XQ88-EVZ3].

200. CAL. CODE REGS. tit. 8, §§ 20100–21200 (2019).

201. CAL. LAB. CODE §§ 1141–61 (West 2019).

202. *Agric. Labor Relations Bd. v. Tex-Cal Land Mgmt., Inc.*, 739 P.2d 140, 141–42 (Cal. 1987); *Tex-Cal Land Mgmt., Inc. v. Agric. Labor Relations Bd.*, 595 P.2d 579, 585–89 (Cal. 1979).

203. CAL. PUB. RES. CODE § 21185 (West 2019).

judicial review of certain “leadership projects” that exceed \$100 million in investment and do not result in any net emission of GHGs.²⁰⁴ The project must also create “high-wage, highly skilled jobs that pay prevailing wages and living wages and provide construction jobs and permanent jobs for Californians.”²⁰⁵ The court must issue a decision within 270 days, including both the trial level and the appellate level proceedings,²⁰⁶ and may appoint a special master²⁰⁷ to “investigat[e] technical and legal issues, as directed by the court.”²⁰⁸ However, the problem is that such expedited review is limited to a subset of developers with deep pockets. The specialized CEQA agency should also adopt a similar measure to ensure finality of the decision.

One of the reasons CEQA litigation is costly is because agency decisions get appealed to the trial court, not the court of appeals. Even if the defendant wins in the trial court, the case can always be appealed by the plaintiff, adding to the delay caused by the CEQA dispute. This would be possible or desirable because the CEQA agency would have higher deference due to its expertise. For EIRs certified by independent review by the CEQA agency board, disputes would be directly reviewed by the court of appeals.

B. NOT A NEW PROBLEM: CEQA AND ADVERSARIAL LEGALISM

A weakness with the proposed solution is that there are no available quantitative data on cost and benefits of having a dedicated agency handling CEQA disputes rather than the judicial system. Since such analysis is beyond the scope of this Note, this Note attempted to qualitatively describes the high cost of CEQA litigation in Part I. However, note that the problem of extraneous costs, delays, and uncertainty caused by leaving law enforcement primarily to judicial litigation is not new, but a regular part of the U.S. governance system. The reality of the high costs of such judicial enforcement is accepted by prominent legal scholars.

Robert A. Kagan uses the term “adversarial legalism” to describe the “policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation.”²⁰⁹ Kagan described adversarial legalism as “a markedly inefficient, complex, costly, punitive, and unpredictable method of

204. *Id.* § 21183(a), (c).

205. *Id.* § 21183(b)(1).

206. *Id.* § 21185.

207. Special masters are court-appointed officers who investigate technical and legal issues and perform other tasks the court may deem appropriate. CAL. CIV. PROC. CODE § 845 (West 2019).

208. *Id.*

209. ROBERT A. KAGAN, ADVERSARIAL LEGALISM 3 (2001).

governance and dispute resolution.”²¹⁰ CEQA is by its structure a prime example of adversarial legalism, as it is completely self-executing and enforced almost solely through litigation.

Kagan elaborated that “adversarial legalism typically is associated with and is embedded in decisionmaking institutions in which *authority is fragmented* and in which *hierarchical control is relatively weak*.”²¹¹ As described above, decisionmakers in CEQA are also fragmented, and there is no single authority that could definitively determine before litigation whether CEQA has been complied with.²¹² Kagan then elaborated that such “litigant-controlled, adversarial decisionmaking tends to be particularly complex, protracted, and costly.”²¹³ Also, “when potent adversarial advocacy is combined with fragmented, relatively nonhierarchical decisionmaking authority, legal norms are particularly malleable and complex, and legal decisions are particularly variable and unpredictable.”²¹⁴ Kagan stated that “[i]t is the combination of costliness and legal uncertainty that makes adversarial legalism especially fearsome and controversial.”²¹⁵

Kagan also described adversarial legalism in the context of environmental law, and his concerns parallel those made in this Note. Since environmental statutes like CEQA leave most of the enforcement to the courts, laws are indeterminate, and dispute outcomes are unpredictable.²¹⁶ And such unpredictability can be exacerbated by judges who value achieving justice in a case rather than consistency.²¹⁷ “Legal variability and malleability encourage” further litigation.²¹⁸ “[I]nterest[] [groups] that lose a policy battle in one agency”—for example, local city council for CEQA—“may try another” venue, such as the trial court.²¹⁹ If the trial court fails to side with the plaintiffs, they would try the appellate courts next.

Kagan also discussed the inevitable cost of such a system. This results in the use of the legal process to delay much needed projects and unjustly extort benefits.²²⁰ Kagan quoted the National Research Council Panel:

210. *Id.* at 4.

211. *Id.* at 9.

212. *See supra* Part II.

