

## **In the Name of the Environment Part III: CEQA, Housing, and the Rule of Law**

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*This is the third study of all state court lawsuits filed under the California Environmental Quality Act (“CEQA”); this Study examined lawsuits filed statewide over three years, between 2019 and 2021. All three studies identified housing as the top target of CEQA lawsuits challenging agency approvals of private projects. California’s housing crisis has caused the state to have the worst housing-adjusted poverty rate in the United States; California also continues to have the highest rate, and highest number, of unsheltered homeless residents. Housing production has remained essentially flat (at about 110,000 housing units per year) notwithstanding the enactment of more than one hundred new housing laws since 2017; the state still needs about three million more homes. Although CEQA’s status quo defenders assert that CEQA is not a material factor in housing production, this Study confirms that, in 2020 alone, CEQA lawsuits sought to block approximately 48,000 approved housing units statewide—just under half of the state’s total housing production. Many housing laws also mandated that local and regional agencies adopt and implement plans to accommodate more housing. CEQA lawsuits filed during the study period challenged agency housing plans that allowed more than one million new housing units. Non-housing projects to accommodate housing and population growth, such as transportation and water infrastructure, are also a major target of CEQA lawsuits. CEQA lawsuits (and lawsuit claims) relating to*

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*climate change, including greenhouse gas emissions (“GHG”) and vehicle miles travelled, a top topic of CEQA lawsuits, even though California already has the lowest per capita GHG in the nation and has enacted scores of GHG and climate change laws and regulations. The study includes data, and examples, of all CEQA lawsuits filed during the study period, to explain how CEQA works today—not historically, and not rhetorically.*

*The study also examines how the unpredictability of CEQA lawsuit outcomes has created a de facto, low-cost, no-risk strategy for project opponents to preserve the environmental status quo and block even benign and beneficial projects until litigation (inclusive of appeals) is completed—typically about in four to five years. This judicial outcome uncertainty has made lenders, investors, and grantors unwilling to fund projects while CEQA lawsuits remain pending, thereby allowing CEQA petitioners to avoid the judicial preliminary injunction process, in which they must persuade a judge that they are likely to prevail on the merits, and will suffer irreparable harm unless the project is halted. A judge can also require petitioners to post a bond to cover delay damages if their lawsuit is ultimately determined to be meritless. Judicial uncertainty in CEQA lawsuits has, in practice, meant that judges can only stand by for the eighteen to twenty-four months of delay that petitioners obtain by the simple act of a filing a lawsuit and paying a small court filing fee.*

*CEQA lawsuit outcome uncertainty is also a profoundly influential factor in how much time and money is spent on CEQA compliance (especially for projects more likely to be sued, such as housing in wealthier communities, as was shown in the second of this CEQA study series). The study examines CEQA jurisprudence in contrast to the administrative jurisprudential factors typically applied to statutes and regulations, and explains the practical consequences of judicially-imposed expansions of CEQA—and judicially-rejected enacted legislation imposing, by statute, interpretive and remedy constraints on judicial outcomes in CEQA lawsuits. One potential explanation for this judicial rejection of the plain language of statutes, such as prohibiting courts from imposing a CEQA remedy to stop construction of a legislative office building in Sacramento unless the office building caused health or safety harms or adversely affected a previously-unknown significant tribal resource; notwithstanding this statutory language, the appellate court stopped this construction project based on historic resource and aesthetic concerns.*

*This Article notes that CEQA lawsuits are also filed as “writs”—not ordinary civil lawsuits—which have a long history and tradition of vesting extraordinary discretion in the judiciary, which acts as a separate and co-equal branch of government and has an independent role in enforcing the Rule of Law, including through use of its equitable authorities. Courts enforce statutes all the time, however, in both writ and non-writ proceedings, and the key attributes of the Rule of Law—including knowing in advance what the law requires—have not constrained many judicial decisions that expand CEQA well beyond what is required by any clear, discernable compliance mandate in CEQA statutes or implementing regulations.*

*Legislative reform of CEQA, unless acceptable to powerful special interests such as certain labor and environmental organizations, remains mired in Sacramento’s politics. The actual pattern of CEQA lawsuits, reflected in this and the prior two studies, should give pause to CEQA’s status quo defenders, who—like this author—often personally profit from CEQA’s unbounded costs and schedules. CEQA’s most visible status quo defenders assert their allegiance to the environment and “environmental justice” (though not other civil rights); they have been buoyed by special interests who wield CEQA as a sword to protect proprietary (and often economic) interests.*

*CEQA’s statutory bias is to preserve the status quo, even when the status quo is causing ongoing harms to people (including hard working families who never voted to abandon the California Dream of homeownership but have been priced out by the housing crisis), or the environment (which needs change to prevent forest fires and catastrophic floods, and achieve massive change to energy production and climate adaptation). With multi-year studies followed by an over four-year litigation slog, CEQA’s foundational prioritization of procedural perfection undermines solving urgent housing, civil rights and environmental priorities.*

