Reforming "The Blob": Why California's Latest Approach to Amending CEQA Is a Bad Idea

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INTRODUCTION[1]

The story of Moe's Stop, a small gas station in San Jose, demonstrates a major problem with the California Environmental Quality Act ("CEQA").[2] The owner of Moe's wanted to add three new pumps to his existing station—an action without any obvious environmental effects—but the owner of a rival gas station across the street used CEQA to convince a judge to order an environmental review of the project, which halted construction for two years.[3] After the completion of the environmental review, Moe added the new pumps, but the rival owner still went back to court to argue that the environmental review had been flawed.[4] The mayor of San Jose, an environmental lawyer, stated that the lawsuit was "ridiculous" and described it as "obviously anticompetitive" in its intent.[5] The cost to the owner of Moe's of the litigation and associated delays was over $1 million.[6] This story of CEQA abuse is not at all unique;[7] it demonstrates just one facet of what legislators and business advocates claim are the myriad negative economic effects of CEQA.[8]

1. Governor Jerry Brown has reportedly called CEQA "the blob." Dan Walters, *An Overview of CEQA Looms Large*, SACRAMENTO BEE, Dec. 3, 2012, http://www.sacbee.com/2012/12/03/5025996/dan-walters-an-overhaul-of-ceqa.html.

2. Scott Herhold, *A San Jose Gas Station Corner Is Ground Zero in Environmental Fight*, SILICON VALLEY MERCURY NEWS (Oct. 29, 2012, 2:21 PM), http://www.mercurynews.com/scott-herhold/ci_21882452/herhold-san-jose-gas-station-corner-is-ground.

3. *Id.*

4. *Id.*

5. *Id.*

6. *CEQA Misuse Case Study: Moe's Stop, San Jose*, CEQA WORKING GRP., http://ceqaworkinggroup.com/moes (last visited July 10, 2014).

7. Editorial, *Alter CEQA but Don't Weaken It*, L.A. TIMES (May 20, 2013), http://articles.latimes.com/2013/may/20/opinion/la-ed-ceqa-reform-california-environmental-quality-20130520.

8. Shiloh Ballard, *Misuse of CEQA Law Calls for Revamp*, SILICON VALLEY BUS. J. (Oct.12, 2012, 3:00 AM), http://www.bizjournals.com/sanjose/print-edition/2012/10/12/misuse-of-ceqa-law-calls-for-revamp.html?page=all; Ian Lovett, *Critics Say California Law Hurts Effort to Add Jobs*, N.Y. TIMES (Sep. 4, 2012), http://www.nytimes.com/2012/09/05/us/to-add-jobs-many-in-california-look-to-alter-green-law.html.

If California were an independent country, its economy would be the eighth largest in the world,[9] which means that the drag CEQA exerts on California's economy has a proportionally large impact on the United States economy. Because California has the toughest environmental laws in the country and CEQA is its "most powerful environmental protection,"[10] there is a long history of proposed amendments to make the statute more business friendly.[11] In fact, the 2012 California Economic Summit, organized by various advocates focused on good governance, identified amending CEQA as one of the seven most important steps to improve California's economy and environmental protection.[12]

In the past three years, the California Legislature has amended CEQA multiple times in an attempt to make judicial review under CEQA more efficient. In 2011, the legislature passed, and Governor Brown signed, two bills, SB 292 ("The Farmers Field Bill") and AB 900, "The Jobs and Economic Improvement Through Environmental Leadership Act" ("The Jobs Bill").[13] The rationale for the bills was to create jobs and to increase the efficiency of the environmental review process for the applicable projects.[14] The Farmers Field Bill specifically expedited the CEQA environmental review process for Farmers Field, a $1.2 billion dollar football stadium and convention center that the Anschutz Entertainment Groups plans to build in downtown Los Angeles.[15] The Jobs Bill expedites the environmental review process for "Environmental Leadership Development Projects" that the governor determines meet certain requirements.[16] In 2013, SB 743 again modified the judicial review process by, among other things, providing that the Judicial Council must adopt procedural rules to ensure that judicial

9. CTR. FOR CONTINUING STUDY OF THE CAL. ECON., CALIFORNIA POISED TO MOVE UP IN WORLD ECONOMY RANKINGS IN 2013 (2013), *available at* http://www.ccsce.com/PDF/Numbers-July-2013-CA-Economy-Rankings-2012.pdf.

10. Lovett, *supra* note 8.

11. *See infra* pp. 8–9.

12. *Tracking Progress of the Signature Initiatives*, CAL. ECON. SUMMIT, http://www.caeconomy.org/progress (last visited July 10, 2014).

13. Employment: Sexual Harassment, 2011 Cal. Legis. Serv. Ch. 88 (S.B. 292) (West); Jobs and Economic Improvement Through Environmental Leadership Act, 2011 Cal. Legis. Serv. Ch. 6.5 (A.B. 900) (West); *see also,* Arash Markazi, *Jerry Brown Signs Bill to Boost LA Venue*, ESPN (Sept. 27, 2011, 9:52 PM), http://espn.go.com/los-angeles/nfl/story/_/id/7027090/governor-signs-bill-expedite-la-nfl-stadium.

14. Markazi, *supra* note 13.

15. *See infra* Part I.B.2.

16. *See infra* Part I.B.3.

review for challenges to Environmental Leadership Development Projects takes no longer than 270 days.[17] The statute also applies these new rules to challenges to the new Sacramento Kings Arena.[18]

This Note argues that although CEQA does have inefficiency problems, bills creating procedural constraints are not an effective way to address them.[19] Although the laws do reduce the length of judicial review,[20] they add other sources of inefficiency, reduce the quality of judicial review, and fail to address vague standards in CEQA that increase the difficulty of EIR preparation and judicial review.[21] California is contemplating further changes to CEQA in 2014.[22] But although several different reform proposals have been made, more research is necessary before deciding on the best way to amend CEQA.[23] Part I of this Note discusses the relevant provisions of CEQA and recent attempts to change the procedure for judicial review. Part II analyzes the efficiency problems with CEQA and argues that procedural changes are a poor solution to these problems. Part III presents reform proposals and argues that before reform is attempted, more research on CEQA must be done.

I. WHAT CEQA, THE FARMERS FIELD BILL, AND THE JOBS BILL DO

A. CEQA

1. CEQA: Operation and Boundaries

The California Environmental Quality Act ("CEQA"), passed in 1970, mandates that California agencies evaluate the environmental impacts of their activities, including "proposals for physical development . . . [and] many governmental decisions which do not immediately result in physical development."[24] It further directs agencies "to avoid or mitigate these impacts, if feasible."[25] CEQA also applies to government approvals of private

17. *See infra* Part I.B.4.
18. S.B. 743, 2013-2014 Reg. Sess. (Cal. 2013).
19. *See infra* Part II.
20. *See infra* Part I.B.5.
21. *See infra* Part II.A.
22. *See infra* Part III.A.
23. *See infra* Part III.B.
24. CAL. PUB. RES. CODE § 21000 (West 2014).
25. CAL. PUB. RES. CODE § 21000 (West 2014); JOHN PAUL HANNA & DAVID VAN ATTA, CALIFORNIA COMMON INTEREST DEVELOPMENTS: LAW & PRACTICE § 12:182 (2012 ed.).

projects.[26] Agencies must understand the environmental effects of their potential actions, consider all the relevant information before making a decision, give the public the chance to comment on environmental issues, and avoid harm to the environment when possible.[27]

"[T]he preparation of an [Environmental Impact Report ("EIR")] is the key to environmental protection under CEQA."[28] EIRs allow agencies to identify the significant environmental effects of proposed projects, alternatives to the project, and mitigation measures to avoid or lessen the significant environmental effects.[29] The process of completing an EIR informs citizens about the rationale for decisions that have a significant effect on the environment "and thereby promotes accountability and informed self-government."[30]

An EIR must include a description of the project,[31] the environmental setting,[32] "inconsistencies between the proposed project and applicable . . . plans,"[33] and consideration and discussion of the environmental impacts.[34] Every substantive and procedural part of an EIR can be challenged in court; the standard of review is abuse of discretion, which is established when "the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence."[35]

An EIR is not required for every project. For CEQA to apply, a project must be discretionary rather than ministerial.[36] There are also statutory exemptions for certain projects,[37] a categorical exemption for types of projects that do not impact the

26. Friends of Mammoth v. Bd. of Supervisors, 502 P.2d 1049 (Cal. 1972); HANNA & VAN ATTA, *supra* note 25, § 12:182.

27. *Id.*

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

[27] CAL. PUB. RES. CODE § 21002 (West 2014).