213. KAGAN, *supra* note 209, at 9.

214. *Id.*

215. *Id.*

216. *Cf. id.* at 219 (stating that the politically charged legislative process leads to indeterminacy and the “politically selected judiciary” leads to unpredictability).

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 212.

“Objectors do not necessarily have to win in the courts to win their point. If the courts provide a vehicle for substantial delay and that delay is costly to the proposers of the project, the threat of going to court becomes a powerful negotiating tool in the hands of the objectors.”²²¹ With an environmental regulation like CEQA, which relies so much on litigation, “even the *threat* of litigation . . . may be enough to” force development projects to concede to unjustified “‘environmental mitigation’ measures.”²²²

Kagan pointed to a case surrounding the construction of the Los Angeles Century Freeway, where the California Department of Transportation agreed to a plaintiff’s demands in a National Environmental Policy Act (“NEPA”)²²³ lawsuit “to construct costly mass transit facilities and to build a large housing project,” a decision made ad hoc in private negotiations.²²⁴ Decisions to implement such costly mitigation measures should be made by experts with protracted cost-benefit analyses that consider science, economics, and policy. Such decisions should not be made from demands of litigation plaintiffs. Otherwise, costs of projects beneficial to society would irrationally balloon out of proportion. The Century Freeway’s costs reached over \$100 million dollars per mile—“more per mile than any other road in American history” because of the delays, lawsuits, and unjustified extortion by plaintiffs suing over environmental protection.²²⁵ Leaving environmental enforcement to the courts creates an odd system where mitigation measures are not created by sound policy but are hastily put together under threat of litigation. As Kagan pointed out, “[A]dversarial legalism served primarily as a mechanism through which particular interests could extort public funds, while delaying widely demanded public works and injecting less, not more, rationality into the search for a sensible balance between economic development and environmental protection.”²²⁶

Despite such downturns, completely changing CEQA to an environmental regulation solely enforced by a singular, authoritative entity would be infeasible given the political reality of the United States, which disfavors such a concentration of power.²²⁷ This Note, therefore, proposes adding an agency that could bring a little more predictability into the

221. *Id.* at 224–25 (citation omitted).

222. *Id.* at 225.

223. NEPA is similar to CEQA except at the federal level. *What is the National Environmental Policy Act?*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/nepa/what-national-environmental-policy-act> [<https://perma.cc/38AY-W8D3>].

224. KAGAN, *supra* note 209, at 225.

225. *Id.* at 211, 281 (citation omitted).

226. *Id.* at 212.

227. *See id.* at 14–16.

equation, by replacing dispute resolution at the trial court level with an agency with more expertise. Challengers are still free to challenge the CEQA agency's decision but would only get a shot at the judicial system once, at the appellate level. Since an agency with heightened experience would approve and certify CEQA documents, the courts could also give more deference to the agency decision. While adversarial legalism is not completely taken out of the picture, this Note intends to provide a solution that aims to create environmental dispute resolution based on sound policy and science, rather than solely through a vague "substantial evidence" standard.

CONCLUSION

CEQA is a much-needed law for environmental protection, but it has various characteristics that allow it to be abused for exclusionary or nonenvironmental purposes. Within the current CEQA system, it is hard for developers to know whether their EIRs are adequate because local agency certification could always be invalidated in court. CEQA is an attractive vehicle for individuals and organizations to attack developments for exclusionary purposes because CEQA litigation can have unpredictable outcomes caused by the lack of uniform standards and the disconnect between the legislation, enforcement, and adjudication of CEQA.

In CEQA's current state, CEQA is legislated by the Governor's Office of Planning and Research, applied and enforced independently by numerous local governments, and adjudicated by a general judicial system without CEQA expertise. This disconnect among enforcement, legislation, and adjudication in such a complex regulatory scheme with technical documents that could be more than ten thousand pages leads to unpredictable outcomes during disputes, because it is hard for people to know if they have complied with CEQA. There is no entity that gives satisfactory assurance to developers that they have complied with CEQA and will not be subject to lawsuits to delay or halt their projects. This is especially a problem given the housing crisis in California.

To remedy such a concern, a specialized, state-level CEQA agency that legislates, enforces, and adjudicates CEQA is needed. Such an agency could create uniform, predictable standards for various technical areas of CEQA if it could employ a team of scientists, engineers, and planners qualified to do so. The agency could also respond to any issues raised during adjudication by making reforms to CEQA guidelines with its legislative power. Unlike the judicial system that may not adequately address nuanced policy or enforcement issues, any legislation by the CEQA agency would take into

consideration practical consequences at the project level. Since the CEQA agency would be the expert and the legislator, the agency's adjudication would have great authority and credibility. Appellate level courts would give great deference to the CEQA agency because of its expertise, giving developers much needed finality. CEQA should be used to protect the environment, not to exclude and preserve the status quo.