*California has enacted thousands of environmental laws and regulations since CEQA was signed into law in 1970. CEQA’s extended adolescent fixation on process over progress—inclusive of unpredictable, grandiose, and chaos-inducing behaviors and outcomes—needs to grow up. This Study makes the same three CEQA reform suggestions as prior studies, and adds one more. First, end anonymous CEQA lawsuits: parties filing CEQA lawsuits need to identify who they are, and show that they are suing to protect the environment, just like they’ve always had to do when suing under federal environmental lawsuits. Second, end*

*duplicative CEQA lawsuits: once a project or plan has completed the CEQA process, no new CEQA lawsuits can be filed as the project is constructed and plan is implemented—progress must occur and process must end. Third, match the remedy to the crime: if an agency made a mistake and didn't study an impact enough, then the appropriate judicial remedy in CEQA—as already prescribed in the CEQA statute itself—is for a judge to require more study and mitigation, without rescinding project approvals and requiring agencies and applicants to re-do the CEQA process for another two years, followed by another six years of litigation after that. Housing delayed in housing denied, and a deficient traffic study shouldn't result in a six year re-run of CEQA processing. Fourth, and new for this Study: this author's plea for the judiciary to return to the norms of administrative law jurisprudence, and canons of statutory construction, when deciding CEQA cases. Simply: no Legislative reform will be effective without judicial outcome predictability consistent with the Rule of Law.*

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#### INTRODUCTION

This is the third in a series of how California’s venerable environmental law, the California Environmental Quality Act (“CEQA”), enacted in 1970, is actually litigated in the real world. All three studies examined all CEQA lawsuits filed statewide, and each concluded that the most frequent target of CEQA lawsuits was housing approved in existing communities. The studies spanned 2010-2012, 2013-2015, and this current study period of 2019-2021.

In our second study, published in the *Hastings Environmental Law Journal*, I observed that CEQA lawsuits “provide a uniquely powerful legal tool to block, delay, or leverage economic and other agendas,” and “is now the tool of choice for resisting change that would accommodate more people in existing communities.”<sup>1</sup> These observations, and other data and observations from our second study, were quoted at length in a recent First District Court of Appeal case involving a twenty-five-year odyssey and 900-page Environmental Impact Report (“EIR”) for a thirty-four single family home project on a parcel in Marin County adjacent to the wealthy town of Tiburon (median home price, \$2,862,177<sup>2</sup>). As the Court of Appeal observed, “all of these . . . observations are vindicated in this woeful record before us.”<sup>3</sup>

California has the highest poverty rate, and highest homeless population, in the nation.<sup>4</sup> There’s a common reason for these shocking humanitarian failures by the fourth largest economy on

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<sup>1</sup> Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California’s Housing Crisis*, 24 HASTINGS ENV’T L.J. 21, 40–41 (2018) [hereinafter Hernandez, In the Name of the Environment II: 2013-2015].

<sup>2</sup> *Tiburon Home Values*, ZILLOW, <http://www.zillow.com/home-values/34285/tiburon-ca/> [<http://perma.cc/DY82-5SX2>] (last visited Mar. 19, 2023).

<sup>3</sup> *Tiburon Open Space Comm. v. County of Marin*, 294 Cal. Rptr. 3d 56, 122 (Ct. App. 2022).

<sup>4</sup> *California Poverty: Basic Statistics*, END POVERTY IN CAL., <http://endpovertyinca.org/ca-poverty-statistics/> [<http://perma.cc/ZE68-BD5P>] (last visited Mar. 19, 2023); *California Homelessness Statistics*, U.S. Interagency Council on Homelessness, <http://www.usich.gov/homelessness-statistics/ca/> [<http://perma.cc/GN2A-SH6T>] (last visited Mar. 19, 2023).

the planet,<sup>5</sup> long governed by a supermajority of Democrat state officers and Legislators, in one of the deepest green states in the nation: state policies block housing that's affordable to its residents, with leaders and advocates defending state policies in the name of the environment (and now climate), even when they expressly acknowledge the exclusionary harms their policy choices inflict on younger families, communities of color, and middle income (including union) workers.

In December 2022, the California Air Resources Board ("CARB")—California's leading air quality and climate agency—adopted a "Scoping Plan"<sup>6</sup> that included scores of policy choices and mandates to reduce greenhouse gas ("GHG") emissions using a metric that primarily counts electricity and petroleum consumption by California's residents and businesses.<sup>7</sup> For example, the Scoping Plan counts GHG from cement and other building products produced in California and does not count GHG from imported cement and other products.<sup>8</sup> The Scoping Plan includes hundreds of GHG and climate policy choices, and was unanimously-adopted by a Board consisting entirely of appointees of Democratic party leaders in the state.<sup>9</sup>

CARB's policy choices, as the Scoping Plan expressly concludes, is that households making \$100,000 or less will bear a disproportionately high cost burden to pay for the state's climate policy choices (including housing).<sup>10</sup> CARB further acknowledges that these middle and lower income households are far more likely to be comprised of Black or Latino residents than White or Asian residents.<sup>11</sup> I describe the disparate race-and-class-based harms inflicted on Californians under the climate change environmental

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<sup>5</sup> See Matthew A. Winkler, *California Poised to Overtake Germany as World's No. 4 Economy*, BLOOMBERG (Oct. 25, 2022, 5:22 AM), <http://www.bloomberg.com/opinion/articles/2022-10-24/california-poised-to-overtake-germany-as-world-s-no-4-economy> [<http://perma.cc/SW6D-UZAZ>].