30. Ballona Wetlands Land Trust v. City of Los Angeles, 134 Cal. Rptr. 3d 194, 202 (Cal. Ct. App. 2011).

31. CAL. CODE REGS. tit. 14, § 15124 (2014).

32. *Id.* § 15125.

33. *Id.* § 15125(d).

34. *Id.* § 15126 (including significant environmental effects, mitigation measures, and alternatives to the proposed project).

35. CAL. PUB. RES. CODE § 21168.5 (West 2014).

36. *Id.* § 21080(b)(1); CAL. CODE REGS. tit. 14, § 15369 (2014).

37. CAL. PUB. RES. CODE § 21080(b) (West 2014); CAL. CODE REGS. tit. 14, § 15378 (2014).

environment,[38] an exemption for projects that clearly will not significantly impact the environment,[39] and an exemption for agricultural housing, affordable housing, and residential infill projects.[40]

CEQA "provides a three-tiered structure to guide agencies."[41] If a project is exempt from CEQA, then no environmental review is required.[42] If it is unclear whether there will be a significant environmental effect, the lead agency must conduct a study to determine if there will be a significant effect.[43] If the agency determines that the project will have no significant effect, the agency issues a negative declaration.[44] Conversely, if the agency determines that the project will have a significant effect on the environment, the agency must prepare an EIR.[45]

The first step in the EIR process is to prepare a draft, which is completed after consulting with the project applicant, the lead agency, and other concerned agencies.[46] Next, members of the public can express their opinions about the EIR by speaking at public hearings or submitting written comments.[47] The final EIR incorporates changes resulting from the review, a list of individuals and organizations that commented on the draft, the response of the lead agency to points raised in the review, and new information added by the lead agency.[48]

If the completed EIR indicates that a project would have at least one significant environmental effect, the project may not proceed unless the agency determines that either 1) the project incorporates mitigation measures to minimize the environmental

38. CAL. PUB. RES. CODE § 21084 (West 2014); CAL. CODE REGS. tit. 14, §§ 15300–33 (2014).

39. CAL. CODE REGS. tit. 14, § 15061 (2014).

40. *Id.* §§ 15193–96.

41. HANNA & VAN ATTA, *supra* note 25, § 12:184.

42. *Id.*

43. CAL. PUB. RES. CODE § 21082.2 (West 2014). The lead agency is "the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment." The lead agency also determines whether an EIR is required and prepares the EIR. *Id.*, § 21165; HANNA & VAN ATTA, *supra* note 25, § 12:187.

44. CAL. PUB. RES. CODE § 21064 (West 2014); *Id.* § 21082.2.

45. *Id.* § 21082.2.

46. *See id* §§ 21091–92; CAL. CODE REGS. tit. 14, §§ 15087, 15105 (2012); HANNA & VAN ATTA, *supra* note 25, § 12:215.

47. HANNA & VAN ATTA, *supra* note 25, § 12:215.

48. CAL. CODE REGS. tit. 14, §§ 15132, 15362(b); HANNA & VAN ATTA, *supra* note 25, § 12:218.

effect or 2) specific factors make mitigation infeasible and the benefits of the project outweigh the environmental harm.[49] To determine if mitigation is infeasible, the agency can consider "economic, legal, social, technological, or other" factors, including whether the project creates jobs for skilled workers.[50]

The agency decides whether and how to approve or execute the project after evaluating the EIR and the required findings.[51] The agency determines whether to approve a project by balancing its benefits against its environmental risks.[52] If the agency approves a project that includes significant environmental effects that are not mitigated, it must prepare a statement of overriding considerations explaining its decision.[53]

After an agency approves a project, it files a notice of determination, which marks the beginning of a 30-day period within which challenges to the project's approval must be filed in court.[54] Initial challenges are filed in a California state trial court, typically by private citizens alleging that the agency has not fully complied with CEQA.[55] There is a presumption in favor of an agency's decision to certify an EIR, and the challenger bears the burden of proving that the EIR is defective.[56] The standard of review is abuse of discretion,[57] which is met only if an agency does not follow the required procedure or if its decision to approve the project is not supported by substantial evidence.[58]

Different standards govern judicial review of facts and legal conclusions.[59] Courts review de novo whether an agency has followed all the CEQA procedural requirements[60] but are deferential to an agency's substantive factual conclusions.[61] A court cannot set aside the approval of an EIR because rejecting the EIR

49. CAL. PUB. RES. CODE § 21081 (West 2014).

50. *Id.*; *see also* HANNA & VAN ATTA, *supra* note 25, § 12:220.

51. CAL. CODE REGS. tit. 14, § 15092(a) (2014); CAL. CODE REGS. tit. 14, § 15093 (2014); HANNA & VAN ATTA, *supra* note 25, § 12:219.

52. CAL. CODE REGS. tit. 14, § 15093 (2014).

53. *Id.*; HANNA & VAN ATTA, *supra* note 25, § 12:221.

54. CAL. CODE REGS. tit. 14, § 15094(f) (2014); HANNA & VAN ATTA, *supra* note 25, § 12:223.

55. HANNA & VAN ATTA, *supra* note 25, §§ 12:215, 12:230.

56. Santa Monica Baykeeper v. City of Malibu, 124 Cal. Rptr. 3d 382, 389 (Cal. Ct. App. 2011).

57. *Id.*

58. *Id.*

59. *Id.* at 390.

60. *Id.*

61. *Id.*

would have been as reasonable or more reasonable.[62] A court has discretion in fashioning remedies if it finds that an agency did not comply with CEQA; it can void any findings or decisions, suspend the project until the EIR is brought into compliance, or take specific actions to bring the defective parts of the EIR into compliance.[63]

2. The History of CEQA Reform

There is a long history of attempts—both successful and unsuccessful—to amend CEQA. In 1976, the CEQA provision requiring that the agency select the best environmental alternative to a project was amended to allow the selection of any alternative project or mitigation tactic.[64] The 1983 recession spurred minor reforms,[65] and later in the same decade, CEQA was amended to require lead agencies to enforce compliance with specific mitigation measures and to increase the length and efficacy of public EIR review.[66] The mid-1990s saw more modest reforms.[67] In 2001, the legislature passed an amendment affecting transportation projects and the most significant projects;[68] and in 2008, the legislature passed a law with the purpose of integrating regional, land use, and transportation planning with CEQA.[69]

The California legislature has altered the CEQA review process specifically for a Los Angeles football stadium once before doing so in the Farmers Field Bill. In 2009, Majestic Realty successfully lobbied for a bill that would exempt the stadium it was planning to build from CEQA analysis and would require the stadium to instead comply with environmental regulations imposed by the neighborhood of Los Angeles in which the stadium was to be

62. *Id.*

63. *See* CAL. PUB. RES. CODE § 21168.9(a) (West 2014); *see also* HANNA & VAN ATTA, *supra* note 25, § 12:235.

64. *See* ELISA BARBOUR & MICHAEL TEITZ, PUBLIC POLICY INSTITUTE OF CALIFORNIA, CEQA REFORM: ISSUES & OPTIONS 7 (2005), *available at* http://www.ppic.org/content/pubs/op/OP_405EBOP.pdf.

65. *See id.*

66. *See id.* at 8.

67. *See id.* at 9.

68. Ronald E. Bass & Albert I. Herson, 1-20 CALIFORNIA ENVIRONMENTAL LAW & LAND USE PRACTICE § 20.03 (2012).

69. *See id.*

built.[70] This bill was so unpopular that legislators were unable to secure similar exemptions for the Farmers Field Stadium project.[71]

B. The Farmers Field Bill, the Jobs Bill, and SB 743

1. Purpose of the Bills

Both the Farmers Field Bill and the Jobs Bill were touted for their job-creating benefits and signed on September 27, 2011.[72] Alex Padilla, the senator who authored the Farmers Field Bill noted in his remarks before the California State Assembly Committee on Natural Resources that the stadium would create 10,000 construction jobs and 10,000 permanent jobs after it was completed.[73] The findings of fact included in the bill noted the high employment rates in California, Los Angeles County, and the City of Los Angeles and contained an estimate higher than Senator Padilla's of the number of jobs that would be created during construction and after completion.[74] These priorities are also reflected in the findings of fact preceding the Jobs Bill, which include reports on unemployment and potential for job creation.[75]

70. *See* Jeremy H. Danney, Comment, *Sacking CEQA: How NFL Stadium Developers May Have Tackled the California Environmental Quality Act,* 19 PENN ST. ENVTL. L. REV. 131, 144–145 (2011). The stadium was embroiled in litigation for two years but is "shovel-ready" as of January 2013. Tim Rutten, *Another Season of NFL Speculation,* L.A. DAILY NEWS (Jan. 6, 2013), http://www.dailynews.com/opinions/ci_22318265/tim-rutten-another-season-nfl-speculation. As of October 2013, construction has not yet started on this stadium, and it is not clear whether the developer will go through with it. *See* Jason Henry, *Industry Plans to Start Grading for Potential NFL Stadium Site,* PASADENA STAR NEWS (Oct. 19, 2013, 4:35 PM), http://www.pasadenastarnews.com/sports/20131019/industry-plans-to-start-grading-for-potential-nfl-stadium-site.

71. *See* Arash Markazi, *Farmers Field Plan Can Be Expedited,* ESPN (Sep. 7, 2011, 8:46 PM), http://espn.go.com/los-angeles/nfl/story/_/id/6941768/assembly-votes-expedite-farmers-field-plan.

72. *See* Jeffrey S. Haber, *Governor Signs CEQA Reform Into Law,* MONDAQ BUS. BRIEFING (Oct. 5, 2011), http://www.mondaq.com/unitedstates/x/147702/Environmental+Law/Governor+Signs+CEQA+Reform+Into+Law. On the same day, the governor declined to sign another CEQA amendment, SB 226, which would have relaxed CEQA review for certain environmentally friendly projects. However, he later signed it. *See* Paula Kirin, *Governor Signs Senate Bill 226: Legislation Will Streamline CEQA Review for Certain Urban Infill and Solar Energy Projects,* MONDAQ BUS. BRIEFING (Oct. 5, 2011), http://www.mondaq.com/unitedstates/x/148656/Environmental+Law/Governor+Signs+Senate+Bill+226+Legislation+Will+Streamline+CEQA+Review+for+Certain+Urban+Infill+and+Solar+Energy+Projects.

73. Markazi, *supra* note 71.

74. Convention Center Modernization & Farmers Field Project, 2011 Cal. Legis. Serv. Ch. 353 (S.B. 292) (2011).

75. CAL. PUB. RES. CODE § 21178 (West 2014). For example "[t]he overall unemployment rate in California is 12 percent, and in certain regions of the state that rate exceeds 13 percent." *Id.* And "these projects further will generate thousands of full-time jobs during

California Senate Bill 743 was signed on September 27, 2013[76] after the California Senate shelved a more ambitious environmental bill.[77] The findings of fact included in SB 743 reveal that its drafters were similarly focused on California's high unemployment rate compared to the rest of the United States.[78] The findings of fact also note that the new Sacramento Kings arena will generate 4,000 jobs during construction and after its completion, not including the jobs that will be created as a result of new development surrounding the arena.[79]

The focus on job creation in all three bills makes clear that the government's decision to pass the bills was largely motivated by the economic benefits, in addition to the environmental benefits, of expediting the CEQA review process.

2. What The Farmers Field Bill Does

The Farmers Field Bill contains environmental and procedural provisions.[80] The first type imposes environmental requirements on the operation of the stadium and convention center.[81] The environmental requirements focus exclusively on limiting the number of automobile trips to the stadium to minimize traffic and air pollution.[82] Environmental advocates disagree about the efficacy of these protections.[83]

construction and thousands of additional permanent jobs once they are constructed and operating." *Id.*

76. Christopher Arns, *Governor Signs Downtown Arena Bill,* SACRAMENTO BUS. J. (Sept. 27, 2013, 1:58 PM), http://www.bizjournals.com/sacramento/news/2013/09/27/brown-signs-downtown-arena-bill.html.

77. Tony Bizjak, *Steinberg Shelves Main Environmental Measure to Aid Arena Effort,* SACRAMENTO BEE (Sept. 11, 2013, 11:58 AM), http://www.sacbee.com/2013/09/11/5727262/california-judicial-council-opposes.html

78. S.B. 743, 2013-2014 Reg. Sess. (Cal. 2013).

79. *Id.*

80. CAL. PUB. RES. CODE § 21168.6.5 (West 2014).

81. *Id.* § 21168.6.5(h)–(i).

82. *Id.* § 21168.6.5(h).

83. The Natural Resource Defense Council and California League of Conservation Voters ultimately backed the bill after initial criticism. *See* Markazi, *supra* note 71. Others argue that AEG's environmental claims will be difficult or impossible to fulfill. David Futch, *Farmers Field's Fanciful Green Promise,* L.A. WEEKLY, http://www.laweekly.com/2011-09-15/news/farmer-s-field-s-fanciful-green-promise/ (Sept. 15, 2011). Additionally, soon after the bill was signed, area residents and a non-profit created to protect the environment and health of area residents named the "Play Fair at Farmers Field Coalition" filed a lawsuit. David Zahniser, *Lawsuit Planned Against Bill that Helps Los Angeles' NFL Stadium,* L.A. TIMES (Aug. 30, 2012, 7:06 AM), http://latimesblogs.latimes.com/lanow/2012/08/lawsuit-planned-against-the-states-nfl-stadium-bill.html. They argued that the Farmers Field Bill violated the

The second type of provision in the bill is designed to expedite any challenges to the EIR prepared for the project[84] by requiring that challenges be filed in the courts of appeal rather than the trial court[85] and by shortening the timeline for judicial review of the challenge.[86] These measures effectively eliminate mandatory appellate review of the EIR because the California Supreme Court, which is the only court that has appellate jurisdiction under the Farmers Field Bill, has the discretion to choose what cases it hears.[87] As a result, the timeline for the mandatory review of the project was reduced to 175 days from 210 days,[88] with the review taking longer if the California Supreme Court decides to hear the case.

3. What The Jobs Bill Does

The Jobs Bill contains reforms similar to those in the Farmers Field Bill, although it covers a broader array of projects.[89] It permits the governor to certify projects for a streamlined environmental review if they meet certain conditions.[90] For a project to qualify, it must meet several economic and environmental goals. On the economic side, the project must result in a minimum of $100 million invested in California by the

California Constitution's requirement that trial courts have original jurisdiction and its prohibition on special statutes. Complaint at 2, Play Fair at Farmers Field Coalition v. California, No. BC491200 (Cal. Super. Ct. Aug. 3, 2012). One of the attorneys for the Coalition said that the law negatively affected the environment and neighborhood of the area around the stadium and threatened to undermine California's environmental laws. Zahniser, *supra*. In response, AEG's spokesman said that the law was supposed to protect the project from those who oppose the project for economic reasons and argued that the law would create jobs and increase public participation in environmental review. *Id.* The lawsuit was eventually settled with AEG granting significant concessions to the plaintiffs. *Play Fair at Farmer's Field Coalition Settles Lawsuit Challenging Proposed Downtown Stadium*, PLAY FAIR FARMERS FIELD, http://playfairfarmersfield.wordpress.com/2012/11/01/187/ (Nov. 1, 2012).

84. CAL. PUB. RES. CODE § 21168.6.5(c)–(f) (West 2014).

85. *Id.* § 21168.6.5(d).

86. *Id.* § 21168.6.5(c), (e)–(f).

87. CAL. R. CT. § 8.500 (2013).

88. CAL. PUB. RES. CODE § 21168.6.5(c), (e)–(f) (West 2014). This does not include the time for petitioning for review by the California Supreme Court. *Id.* The bill also makes it harder for courts to extend the timeline for scheduling briefings and hearings. Under CEQA, the standard is "good cause" for granting an extension to the briefing schedule and the requirement to have a hearing within 30 days is "to the extent feasible." § 21168. Under the Farmers Field Bill the standard for both is "extraordinary good cause." *Id.* § 21168.6.5(d)(7).