<sup>6</sup> *CARB Approves Unprecedented Climate Action Plan to Shift World's 4th Largest Economy from Fossil Fuels to Clean and Renewable Energy*, CAL. AIR RES. BD. (Dec. 15, 2022) [hereinafter *CARB Approves*] <http://ww2.arb.ca.gov/news/carb-approves-unprecedented-climate-action-plan-shift-worlds-4th-largest-economy-fossil-fuels> [<http://perma.cc/KYK6-LNX4>].

<sup>7</sup> CAL. AIR RES. BD., 2022 SCOPING PLAN FOR ACHIEVING CARBON NEUTRALITY 158 (2022).

<sup>8</sup> *Id.* at 86, 208.

<sup>9</sup> See *CARB Approves*, *supra* note 6; Nadia Lopez, *California Approves Far-Reaching Strategy for Tackling Climate Change. So What's Next?*, CALMATTERS (Dec. 15, 2022), <http://calmatters.org/environment/2022/12/california-plan-climate-change/> [<http://perma.cc/ANA2-QWP8>].

<sup>10</sup> See CAL. AIR RES. BD., 2022 SCOPING PLAN FOR ACHIEVING CARBON NEUTRALITY 124–26 (2022).

<sup>11</sup> See *id.* at 126–27.

banner, in which recently-invented CEQA climate change “impacts” of people who occupy new housing play a pivotal role, in *Green Jim Crow*.<sup>12</sup> *Green Jim Crow* lays bare the racist attributes of core climate policies that are implemented through CEQA, such as the elevation of Vehicle Miles Travelled (“VMT”) as an environmental “impact” even when the vehicle being driven is a zero emission electric car. The goal of the VMT policy was to focus more housing near high frequency transit, and increase housing density, to reduce GHG emissions from the ordinary activities of Californians.<sup>13</sup> In actuality, the neighborhoods slated for redevelopment into high density housing under the VMT policies largely overlapped with majority Black and ethnic minority neighborhoods first mapped by federal mortgage insurance “redlining” maps to deny residents of these neighborhoods access to the attainable homeownership programs offered to White residents (and veterans) under the New Deal and beyond.<sup>14</sup> The VMT incentive policies increase gentrification and displacement, and incentivize exceptionally high cost housing (\$1,000 or more per square foot, resulting in \$3,500 or more monthly rents or over \$1 million or more condos), to the direct detriment of displaced communities of color and other median/low income households.<sup>15</sup> As discussed further, *infra*, VMT “mitigation” obligations add costs of \$50,000 or more to new housing in non-transit locations, which are most frequently used to subsidize public transit or construct bike lanes for other people, somewhere else, even if not proximate to the new housing. Like the cost of land, labor, and building materials, mitigation costs imposed by agencies increase the cost of producing new housing, but VMT mitigation costs are most often assessed against families forced to “drive until they qualify” for housing they can afford to buy or rent, who must still drive to get to work (like more than ninety-five percent of Californians).<sup>16</sup> People buying or renting these lower cost suburban homes are most likely to be the median/middle income households (now majority minority) who cannot afford high density housing in the fraction of one percent of California located within a half mile from high frequency bus stops, rail stations, or ferry terminals.<sup>17</sup>

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<sup>12</sup> Jennifer Hernandez, *Green Jim Crow*, BREAKTHROUGH INST. (Aug. 16, 2021), <http://thebreakthrough.org/journal/no-14-summer-2021/green-jim-crow> [http://perma.cc/8TPF-EV5R].

<sup>13</sup> *See id.*

<sup>14</sup> *See id.*

<sup>15</sup> *See id.*

<sup>16</sup> *See generally id.*

<sup>17</sup> *See generally id.*



This Part Three of our *In the Name of the Environment* series provides further evidence of California's anti-housing environmental/climate agenda: as described in more detail in Part II (CEQA v. Housing), just 7 of the 514 lawsuits in this Study's dataset sought to block 1,079,347 planned housing units (half to one-third of California's estimated housing shortfall). Lawsuits filed in just one year (2020) sought to block just under 48,000 approved housing units (the equivalent of just under half of California's total annual housing production). The entrenched strength of these environmental/climate anti-housing stakeholders is all the more remarkable given the Governor's conclusion that the state has 3.5 million fewer housing units than it needs,<sup>18</sup> and given the scores of new laws enacted by the Legislature and signed by the current and former governor to spur increased housing production.

CEQA remains a revered cornerstone of California's environmental laws, even as all three *In the Name of the Environment* CEQA studies confirm that CEQA lawsuits are most often aimed at blocking housing and climate priorities purportedly supported by the state's elected leaders. More academic researchers, including once-ardent CEQA status quo defenders, have independently confirmed the accuracy of the data in our studies—and increasingly have also acknowledged its use as an anti-housing exclusionary tool by wealthier communities. For example, as explained by UC Berkeley Law Professor Eric Biber in *CEQA and Socioeconomic Impacts: Why Expanding CEQA to Cover Socioeconomic Impacts Might Harm Equity Goals*, in a comment criticizing an appellate court decision to roll back undergraduate enrollment at UC Berkeley:

In research I have helped work on about how CEQA and local land-use law is implemented for housing projects in California, we have found evidence that litigation and administrative appeals are more common in wealthier neighborhoods fighting projects. This suggests it is more likely that more privileged communities will use socioeconomic impact analysis challenges under CEQA to stop needed housing projects, housing that is needed to resolve the state's dire housing crisis.<sup>19</sup>

Professor Biber's research observation mirrors my own. In our second study, *California Environmental Quality Act Lawsuits and*

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<sup>18</sup> Gavin Newsom, *The California Dream Starts at Home*, MEDIUM (Oct. 20, 2017), <http://medium.com/@GavinNewsom/the-california-dream-starts-at-home-9dbb38c51cae> [<http://perma.cc/3QDJ-LJLJ>].

<sup>19</sup> Eric Biber, *CEQA and Socioeconomic Impacts*, LEGALPLANET (Sept. 26, 2021), <http://legal-planet.org/2021/09/26/ceqa-and-socioeconomic-impacts/> [<http://perma.cc/JD8X-AAHL>].

*California's Housing Crisis*, we mapped the location of the nearly 14,000 housing units challenged in a swath of Southern California to show that anti-housing CEQA lawsuits are indeed far more common in Whiter, wealthier, and healthier neighborhoods.<sup>20</sup>

Challenges to the CEQA status quo have also become more frequent, and less politically verboten, by elected leaders. For example, CEQA has been described by a prominent State Senator and pro-housing production leader as “the law that swallowed California.”<sup>21</sup> This Study provides direct evidentiary support for the accuracy of that observation in Parts II (CEQA and Housing) and Part III (CEQA and Everything Else).

Part IV examines CEQA judicial precedents, including the unwillingness of many courts to apply longstanding administrative jurisprudential canons such as deferring to the plain language of the CEQA statute, in anti-housing and other CEQA lawsuits. CEQA jurisprudence—reported appellate and Supreme Court decisions—has made the outcome of CEQA lawsuits entirely unpredictable, as we first reported in an earlier study examining fifteen years of judicial outcomes in CEQA lawsuits.<sup>22</sup>

No statute should be so ambiguous, uncertain, or incomprehensible that our institutions and people don't know what's even required under our Rule of Law system, as described by the American Bar Association.<sup>23</sup> Unless agencies—and those regulated by agencies including project applicants—know what the law requires, the adequacy of CEQA compliance more closely resembles judicial outcomes of core Constitutional disputes such as the fuzzy line between free speech and obscenity, which prompted U.S. Supreme Court Justice Potter Stewart's famous test for what is obscene: “[he] know it when [he] sees it.”<sup>24</sup>

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<sup>20</sup> Hernandez, *In the Name of the Environment II: 2013-2015*, *supra* note 1, at 30–32.

<sup>21</sup> Alexander Nieves, *Politico Q&A: California Senate Housing Chair Scott Wiener*, POLITICO (Mar. 10, 2022, 7:00 AM), <http://www.politico.com/news/2022/03/10/scott-wiener-ceqa-housing-00015320> [<http://perma.cc/92ZL-ZQTX>].

<sup>22</sup> See JENNIFER L. HERNANDEZ ET AL., HOLLAND & KNIGHT, CEQA JUDICIAL OUTCOMES: FIFTEEN YEARS OF REPORTED CALIFORNIA APPELLATE AND SUPREME COURT DECISIONS 5 (2015) [hereinafter Hernandez, *In the Name of the Environment I: 2010-2012*], <http://www.hklaw.com/files/Uploads/Documents/Articles/0504FINALCEQA.pdf> [<http://perma.cc/2CQX-4WVU>].

<sup>23</sup> See *Rule of Law Initiative*, AM. BAR ASS'N, [http://www.americanbar.org/advocacy/rule\\_of\\_law/](http://www.americanbar.org/advocacy/rule_of_law/) [<http://perma.cc/72LY-JN7X>] (last visited Apr. 2, 2023).

<sup>24</sup> “*I Know it When I See it*: A History of Obscenity & Pornography in the United States”, WASH. UNIV. IN ST. LOUIS ARTS & SCIS., <http://history.wustl.edu/i-know-it-when-i-see-it-history-obscenity-pornography-united-states> [<http://perma.cc/CY6V-L5YX>] (last visited Apr. 1, 2023). Obscenity is not protected by the First Amendment. *Obscenity*, Dep't. Just. (Mar. 29, 2021), <http://www.justice.gov/criminal-ceos/obscenity#:~:text=Obscenity%20is%20not%20protected%20under,if%20given%20material%20is%20obscene> [<http://perma.cc/G42C-DNS9>].