89. Jobs and Economic Improvement Through Environmental Leadership Act, 2011 Cal. Legis. Serv. Ch. 6.5 (A.B 900).

90. *Id.*

completion of the construction and create high-wage, high-skill jobs, both during construction and after completion.[91] On the environmental side, the project must not result in a net increase in greenhouse gas emissions, and it must implement the required mitigation measures.[92] Finally, the applicant must pay the costs of the court in hearing and deciding the case and the costs of preparing the administrative record.[93]

If these conditions are met, any action challenging approval of the project must be filed in the Court of Appeals that has geographic jurisdiction, and the court must decide the challenge within 175 days.[94]

4. What Senate Bill 743 Does

SB 743 contains four broad changes. The first change eases the CEQA review process for certain projects built on infill sites in transit priority areas by providing that the aesthetic and parking impacts of these projects will not be considered significant impacts on the environment.[95] Second, SB 743 requires the Office of Planning and Research to amend the guidelines establishing criteria for determining the significance of transportation impacts in transit priority areas to "promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses."[96]

More significantly, SB 743 amends the expedited judicial review process contained in the Jobs Bill.[97] Instead of the 175 day timeline contained in the Jobs Bill, SB 743 requires that by July 1, 2014, the Judicial Council adopt "a rule of court to establish procedures applicable to actions or proceedings brought to attack, review, set aside, void, or annul the certification of the environmental impact report" for any leadership development projects as defined in the Jobs Bill and the SB 743.[98] The entire challenge, including appeals, must be resolved within 270 days after the record is certified.[99] This provision responded to a decision by a California Superior Court

91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. S.B. 743, 2013-2014 Reg. Sess. (Cal. 2013).
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*

judge declaring that the expedited review prohibitions in the Jobs Bill violated the California Constitution.[100]

Finally, SB 743 prescribes the process and timeline for the environmental review of the new Sacramento Kings arena, notably requiring that the judicial review of any challenges to the certification of the EIR be conducted according to the rule the Judicial Council must create by July 1, 2014.[101]

5. What the Judicial Council's Rules Do

The Judicial Council has proposed new rules and rule amendments to comply with the mandate contained in SB 743.[102] Because SB 743 imposed only a broad requirement that CEQA proceedings in the trial court and appellate court need to be resolved in 270 days,[103] the Judicial Council was responsible for determining how that time should be allocated among specific stages of the proceedings.[104] As noted above, SB 743 provide that the new rules will apply to challenges to both Environmental Leadership Development Projects and to the Kings arena; however, the Judicial Council notes that SB 743 provides that the new procedures will override existing law for challenges to the Kings arena, but not for challenges to Environmental Leadership Development Projects, meaning that the timelines will be slightly different.[105]

The Judicial Council has also identified several problems with the way the new expedited rules will interact with other California Rules of Court, provisions of the California Code of Civil Procedure, and provisions of CEQA. For example, under SB 743, the certification of the record triggers the start of the 270-day time

100. Garrett Colli, *Last Minute CEQA Bill Brings Significant Changes for Major Infrastructure Projects and Projects within Transit Priority Areas*, CAL. LAND USE BLOG (Sept. 24, 2013), http://landuselaw.jmbm.com/2013/09/last-minute-ceqa-bill-brings-significant-changes-for-major-infrastructure-projects-and-projects-with.html; *see also* JUDICIAL COUNCIL OF CAL., ADMIN. OFFICE OF THE COURTS, CEQA ACTIONS: RULES TO IMPLEMENT SENATE BILL 743: INVITATION TO COMMENT, *available at* http://www.courts.ca.gov/documents/W14-02.pdf [hereinafter RULES TO IMPLEMENT SENATE BILL 743]; Bob Egelko, *Judge Rejects Change to Environmental Law*, S.F.CHRON. (Apr. 1, 2013, 8:34 PM), http://www.sfgate.com/science/article/Judge-rejects-change-to-environmental-law-4401529.php (Judge Frank Roesch declaring the Jobs Bill's expedited review process to be unconstitutional).

101. S.B. 743, 2013-2014 Reg. Sess. (Cal. 2013).

102. RULES TO IMPLEMENT SENATE BILL 743, *supra* note 100.

103. S.B. 743, 2013-2014 Reg. Sess. (Cal. 2013).

104. RULES TO IMPLEMENT SENATE BILL 743, *supra* note 100.

105. *Id.* at 2 n.2.

limit.[106] But under other rules governing CEQA challenges, a challenge can be started as many as thirty days after the Notice of Determination has been filed.[107] This means that twenty-five days could elapse before a court can begin its review of the case (because the record must be certified within five days of a notice of determination being filed).[108] The Judicial Council addresses this issue by incentivizing parties to file their action more quickly by giving extra briefing time to parties who file their petition within five days of the certification of the record.[109]

A second problem arises in challenges to Environmental Leadership Development Projects because of the comparatively generous amount of time CEQA allows for service of the petition on public agencies and real parties in interest.[110] CEQA provides that a party has ten business days to serve the public agency and 30 days to serve any real party in interest.[111] Because the Judicial Council can only override these rules for the Sacramento arena cases, they propose incentivizing faster service by reducing the time for filing the petitioner's briefs by one day for every two days in which service is not completed (with a grace period of two days after the petition is filed).[112]

The Judicial Council has allocated between 140 and 150 days to the trial court proceedings challenging the EIRs for Environmental Leadership Development Projects.[113] From the time the petition is served, the respondent has ten days to file a responsive pleading and the petitioner has ten days to respond.[114] A case management conference must be held ten days after that, and the petitioner's brief is due twenty days after the conference, or thirty-five days after if the petition was filed within ten days after the Notice of Determination.[115] The respondent has twenty-five days to respond to the petitioner's brief, and the petitioner then has ten days to respond.[116] The hearing must occur within twenty days after the

106. *Id.* at 2.
107. *Id.* at 3.
108. *Id.*
109. *Id.* at 4.
110. *Id.*
111. *Id.*
112. *Id.* at 7.
113. *Id.* at 4.
114. *Id.* at 5.
115. *Id.*
116. *Id.*

final brief, and the judgment must be issued thirty days after the hearing.[117]

The Judicial Council then gives five days from the notice of the entry of judgment for filing post-judgment motions (except for some that receive fifteen days because of a statutory mandate) and five simultaneous days for filing a notice of appeal.[118] If a motion for a new trial or to vacate a judgment is denied, the parties get a five-day extension for filing a notice of appeal.[119]

This leaves 110 days for the procedures in the Court of Appeal. The appellant files his opening brief twenty-five days after the notice of appeal is served and filed, the respondent files his brief twenty-five days after that time, and the appellant's reply brief is due fifteen days later.[120] Oral argument must be conducted forty-five days after the reply brief is filed.[121] That entire process takes 270 days, although the rules do not account for the time it will take the Court of Appeal to issue a decision nor do they account for potential review in the California Supreme Court.[122] During the process, the parties can stipulate to an extension of time, thus waiving the 270-day requirement, and the court can grant extensions for good cause.[123]

The compressed and rigid timeline stands in stark contrast to the standard procedures for challenging EIRs. The only hard deadline in those cases is that petitions must be filed within thirty days after the Notice of Approval or Determination is filed.[124] Otherwise, CEQA simply requires that challenges to EIRs get priority over other civil actions so that they will be resolved quickly.[125] As for the appeals process, the California Rules of Court allow a party at least sixty days after the termination of proceedings in the trial court to file a notice of appeal[126] and at least ninety days for the briefing.[127]

117. *Id.* at 6.
118. *Id.*
119. *Id.* at 7.
120. *Id.* at 8.
121. *Id.* at 9.
122. *Id.*
123. *Id.* at 8.
124. CAL. PUB. RES. CODE § 21167 (West 2014).
125. *Id.* The individual superior courts in California can set their own timelines for CEQA challenges if they wish. *See, e.g.*, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, CIVIL DIVISION RULES, RULE 3.232: CEQA ACTIONS, *available at* http://www.lasuperiorcourt.org/courtrules/CurrentCourtRulesPDF/Chap3.pdf#page=1.
126. CAL. R. CT. 8.104. (2014).
127. CAL. R. CT. 212. (2014).

CEQA simply requires that the court regulate the briefing schedule so that the oral argument takes place within a year after the appeal is filed, as long as it is feasible.[128]

II. WHY THE FARMERS FIELD BILL, THE JOBS BILL, AND SB 743 ARE NOT A SOLUTION TO CEQA'S PROBLEMS

Although the Farmers Field Bill, the Jobs Bill, and SB 743 do compress the timeline for judicial review of the environmental review process, and thus remove one of the sources of inefficiency, all three bills fail to address the primary problems with CEQA, which stem from its vagueness, its deference to local discretion, and the opportunities it creates for vexatious litigation. In addition, these bills create a new problem by reducing the time that courts have to decide complicated CEQA challenges.

A. Problems with CEQA

The overarching problem with CEQA is that its vagueness in certain areas leads to inefficiency[129] by creating opportunities for vexatious litigation and by forcing companies to complete excessively long EIRs.

1. Vague Legal Standards

i. What Is "Approval" of a Project?