For years after our CEQA judicial outcome study was published, and consistently through today, CEQA status quo defenders excuse unpredictable judicial outcomes and persist in blaming agencies for losing CEQA lawsuits because they are “not doing CEQA the right way.”<sup>25</sup> However, two prominent law school professors (and longtime CEQA status quo defenders) opined in a recent *amicus* brief defending a longtime CEQA petitioner lawyer.<sup>26</sup> The petitioner lawyer’s conduct met the legal test of “malicious prosecution” when she intentionally filed a meritless CEQA lawsuit to block a single family home project in San Anselmo (near Tiburon, also in Marin County).<sup>27</sup> In the brief, the law school professors explained that the “fact” of CEQA litigation uncertainty is “universally acknowledged,” citing to the accuracy of data we gathered in an earlier CEQA study showing roughly 50/50 odds of a project opponent beating an agency in a CEQA lawsuit.<sup>28</sup>

Well into fifteen years of our comprehensive study of CEQA, it is impossible to explain CEQA litigation patterns without highlighting the role the judiciary has and continues to play in expansively and creatively applying CEQA to identify new analytical and other requirements that are not expressly written into CEQA, the CEQA Guidelines, or any prior published case comprising CEQA jurisprudence.

This third *In the Name of the Environment* study recommends, in Part V, that the California Supreme Court grant review of a recent UC Berkeley appellate court decision, which elevates for the first time the “social noise” of partying undergraduates in unbuilt dorms as a CEQA impact, and take the opportunity created by this review to revisit CEQA jurisprudence.

It has been fifty-one years since the California Supreme Court’s first CEQA decision, *Friends of Mammoth*, involves a condo project near Mammoth ski resort.<sup>29</sup> In that case, the Court

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<sup>25</sup> Richard Drury, Remarks at 2022 Environmental Law at Yosemite: CEQA Update (Oct. 15, 2022), <http://cla.inreachce.com/Details/Information/e30ce592-0a46-4f23-80e5-2af3b4084930> [<http://perma.cc/E3WL-WNC7>] (recording available for purchase here); Richard Drury, Remarks at CEQA New Developments and Practice Challenges for 2022 (Dec. 2022), <http://cle.com/seminars.php?page=0&ord=date&ordby=> [<http://perma.cc/2TZR-WMG9>] (recording available for purchase here); see generally *CEQA Works Coalition*, PLAN. & CONSERVATION LEAGUE, <http://www.pcl.org/campaigns/ceqa/ceqa-works-coalition/> [<http://perma.cc/LL55-WU9R>].

<sup>26</sup> See Brief for Richard M. Frank & Sean B. Hecht as Amici Curiae Supporting Appellants, *Jenkins v. Brandt-Hawley*, 302 Cal. Rptr. 3d 883 (Ct. App. 2022) (No. A162852) [hereinafter Frank & Hecht Amicus Brief].

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Friends of Mammoth v. Bd. of Supervisors*, 502 P.2d 1049 (Cal. 1972).

directed lower courts to interpret CEQA broadly to protect the environment.<sup>30</sup> That decision is the most often cited by courts that decline to apply the plain language of CEQA's statutes. *Friends of Mammoth* continues to serve as the rationale for courts' willingness to require the most draconian of CEQA remedies—rescission of project approval pending more CEQA legislation. This draconian remedy has been applied even to housing that has been constructed, and occupied, while the lawsuit was pending. Justice Chin, in a dissent to an anti-housing CEQA lawsuit in which all justices agreed that CEQA was not a population control statute, stated: "We have caution[ed] that rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement."<sup>31</sup>

The outsize use of CEQA lawsuits to block housing in existing communities is just one cause of the housing crisis, and the Legislature is dutifully enacting dozens of laws each year to try to spur housing production to address the state's multi-million housing unit shortfall. This is not California's first CEQA versus housing battle of the "super-statutes,"<sup>32</sup> as another law professor has quipped.<sup>33</sup> The new housing legislation is again at risk of being crushed by CEQA,<sup>34</sup> repeating the last round where the legislation directed more and faster housing approvals in the 1980s, only to be crushed by CEQA judicial decisions which included judicial rejection of plain language statutory directives beginning with the wholesale rejection of most 1993 legislative reforms to CEQA and continuing through the UC Berkeley

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<sup>30</sup> See generally *Friends of Mammoth*, 502 P.2d at 1049.

<sup>31</sup> *Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 361 P.3d 342, 367 (2015) (Chin, J., dissenting) (quoting *Citizens of Goleta Valley v. Bd. of Supervisors*, 801 P.2d 1161, 1175 (1990)). The majority agreed that "CEQA is not intended as a population control measure." *Id.* at 350.

<sup>32</sup> See James Brasuell, *Land Use Regulations on a Collision Course in California*, PLANETIZEN (Dec. 2, 2021, 8:00 AM), <http://www.planetizen.com/news/2021/12/115441-land-use-regulations-collision-course-california> [<http://perma.cc/XC8T-346U>].

<sup>33</sup> See Christopher S. Elmendorf & Tim Duncheon, *Does the HAA (or Anything Else) Provide a Remedy CEDQA-Laundered Project Denials?*, SLOG (Dec. 1, 2021), <http://www.sloglaw.org/post/does-the-haa-or-anything-else-provide-a-remedy-ceqa-laundered-project-denials> [<http://perma.cc/VCT4-JQ69>]; Christopher S. Elmendorf & Tim Duncheon, *How CEQA and the HAA Became "Super"*, SLOG (Nov. 30, 2021), <http://www.sloglaw.org/post/how-ceqa-and-the-haa-became-super> [<http://perma.cc/J9XL-XGY9>].

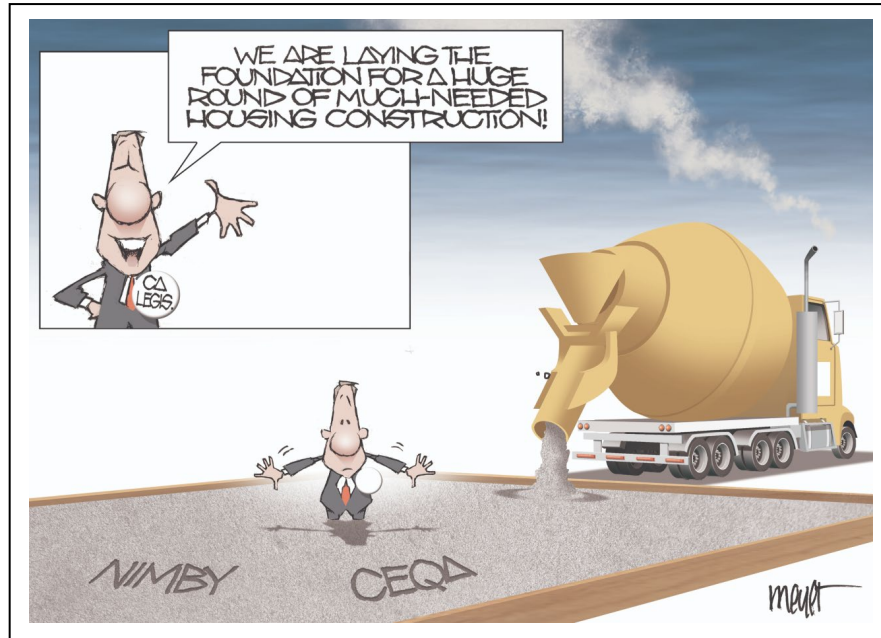
<sup>34</sup> See *Yes in my Back Yard, a California Nonprofit et al vs. City and County of San Francisco et al (CEQA Case)*, No. CPF22517661, THE SUPERIOR COURT OF CAL., CNTY. OF S.F., <http://webapps.sftc.org/ci/CaseInfo.dll?CaseNum=CPF22517661&SessionID=41B83325A4C4DB77D1B4300F3F09A3BA9FBD2C93> [<http://perma.cc/QU78-3VBL>] (last visited Apr. 1, 2023).

student housing case in February 2023.<sup>35</sup> Unless the California Supreme Court and appellate courts revisit their own “business-as-usual” CEQA jurisprudence, pro-housing, pro-civil rights, and pro-climate resiliency statutory mandates and funding priorities will be first delayed and then crushed by status quo defenders in CEQA lawsuits. Fortunately, the judiciary’s pathway to success is less politically fraught than the Legislature’s navigation through the swarm of special interests that use CEQA to advance their own economic and (non-environmental) policy goals.

In what I fervently hope will be the last in our *In the Name of the Environment* series, I write this to give voice to struggling, hard-working Californians who do not have a swarm of special interest lobbyists but do need and deserve to be able to work hard and buy a home (and shouldn’t need to visit their kids and grandkids via videoconference because the kids couldn’t afford to stay in California). I write this to give voice to lower income Californians scrambling for too few affordable units who endure decade-long lottery delays for taxpayer-funded affordable housing (and do not want to rent a one bedroom cottage in someone else’s backyard to raise their family). I write this for residents who need (and pay among the highest taxes in the country to use) effective, reliable, and affordable water, transportation, and energy infrastructure, as well as public services like parks, schools, and public safety. For the people who could not just de-camp to Hawaii during the state’s extended COVID lock-down, for those without fancy college degrees who make a living by showing up and doing a job, not just tapping on a keyboard. For these people—my families and the tens of millions of families like mine—we urgently need the state’s elected leaders and our distinguished judiciary to please restore CEQA to ordinary administrative law jurisprudence, and allow critically-needed housing, climate resilient infrastructure, water supplies, and public services to be built in full compliance with the thousands of environmental protection statutes and regulations adopted since 1970—and stop allowing CEQA to be the massive Not in My Back Yard (“NIMBY”) status quo defender (and special interest extortion tool) that it has evolved into over the past fifty-two years.

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<sup>29</sup> See *Make UC A Good Neighbor v. Regents of Univ. of Cal.*, 304 Cal. Rptr. 3d 834 (Ct. App. 2023).

POLITICAL CARTOON<sup>36</sup>

## I. STUDY BACKGROUND AND METHODOLOGY

CEQA requires that any party who files a lawsuit alleging noncompliance with CEQA must send a copy of that lawsuit to the California Attorney General (“Cal AG”).<sup>37</sup> For all data gathered in all three of our *In the Name of the Environment* studies, we sent Public Records Act requests to the Cal AG asking for copies of all CEQA lawsuits filed during each of our three, three-year study periods (2010–2012, 2013–2015, and 2019–2021). Each petition was then reviewed, with pertinent data (such as project location, type of agency action/project challenged, etc.) entered into datasheets, and then compiled into the categories reported in each study.<sup>38</sup> The third data set comprising this Study is reported in Parts III and IV below.