CEQA's legal standards are vague and general and do not provide much guidance to judges, agencies, or lawyers. For example, one of the threshold issues in determining when the obligation to prepare an EIR kicks in is the question of what exactly

128. CAL. PUB. RES. CODE § 21167 (West 2014).

129. BARBOUR & TEITZ, *supra* note 64, at 15. Although environmental laws are generally enforced pragmatically and discretion is granted to the enforcers, Clifford Rechtschaffen, *Promoting Pragmatic Risk Regulation: Is Enforcement Discretion the Answer?*, 52 KAN. L. REV. 1327, 1334 (2004), this does not mean that greater clarity is impossible. The U.S. environmental law system, along with the German and Japanese environmental protection regimes, is generally able to create enforceable, specific requirements out of general standards, which imposes enforceable obligations on polluters. E. Donald Elliot, *Environmental Law in Global Perspective: Five Do's and Five Don'ts from Our Experience*, NAT'L TAIWAN U. L. REV. 145, 148 (2010), *available at* http://digitalcommons.law.yale.edu/fss_papers/2717. There is no reason this degree of specificity cannot be included in the regulations implementing CEQA. Several other states have significance thresholds that provide more guidance than those included in CEQA. John Watts, Comment, *Reconciling Environmental Protection with the Need for Certainty: Significance Thresholds for CEQA*, 22 ECOLOGY L.Q. 213, 243–45 (1995). Some of these standards manage to increase certainty without removing the necessary flexibility. *Id.*

constitutes an approval of a project.[130] If the action is not an approval, or if the subject of the approval does not constitute a project, then an EIR is not required, regardless of the potential environmental impact.[131] Without clarity in this area, developers and agencies may prepare unnecessary EIRs, or may take actions that end up vulnerable to legal challenge because they believe what they are doing is not an approval or what they are acting on is not a "project." Either course of action could result in significant expenses. Nevertheless, the California Supreme Court characterizes both the definition of "project" and the definition of "approval" as fact-specific determinations.[132] In a recent decision,[133] the California Supreme Court declined to create a bright-line test,[134] leaving the area vague enough that future litigation is inevitable.[135]

ii. What Is "Economic Infeasibility"?

CEQA prohibits agencies from approving projects that have significant environmental effects if there are feasible alternatives or mitigation measures.[136] However, if the alternatives or mitigation measures are infeasible for social, economic, or other unspecified reasons, then a project can be approved despite its significant environmental effects.[137] CEQA, its guidelines, and the court cases interpreting both have failed to provide a workable definition of economic infeasibility.[138] It is not the job of agencies and courts to decide that a particular profit margin is so low that a project is economically infeasible.[139] In theory, public funds could always be raised to pay for mitigation or alternative projects, which would

130. CAL. PUB. RES. CODE § 21100(a) (West 2014); Save Tara v. City of West Hollywood, 194 P.3d 344, 353 (Cal. 2008).

131. CAL. PUB. RES. CODE § 21100(a) (West 2014); *Save Tara*, 194 P.3d at 353.

132. Lisabeth D. Rothman, *CEQA Turns 40: The More Things Change, The More They Stay The Same*, 20 Envtl. L. News 1, 5 (2010), *available at* https://law.ucdavis.edu/centers/environmental/files/Rothman-article-Hernandez.pdf.

133. *Save Tara*, 194 P.3d at 354 ("This court, like the CEQA Guidelines, has thus recognized two considerations of legislative policy important to the timing of mandated EIR preparation: (1) that CEQA not be interpreted to require an EIR before the project is well enough defined to allow for meaningful environmental evaluation; and (2) that CEQA not be interpreted as allowing an EIR to be delayed beyond the time when it can, as a practical matter, serve its intended function of informing and guiding decision makers.").

134. *Id.*; Rothman, *supra* note 132, at 5.

135. Rothman, *supra* note 132, at 5.

136. CAL. PUB. RES. CODE § 21002 (West 2014).

137. *Id.*

138. Rothman, *supra* note 132, at 6.

139. *Id.*

render the concept of economic infeasibility meaningless in practice.[140] This provision fails to provide certainty not only for developers who are trying to determine whether a project will be approved, but also for agencies and judges who are trying to determine whether a project should be approved as is, or whether an alternative should be selected or mitigation required. It also leaves open the opportunity to litigate arguments about economic feasibility, which is wasteful because no real answer exists.

iii. Vague Requirements

CEQA does not make clear what kind of environmental effects are permitted before an EIR is required, and the CEQA regulations, which are supposed to provide guidance on implementing CEQA, do not make clear the quality and quantity of analysis an EIR must contain for it to survive court challenges.

An EIR is required if a project will have "significant effects" on the environment.[141] Significant effects are defined as "substantial . . . adverse changes in physical conditions."[142] This open-ended definition provides minimal guidance to developers who are unsure of how much of an environmental effect is permissible for any given project. Even if it is clear that an EIR is required, the regulations provide little detail about what an EIR must contain, stating merely that it must demonstrate a "sufficient degree of analysis"[143] and "good faith effort."[144]

The ambiguity in these two key definitions means that developers, in an attempt to avoid the costs associated with an EIR, might spend significant time and money to unnecessarily reduce environmental effects that would never have been "substantial" in the first place. Alternatively, an overly optimistic developer early in a project might overestimate the permitted amount of environmental damage and have to make changes later in a project when they will be more expensive. Developers could make similar mistakes when they are preparing an EIR—either spending unnecessary time and money to prepare an EIR that goes beyond what is required or paying later to defend an inadequate EIR in

140. *Id.*

141. CAL. PUB. RES. CODE. § 21080(c)(1) (West 2014).

142. *Id.* §§ 21080, 2100(d).

143. CAL. CODE REGS. tit. 14, § 15151 (2005).

144. C. Aylin Bilir, Note, *Stopping the Runaway Train of CEQA Litigation: Proposals for Non-Judicial Substantive Review*, 35-SPG ENVIRONS ENVTL. L. & POL'Y J. 145, 151–53 (2012); CAL. CODE REGS. tit. 14, § 15151 (2012).

court and then make the required changes. The vagueness in defining what constitutes an adequate EIR can also harm the courts and agencies, because they must attempt to fill in the vague standards with their own definitions, which creates more work to be repeated each time they create or evaluate a new EIR.

Numerical thresholds—or simply more specific definitions—would make it easy for the public, judges, and agencies to quickly determine whether a project is environmentally acceptable or not. Without such thresholds, those evaluating the project will be forced to do a more searching, and more expensive, inquiry.

iv. Discretion in Choosing a Remedy

CEQA gives judges the ability to choose different remedies depending on the violation. Judges can choose to void an approval, suspend activity on the project until the agency makes the required changes, or require the agency to take specific actions to remedy the problem.[145] This creates uncertainty for parties who are trying to plan for post-litigation contingencies. For example, the timelines associated with each of these remedies are likely quite different. If a judge voids an approval the process will need to start over again, which will take significantly longer than suspending activity on the project or requiring the agency to remedy the problem. Instead of planning for two different outcomes—the judge deciding that the EIR is acceptable or deciding that specific changes need to be made—developers must plan for a multitude of different outcomes, which will make the litigation process more expensive for them.

2. Deference to Local Discretion

A final source of uncertainty in CEQA is structural: The law grants "deference to local control and discretion,"[146] which means there will be different requirements in different areas of the state. For example, the application of "significance" thresholds is left to individual localities.[147] Because these standards are used to determine whether impacts are significant, projects with an identical impact on the environment could be regulated differently

145. Bilir, *supra* note 144, at 151–52; CAL. PUB. RES. CODE. § 21168.9 (West 2014).

146. BARBOUR & TEITZ, *supra* note 64, at 15; CAL. PUB. RES. CODE. § 21100(4)(e) (West 2014).

147. Watts, *supra* note 129, at 236; CAL. PUB. RES. CODE. § 21082 (West 2014).

by CEQA depending on where they are constructed.[148] The fact that these standards are voluntary[149] adds an additional layer of uncertainty because some places may not have adopted them at all. Additionally, different localities might require or forego mitigation for different impacts.[150]

3. Opportunities for Vexatious Litigation

One result of the ambiguities in CEQA is the creation of opportunities for vexatious litigation to oppose projects for non-environmental reasons, including economic reasons, like protecting property values or excluding new residents.[151] For example, developers use CEQA to prevent other developers from encroaching on their territory,[152] and bounty-hunting lawyers use it to extract money from development companies.[153] This process is known as greenmail and can be used by various groups, including businesses, homeowners associations,[154] or unions (as a way of ensuring that projects use local labor).[155]

Because the requirements for standing to sue under CEQA are lax, parties are able to use CEQA lawsuits to advance non-environmental ends.[156] The California Supreme Court has held, in reference to CEQA cases, that "strict rules of standing that might

148. Watts, *supra* note 129, at 236.

149. CAL. PUB. RES. CODE § 21082 (West 2014).

150. BARBOUR & TEITZ, *supra* note 64, at 15–16.

151. Todd Nelson, Comment, Save Tara *and the Modern State of the California Environmental Quality Act,* 45 LOY. L.A. L. REV. 289, 292–93 (2011); Rothman, *supra* note 132, at 3; BARBOUR & TEITZ, *supra* note 64, at 11; Charles Crumpley, *Not Suited for Development,* FOX & HOUNDS (Apr. 15, 2011), http://www.foxandhoundsdaily.com/2011/04/8888-not-suited-development/.

152. *Developers Using Environmental Laws to Fight the Competition,* CALCOAST NEWS (Nov. 14, 2011), http://calcoastnews.com/2011/11/developers-using-environmental-laws-to-fight-the-competition/; Nicholas Riccardi, *Firms Turning to Environmental Law to Combat Rivals,* L.A. TIMES (Nov. 14, 2011), http://articles.latimes.com/2011/nov/14/local/la-me-development-ceqa-20111114.

153. James Brasuell, *Leaked Settlement Shows How NIMBYs Greenmail Developers,* CURBED LOS ANGELES (Jan. 3, 2013), http://la.curbed.com/archives/2013/01/leaked_settlement_shows_how_nimbys_greenmail_developers_1.php.

154. *Id.*

155. Kevin Dayton, *Mailers Expose Union CEQA Greenmail Against Solar Developers,* UNION WATCH, (Sept. 26, 2012), http://unionwatch.org/mailers-expose-union-ceqa-greenmail-against-solar-developers/.

156. Rothman, *supra* note 132, at 8; Eric Biber, *Could Standing Save CEQA?,* LEGAL PLANET (Apr. 9, 2012), http://legalplanet.wordpress.com/2012/04/09/could-standing-save-ceqa/; Richard Frank, *Paper or Plastic?,* LEGAL PLANET (July 14, 2011), http://legalplanet.wordpress.com/2011/07/14/paper-or-plastic/.

be appropriate in other contexts have no application where broad and long-term effects are involved."[157] The Court elaborated on this holding when it said that plaintiffs need not be affected by an environmental impact to have standing to sue under CEQA.[158] The Court said that "it is not unusual for business interests whose operations are directly affected by a government project to raise a CEQA challenge to the government's environmental analysis."[159] Business-based challenges to EIRs are permitted because "[s]uch parties are in fact adversely affected by governmental action and have standing in their own right to challenge that action."[160] This permits groups with only an economic interest in the outcome of an environmental impact review to challenge it using CEQA.[161] In one case, for example, an oil industry trade group had standing to challenge vehicle admissions standards adopted pursuant to CEQA—the trade group's interest, although not stated in the decision, was presumably in the effect the standards will have on the success of its members' businesses.[162] Even though CEQA reviews are not always challenged in court—and when they are, the agency usually wins[163]—there is persuasive evidence that the threat of litigation does reduce the amount of development.[164]

4. Excessively Long EIRs

The ambiguities in CEQA have also contributed to increasingly long EIRs,[165] made as comprehensive as possible because of the lack of clear guidelines and the threat of extensive litigation.[166] For example, the EIR for the Farmers Field Project was 10,000 pages long,[167] and its length is not unique.[168] Longer EIRs impose costs in several ways. They take longer and cost more to draft and review.[169]

157. Bozung v. Local Agency Formation Com., 529 P.2d 1017, 1018 (Cal. 1975).
158. Save the Plastic Bag Coal. v. City of Manhattan Beach, 254 P.3d 1005, 1008 (Cal. 2011).
159. *Id.*
160. *Id.*
161. Frank, *supra* note 156.
162. W. States Petrol. Ass'n. v. Superior Court, 888 P.2d 1268, 1269–70 (Cal. 1995).
163. BARBOUR & TEITZ, *supra* note 64, at 16.
164. *Id.* at 11.
165. Nelson, *supra* note 151, at 93.
166. S.F. PLANNING & URBAN RESEARCH ASS'N, FORM & REFORM: FIXING THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 6 (2006) [hereinafter FORM & REFORM].
167. Farmers Field, *Farmers Field Environmental Impact Report,* http://www.farmersfield.com/final-eir/ (last visited Aug. 4, 2014).
168. Rothman, *supra* note 132, at 13.
169. Nelson, *supra* note 151, at 93; Rothman, *supra* note 132, at 13.

Project proponents sometimes pay the cost of preparing the EIR and any litigation that results.[170] There are also costs associated with the delay.[171] For example, private developers have to pay carrying costs on their property while they wait for approval, and the delay of public projects imposes costs on the public and can lead to issues with project financing.[172]

B. What the Farmers Field Bill, the Jobs Bill, and SB 743 Do

The Farmers Field Bill, the Jobs Bill, and SB 743 do not address the core problem of CEQA-created inefficiency. The approaches adopted in the three bills only create superficial procedural constraints—a shorter timeline and limited opportunities for judicial review of challenges to EIRs.

It is probable that there will be some efficiency gains attributable to these laws. The timeline for review will probably be shorter, which will reduce the costs associated with the land being unused. However, any efficiency gains attributable to the procedural constraints will be reduced by the fact that in order to obtain expedited review, a project must first be certified as an Environmental Leadership Development Project by the governor. Furthermore, any net efficiency gains are not worth the loss in decisional quality that they might create. Instead of focusing on procedural changes, the California government should focus on amending CEQA's substantive law to reduce its vagueness.

1. Potential Inefficiencies in Project Certification

There is an additional cost for states and private parties built into the Jobs Bill and SB 743: In order for a project to qualify for expedited judicial review, the governor must certify that the project meets certain environmental and economic goals.[173] Specifically, the project must: 1) result in at least $100 million invested in California by the time construction is completed; 2) create "high wage, highly skilled jobs that pay prevailing wages and living wages" for both construction and permanent jobs; and 3) not create a net increase in greenhouse gas emission.[174] Furthermore, the project applicant must enter into a binding agreement that the approval of

170. Nelson, *supra* note 151, at 93.
171. Rothman, *supra* note 132, at 3; FORM & REFORM, *supra* note 166, at 6.
172. Rothman, *supra* note 132, at 13.
173. CAL. PUB. RES. CODE. § 21184 (West 2014).
174. CAL. PUB. RES. CODE. § 21183(a)–(c) (West 2014).

the project is conditioned on the mitigation measures required by CEQA and that these mitigation measures will be enforceable against the applicant.[175] Finally, the applicant must pay the costs of the Court of Appeal in hearing and deciding the challenge and the costs of preparing the administrative record for the governor's evaluation.[176]

So far, the governor has certified only three projects as Environmental Leadership Development Projects,[177] including a solar project and a new Apple research campus.[178] This process requires the developer to assemble evidence and materials necessary for the governor to make such a decision.[179] The length of the documents involved in Apple's application indicates that the certification process can impose a significant burden on both the applicant and the California government. For example, Apple's initial application was 270 pages long.[180] It includes a detailed project description and extensive analysis of the necessary mitigation measures and greenhouse gas emissions.[181] Apple also filed a 36-page supplement to the initial application and then an updated version of the supplement.[182] Apple also filed additional supplemental documents, including an analysis of the wages that would be paid and an analysis of the vehicle traffic generated by the project.[183]

The California government bore the cost both of contributing to the application and analyzing it. Because Environmental Leadership Development Projects must result in net zero greenhouse gas emissions, the California Air Resources Board

175. CAL. PUB. RES. CODE. § 21183 (d) (West 2014).

176. CAL. PUB. RES. CODE. § 21183(e) (West 2014).

177. RULES TO IMPLEMENT SENATE BILL 743, *supra* note 100.

178. Erin Coe, *Calif. Speeds CEQA Review for $1B NextEra Solar Project,* LAW360.COM (Feb. 26, 2013, 7:10 PM), http://www.law360.com/articles/418894/calif-speeds-ceqa-review-for-1b-nextera-solar-project.

179. CAL. PUB. RES. CODE. § 21182 (West 2014).

180. APPLE INC., APPLICATION FOR ENVIRONMENTAL LEADERSHIP PROJECT (2012) [hereinafter APPLE LEADERSHIP PROJECT], *available at* http://opr.ca.gov/docs/AppleCampus2App.pdf .

181. *Id.*

182. *See* APPLE INC., SUPPLEMENT TO APPLICATION FOR ENVIRONMENTAL LEADERSHIP DEVELOPMENT PROJECT (2013), *available at* http://opr.ca.gov/docs/AC2_Enviro_FULL_Supplement.pdf.

183. *See* Letter from Gavin R. Keith, Preconstruction Dir., DPR Skanska, to Terry Reagan, Apple Inc. (May 18, 2012), *available at* http://opr.ca.gov/docs/AppleCampus2_Wages Letter.pdf; APPLE INC., ITE TRIP GENERATION (2012), *available at* http://opr.ca.gov/docs/AppleCampus2ITETripGeneration.pdf.

("CARB") must analyze the data provided by Apple to determine whether the project meets the standard.[184] As a result, CARB completed a 17-page report analyzing the 200 plus pages of data provided by Apple.[185] Next, both the governor and the legislature will have to review the information provided by Apple and the ARB to determine whether certification is appropriate.