For those unfamiliar with CEQA, we start with a very brief summary of this law and suggest that readers review *Getting Started with CEQA*, published by the Governor’s Office of

<sup>36</sup> Tom Meyer, CEQA Cartoon.

<sup>37</sup> See CAL. PUB. RES. CODE § 21167.7 (West 2023) (requiring parties to furnish a copy of the petition, as well as any amended or supplemental petition, to the Attorney General’s Office within ten days after filing the pleading).

<sup>38</sup> As with past years, copies of each CEQA lawsuit, and datasheets, can be made available for in-person review in the author’s law office by appointment.

Planning & Research (“OPR”).<sup>39</sup> OPR is the state agency assigned by CEQA to develop “guidelines”—which serve as the equivalent for most purposes of regulations—to provide more detailed and practical directions on CEQA compliance requirements.<sup>40</sup>

CEQA is both a procedural statute, requiring analysis and public disclosure of the environmental consequences of proposed agency actions, and a substantive statute, requiring that public agencies fully consider public comments as well as avoid or minimize to the greatest extent feasible significant adverse environmental impact. Only after an agency requires all such “feasible”<sup>41</sup> means of avoiding or reducing an environmental impact is an agency nevertheless allowed to approve a project based on an “overriding” social (e.g., affordable housing), economic (e.g., job-creating), legal (e.g., emergency response to a fire or broken bridge), or technological (e.g., energy conserving LED lighting retrofits), benefits of a project.<sup>42</sup>

CEQA applies to both public agency approvals of their own plans, regulations, and policies and to public agency decisions to approve or fund projects undertaken by the private parties from homeowners to large corporations. Scores of statutory exemptions to CEQA have been approved over the past decades, which are typically limited to politically favored projects, and also include numerous eligibility criteria and restrictions which render many “unicorns”—much discussed, rarely if ever seen in practice.<sup>43</sup> There are also limited regulatory (or “categorical”) exemptions from CEQA for project categories that “normally” would not result in adverse environmental impacts.<sup>44</sup> Whether a project qualifies for either a statutory or regulatory exemption can also be challenged in a CEQA lawsuit.

A CEQA lawsuit challenges whether an agency has properly complied with CEQA, but in most cases is intended to—and does—block construction of the approved agency or private party project

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<sup>39</sup> *Getting Started with CEQA*, GOVERNOR’S OFF. OF PLANNING AND RSCH., <http://opr.ca.gov/ceqa/getting-started/> [<http://perma.cc/GZ4Z-4HZ9>] (last visited Apr. 1, 2023).

<sup>40</sup> *See id.*

<sup>41</sup> CAL. CODE REGS. tit. 14, § 15021 (2023).

<sup>42</sup> *See* CAL. CODE REGS. tit. 14, § 15093 (2023).

<sup>43</sup> *See, e.g.*, CAL. CODE REGS. tit. 14, §§ 15260–15285 (2023); *see also* Hernandez, In the Name of the Environment I: 2010-2012, *supra* note 22, at 82-84; Jennifer L. Hernandez et al., *SB7 Creates Expedited CEQA Litigation Schedule for Qualifying Projects*, HOLLAND & KNIGHT (May 28, 2021), <http://www.hklaw.com/en/insights/publications/2021/05/sb-7-creates-expedited-ceqa-litigation-schedule> [<http://perma.cc/2KEL-FALT>].

<sup>44</sup> CAL. CODE REGS. tit. 14, §§ 15300–15333 (2023).

until the lawsuit is resolved.<sup>45</sup> There are two reasons for this practical consequence. First, as recently acknowledged in an amicus filing by two longtime CEQA practitioners (both of whom were tenured law school professors at the University of California—one of whom after decades of senior service in the California Attorney General's office and the other having since moved on to the Earthjustice environmental advocacy organization), the outcome of judicial decisions in CEQA cases is entirely unpredictable.<sup>46</sup> Second, the most common judicial remedy in CEQA decisions against agencies (which happen in about fifty percent of CEQA appellate court cases),<sup>47</sup> is that the project approval is rescinded pending further CEQA processing and re-approval.<sup>48</sup> Even completed apartment projects with tenants in occupancy have been ordered vacated<sup>49</sup> and have been left vacant for years based on a CEQA deficiency identified by a judge or appellate court, often for aesthetic or other non-polluting and non-safety reasons, years after the project was approved.<sup>50</sup>

CEQA lawsuits typically require two to five or more years to resolve, with one lawsuit involving a single family home project on an existing lot in Berkeley that was unanimously supported by adjacent neighbors, the appointed Planning Commission, and the elected City Council, tied up in the courts for eleven years. The Berkeley family homeowner won the lawsuit, but raised their

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<sup>45</sup> See Jennifer L. Hernandez, *California's Environmental State Agencies Are Converting CEQA's Anti-Project Howitzer into a Neutron Bomb*, DAILY J. (Aug. 25, 2022), <http://www.dailyjournal.com/articles/368863-california-s-environmental-state-agencies-are-converting-ceqa-s-anti-project-howitzer-into-a-neutron-bomb> [<http://perma.cc/N5ZV-FRC8>].