If the governor determines that all five conditions have been met, he submits that finding and the information on which he relied to the Joint Legislative Budget Committee for review and concurrence or nonconcurrence.[186] That committee must make its determination within thirty days.[187] Thus, although judicial review is shortened for these projects, the certification process adds at least thirty days of government review—and probably much more—in addition to a significant number of hours for Apple to prepare the application.[188] All told, the new timeline is longer than it initially appears.

Although the total cost of the certification process is not clear for either the private parties or the government, it must be significant. The length and depth of the documents the applicant must prepare, the amount of data that the ARB must analyze and report on, and the volume of dense material that the governor and the Joint Legislative Budget Committee must consider, all mean that the process will impose significant costs on both private parties and the government. Therefore, the combination of the certification process and the expedited judicial review may not offer much of an

184. *California Jobs*, CAL. OFFICE OF PLANNING AND RESEARCH, http://opr.ca.gov/s_californiajobs.php (last visited Aug. 4, 2014).

185. *See* Executive Order LP-12-002 Relating to Determination of Any Net Additional Greenhouse Gas Emissions Pursuant to Public Resources Code § 21183(c) for Apple Campus 2 Project, Apple Inc. (Cal. Air Res. Bd. June 14, 2012), *available at* http://opr.ca.gov/docs/ARBDeterminationAppleCampus2.pdf.

186. CAL. PUB. RES. CODE § 21184 (West 2014).

187. *Id.* § 21184(b)(2)(B).

188. The statute does not impose a timeline on the governor's consideration of the project, so it is unclear how long the governor will take to consider whether a project meets the requirements. With the Apple project, for example, the application was filed on April 19, 2012, and the Joint Legislative Budget Committee concurred in the Governor's certification on July 23, 2012, indicating that the Governor took around two months and the entire certification process more than three. *See* APPLE LEADERSHIP PROJECT; Letter from Sen. Mark Leno, Chair of Joint Legislative Budget Committee, to Ken Alex, Dir., Cal. Office of Planning and Research (July 23, 2012), *available at* http://opr.ca.gov/docs/Apple_Joint_Legislative_Budget_Comm_letter.pdf.

efficiency gain over the standard process. Perhaps this is why only four parties have started the application process.[189]

2. Reduced Quality of Judicial Review

The judicial review process created by the Farmers Field Bill, the Jobs Bill, and the SB 743 might also reduce the quality of judicial review of challenges to EIRs by compressing the timing for briefing and review. There are several studies that demonstrate that decision-making processes are undermined by an excessive focus on speed.[190] A bad decision-making process can lead to bad decisions.[191] These problems are likely to be exacerbated by the fact that EIRs are long and complicated to review.[192]

The Judicial Council has expressed similar concerns with the provisions in SB 743.[193] The Council describes the 270-day timeline as "unworkable"[194] and "impossible for the courts to fulfill"[195] and notes that the deadlines in rules proposed under SB 743 are "so short as to be unrealistic."[196] Because of its concerns, the Judicial Council has included in its proposed rules provisions allowing extensions of time "for good cause" and "to promote the interests of justice."[197] This may help to ease some of the pressures created

189. *See California Jobs*, *supra* note 184.

190. *See, e.g.*, Leslie A. Perlow et al., *The Speed Trap: Exploring the Relationship Between Decision Making and Temporal Context*, 45 ACAD. OF MGMT. J. 931 (2002). But there are also studies asserting that the relationship is more ambiguous. *Id.* This proposition also applies to the decision-making process of regulatory agencies, which promulgate less efficient regulations when they are under tight deadlines, and to government decision-makers in general, who appear to behave less predictably when acting under deadlines. *See* Alden F. Abbot, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171, 195 (1987); Daniel Carpenter & Justin Grimmer, The Downside of Deadlines 1 (Robert Wood Johnson Found. WP-41 2009), *available at* http://healthpolicyscholars.org/sites/healthpolicyscholars.org/files/w41_downside_of_deadlines.pdf. Deadlines appear to increase the error rate not linearly, but exponentially. *Id.* at 2.

191. *See* John S. Hammond et al., *The Hidden Traps in Decision Making*, HARV. BUS. REV. 3 (Sept.–Oct. 1998).

192. RULES TO IMPLEMENT SENATE BILL 743, *supra* note 100.

193. JUDICIAL COUNCIL OF CAL., STATUS OF 2013 LEGISLATION CONSIDERED BY THE POLICY COORDINATION AND LIAISON COMMITTEE–FINAL (2013), *available at* http://www.courts.ca.gov/documents/Legislative-Status-Chart-2013.pdf.

194. *Id.*

195. Ron McNicoll, *Legislature OKs CEQA Changes*, THE INDEP. (Sept. 27, 2013, 12:00 AM), http://www.independentnews.com/news/article_a062d632-26de-11e3-9ea9-001a4bcf887a.html.

196. RULES TO IMPLEMENT SENATE BILL 743, *supra* note 100.

197. *Id.*

by the short timelines, but they also mean that any efficiency gains from the new timelines will be less than they first appear.

III. WHAT SHOULD COME NEXT

A. Proposals for Reform

The pressure for CEQA reform is constant in California and is exerted by both environmental[198] and business groups.[199] Because of this, it is likely that other changes will be proposed in the near future. Although the Farmers Field Bill, the Jobs Bill, and SB 743 do not present ideal models for reform, other proposals would address the actual problems with CEQA.

Advocates of CEQA reform have advanced several different ideas: 1) clarifying the requirements and application of the statute; 2) requiring greater disclosure of the basis of agency determination; 3) streamlining the review and litigation process; 4) expanding and streamlining the state's role in supervision and information management; 5) standardizing and perhaps codifying specific significance thresholds; 6) reducing local variation; strengthening tiering;[200] and 7) clarifying the state legal and policy framework in which CEQA is operating.[201]

Another proposal emphasizes the importance of increasing public trust in agency decision-making,[202] which might lead to less litigation. This could be accomplished through requiring independent evaluation of the substance of an environmental impact report, either with a review panel or a dedicated agency.[203]

198. *See, e.g.*, Editorial, *Don't Let CEQA Rule Out Alternative Energy*, PAC. COAST BUS. TIMES (Dec. 14, 2012), http://www.pacbiztimes.com/2012/12/14/editorial-dont-let-ceqa-rule-out-renewable-energy-projects/ (stating CEQA reform discourages clean energy initiatives); FORM & REFORM, *supra* note 167, at 6 (stating CEQA reform discourages smart, sustainable development).

199. Michael Gardner, *Key Environmental Law Targeted for Overhaul*, SAN DIEGO UNION TRIB. (Dec. 23, 2012), http://www.utsandiego.com/news/2012/dec/23/lawmakers-target-key-environmental-for-overhaul.

200. Tiering involves concentrating environmental review at the early stages of long-range plans, which creates models that can be useful for later projects in those plans. BARBOUR & TEITZ, *supra* note 64, at 20.

201. *Id.* at 37–40.

202. Bilir, *supra* note 144, at 163.

203. *Id.* Independent review panels have been proposed in other states. Michael B. Gerrard & Monica J. Bose, *Possible Ways to Reform SEQRA,* N.Y.L.J., Jan. 23, 1998, at 1. The panels would be composed of independent members who have experience preparing and reviewing the documents associated with environmental reviews. *Id.* These panels would

Another approach focuses on relaxing judicial review of EIRs as a way of reducing pressure to make them so exhaustive, clarifying the standard for economic infeasibility, enforcing and investigating standing issues, and publishing more decisions where EIRs are upheld.[204]

The Governor's Office of Planning and Research is currently evaluating potential changes to the CEQA Guidelines.[205] The proposed changes contain both substantive and procedural changes. For example, one proposed procedural change would "[c]larify that NOPs must be posted at the County Clerk's office," and one substantive change would "[a]dd loss of open space as an example of potential cumulative impacts."[206] Overall, the proposed changes focus on clarifying ambiguous requirements and definitions,[207] which might help to alleviate some of the problems caused by vagueness.

The proposals all agree that there are areas of CEQA that can and should be amended without lessening the statute's environmental protection. Moreover, there are aspects of the statute that add little or nothing to environmental protection but increase the costs of development. Reform will be more effective if it is based on an empirical evaluation of the costs and benefits of CEQA, so the first step ought to be an extensive empirical examination of what CEQA does well and what it does poorly.

B. The Need for Further Research

As an initial point, it is important to note that much is still unknown about the costs and benefits of CEQA, and the studies that have been done about it are quite old.[208] This is surprising considering how broadly CEQA applies,[209] although scholars have long noted the overall lack of quantitative information about the effects of environmental laws.[210]

increase the degree of centralization involved in the review process, which might result in a process that is "faster, cheaper, and more certain." *Id.*

204. Rothman, *supra* note 132, at 19

205. GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, POSSIBLE TOPICS TO BE ADDRESSED IN THE 2014 CEQA GUIDELINES UPDATE (Dec. 20, 2013), *available at* http://www.opr.ca.gov/docs/PossibleTopics2014CEQAGuidelinesUpdate.pdf.

206. *Id.*

207. *Id.*

208. BARBOUR & TEITZ, *supra* note 64, at 24.

209. *Id.*

210. Daniel C. Esty, *Environmental Protection in the Information Age,* 79 N.Y.U. L. REV. 115, 140–41 (2004).

A significant problem with measuring the costs and benefits of CEQA is that its social and environmental benefits are inherently difficult to quantify.[211] Measuring environmental impacts is a multistep process.[212] First, it must be determined whether local mitigation measures have been adopted;[213] then, it must be determined whether these mitigations measures have been implemented; and finally, whether they have worked.[214] This inquiry is complicated for two reasons: first, because there is no academic consensus on how to measure environmental benefits; and second, because CEQA is deferential to local discretion.[215] Because CEQA does not provide clear guidelines for what environmental benefits it is supposed to ensure, the task of measuring its efficacy is even more difficult.[216] This is the kind of analysis that needs to be done if CEQA is to be amended effectively.

In addition to measurable environmental improvements, CEQA might have positive intangible effects that are more difficult to measure. For example, CEQA's EIR requirement increases public transparency about environmental protection and informs the electorate about the values of elected officials.[217] Despite the important implications of these effects, it is unclear how and if they should be measured and weighed against the more tangible environmental and economic costs and benefits of CEQA.

CEQA also might have a positive intangible effect on the decision-making processes of the agencies that are subject to its requirements.[218] There are at least two ways in which the preparation of EIRs might affect how agencies make decisions.[219] The first way is the "near-miss effect," in which the team responsible for writing the EIR discovers requirements that would apply and designs around them.[220] The second way is the "tourniquet effect": A party might be able to avoid having to complete an EIR entirely if they can identify the potential adverse effects and design around them in the initial stages of the

211. BARBOUR & TEITZ, *supra* note 64, at 25.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. CAL. CODE REGS. tit. 14, § 15003(b), (e) (2012).
218. Michael B. Gerrard, *The Effect of NEPA Outside the Courtroom*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10,615, 10,615 (2009).
219. *Id.*
220. *Id.*

project.[221] The "near miss" and "tourniquet" effects improve the efficiency of the environmental review process because potential environmental problems would be discovered and addressed earlier, which would allow for changes in the plan before significant costs had been incurred. However, because these efficiency and environmental gains would occur earlier in the planning process, they would not show up in analysis of the benefits of mitigation or project alternatives.

A complete understanding of CEQA would take into account the procedural and intangible benefits of the environmental review process, in addition to the environmental benefits that are easier to quantify. It is also important to clarify which aspects of CEQA actually impose significant and unjustified costs on developers. Before moving forward with reform, the legislature should examine those aspects of CEQA, as well as others, to determine which actually create inefficiencies that are significant enough to be addressed.

C. Starting Points for Reform

There are three aspects of CEQA that should be the starting point for any attempt at reform: its ambiguous requirements for standing, its vague legal standards, and its deference to local discretion.[222] The ambiguous requirements for standing allow non-environmentally motivated litigation to proceed under the law.[223] Although it is certainly possible that litigation motivated by non-environmental concerns could have the effect of increasing environmental protection, it seems less likely that these lawsuits will provide the same environmental benefits that environmentally-motivated lawsuits do. There are at least two ways to address the potential standing problem. The first is to actually tighten up the standing requirements, which the California courts have declined to do.[224] This would reduce the number of CEQA lawsuits and would certainly help to prevent parties from challenging EIRs for non-environmental reasons, but it might over-deter parties from suing, to the extent that it might filter out lawsuits that are not

221. *Id.*

222. *See supra* Part II.A.

223. *See supra* Part II.A.3.

224. Save the Plastic Bag Coal. v. City of Manhattan Beach, 254 P.3d 1005, 1005 (Cal. 2011).

based on environmental concerns but which might actually result in increased environmental protections.

Another way to address this problem is to require that CEQA challengers reveal their financial interest and identify who is paying the costs of the challenge. This would give judges another factor to consider when evaluating the merits of a CEQA challenge. At the same time, it would not create the risk of over-deterrence. From an environmental perspective, this second strategy, which goes to the merits, is preferable to the first, which creates a blanket standing restriction.

A second step would be to give more guidance about what is an adequate EIR and what is not by, for example, helping preparers and judges understand the meaning of "sufficient degree of analysis" and "good faith effort."[225] More guidance is desirable because it would increase the efficiency of both the preparation process for the agencies and the evaluation process for the judges. More guidance would also help to reduce the frequency of vexatious litigation by making frivolous lawsuits less likely to succeed and to decrease the length of EIRs because preparers would not feel like they had to include an excessive amount of information to make the EIRs litigation-proof.[226] Giving specific guidance about the meaning of these concepts is difficult because EIRs are so complicated that what constitutes a "sufficient degree of analysis" and "good faith effort" will vary depending on the requirements of each individual project.[227] One possible way to balance the need for flexibility with the need for guidance would be to publish more examples of EIRs that had been deemed acceptable and those that had been deemed unacceptable, along with specific explanations about what was good and bad about each.[228] This would provide more specific guidance for both judges and preparers.

The final way to improve the efficiency of CEQA would be to give specific numeric guidelines about when an impact counts as significant. Instead of giving numeric guidelines, CEQA's regulations contain examples, but these examples use synonyms for "significant" to describe the effect on the environment, which

225. CAL. CODE REGS. tit. 14, § 15151 (2012).
226. *See supra* Part II.A.3.
227. *See supra* Part II.A.1.iii.
228. Rothman, *supra* note 132, at 19.

provide little guidance beyond what is in the statute.[229] However, replacing these vague standards with absolute numerical thresholds also has distinct drawbacks—experience in other states shows that where there are specific thresholds, developers will design their projects to inflict the maximum legal environmental damage, which undermines the purpose of CEQA.[230]

As an alternative, California could adopt a review process that is similar to that which is in place in Florida to determine when review by the Department of Environmental Review is necessary for a project:[231] If a project's impact is below 80% of the thresholds for review, then there is automatically no review;[232] if the impact is over 120%, there is automatic review;[233] if the impact is between 80% and 100% of the threshold, the state must prove that review is necessary;[234] if it's between 100% and 120%, then the developer must prove that it is not.[235] This creates incentives for developers to significantly reduce their environmental impacts while creating certainty if the impacts are at either end of the spectrum. At the same time, allowing discretionary review for projects close to the thresholds means that developers cannot avoid review entirely by having impacts that are only slightly below the thresholds. This preserves the flexibility necessary for successful environmental protection while adding more certainty into the planning process.

IV. CONCLUSION

Because of the perceived stringency of the requirements that CEQA imposes on developers and the resulting drag on the economy, calls for CEQA reform have been almost constant ever since it was passed and have been especially insistent in 2013–14. The latest rounds of reform, which focus on compressing the timeline for judicial review, are the wrong solution. The essential problem with this approach is that it is an ineffective procedural solution to a substantive problem. Although it does increase the time efficiency of review by shortening the timeline, it adds in other inefficiencies by requiring companies and the government to

229. Watts, *supra* note 129, at 234.
230. *Id.* at 245.
231. *Id.*
232. *Id.*
233. *Id.* at 246.
234. *Id.*
235. *Id.*

engage in an expensive and time-consuming certification process to obtain expedited review. Furthermore, it does not address the actual sources of inefficiency in CEQA, which come from ill-defined standing requirements, a vague definition of what constitutes an acceptable EIR, and a lack of guidance in significance thresholds. These problems have resulted in an increase in both vexatious litigation and the length of EIRs.

Before moving forward with CEQA reform, California needs to do research to determine what kind of impact CEQA has on the environment and where the sources of inefficiency lie and who should bear the costs. Armed with this information, the government should proceed with reform that is designed to protect what CEQA does well, improve what it does not, and amend the review process to remove potential sources of inefficiency. California would be well served to require parties challenging EIRs to identify who is behind the challenge and who is funding it, publish more acceptable and unacceptable EIRs along with explanations of why they were deemed sufficient or insufficient, and adopt Florida's method of determining when an environmental impact report is required. These reforms would address some of the inefficiencies built into CEQA review without undermining environmental protection in California.