<sup>46</sup> Frank & Hecht Amicus Brief, *supra* note 28, at 12–13.

<sup>47</sup> See Hernandez, *In the Name of the Environment I: 2010-2012*, *supra* note 22, at 80.

<sup>48</sup> See *CEQA Remedies Clarified*, MANATT (Nov. 2, 2012), <http://www.manatt.com/insights/newsletters/real-estate-and-land-use/ceqa-remedies-clarified> [<http://perma.cc/KSD4-RF6M>]; see also Arthur F. Coon, *Remedial Legal Logic: Fifth Circuit Doubles Down on Split with Other Districts*, MILLER STARR REGALIA: CEQA DEVS. (Nov. 29, 2020), <http://www.ceqadevelopments.com/2020/11/29/remedial-legal-logic-fifth-district-doubles-down-on-split-with-other-districts-in-holding-ceqa-doesnt-allow-limited-writ-remedy-of-partial-eir-decertification-but-does-it-really-m/> [<http://perma.cc/M3RG-XK5N>].

<sup>49</sup> See Bianca Barragan, *Everyone Living in Hollywood's Sunset and Gordon Tower Has to Move Out*, CURBED L.A. (Mar. 20, 2015, 12:49 PM), [http://la.curbed.com/archives/2015/03/sunset\\_gordon\\_eviction.php#more](http://la.curbed.com/archives/2015/03/sunset_gordon_eviction.php#more) [<http://perma.cc/P5EC-9E2D>].

<sup>50</sup> See *id.*; see also David Garrick, *A New Ruling Could Thwart High-Rise Housing Development in San Diego by Complicating Approvals*, SAN DIEGO UNION-TRIB. (Feb. 4, 2023, 5:00 AM), <http://www.sandiegouniontribune.com/news/politics/story/2023-02-04/junipers-ruling-environmental-impact-review-housing> [<http://perma.cc/HRP2-AB6Y>]; M. Nolan Gray, *How Californians Are Weaponizing Environmental Law*, THE ATLANTIC (Mar. 12, 2021), <http://www.theatlantic.com/ideas/archive/2021/03/signature-environmental-law-hurts-housing/618264/>.



children elsewhere as their dream house remained mired in litigation and has to this date never been built.<sup>51</sup>

In our prior two studies, *In the Name of the Environment: Litigation Abuse Under CEQA* (the “2010–2012 Study”)<sup>52</sup> and *California Environmental Quality Act Lawsuits and California’s Housing Crisis* (the “2013–2015 Study”),<sup>53</sup> we showed how CEQA lawsuits have become weaponized to block environmentally beneficial as well as benign projects. For example, in our 2010–2012 Study we showed that CEQA lawsuits are rarely (thirteen percent) filed by recognized environmental advocacy organizations such as the Sierra Club or Center for Biological Diversity,<sup>54</sup> and are instead almost always filed by either individuals, or new and often informal organizations (e.g., named, “Save Fifth Street”) with no identified funding source which was created for the purpose of opposing the challenged project.<sup>55</sup> Through investigative journalists and concurrent media reports, we were able to show that these shadowy new organizations were fronts for anonymous neighbors (e.g., a Berkeley homeowner who opposed the remodel of the community library), competitors (e.g., warring gas station owners), and labor (e.g., retail clerk and construction unions).<sup>56</sup> Unlike all other similar state and federal environmental laws, CEQA lawsuits can be filed by anonymous entities whose primary litigation objective is not protecting the environment.<sup>57</sup>

Our prior two studies also showed that, in stark contrast to the old growth forest clear cuts, major chemical factories, and massive freeways under consideration when CEQA was adopted in 1970, modern CEQA lawsuits are primarily filed to block housing and public infrastructure projects in existing neighborhoods, especially cities.<sup>58</sup> Increased traffic congestion, construction noise, changes to the “character of a community,” and

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<sup>51</sup> See Arthur F. Coon, *First District Upholds CEQA Class 3 Categorical Exemption*, MILLER STARR REGALIA: CEQA DEVS. (Feb. 12, 2019), <http://www.ceqadevelopments.com/2019/02/12/first-district-upholds-ceqa-class-3-categorical-exemption-for-single-family-residence-projects-in-berkeley-hills-rejects-claim-that-location-exception-applies-based-on-site/> [<http://perma.cc/M9R5-PZXX>] (discussing *Berkeley Hills Watershed Coal. v. City of Berkeley*).

<sup>52</sup> Hernandez, *In the Name of the Environment I: 2010-2012*, *supra* note 22.

<sup>53</sup> Hernandez, *In the Name of the Environment II: 2013-2015*, *supra* note 1.

<sup>54</sup> See Hernandez, *In the Name of the Environment I: 2010-2012*, *supra* note 22, at 24.

<sup>55</sup> See *id.*

<sup>56</sup> See *id.* at 19, 93.

<sup>57</sup> See *id.* at 24.

<sup>58</sup> See *id.* at 9–15; see also Hernandez, *In the Name of the Environment II: 2013-2015*, *supra* note 1, at 28–31.

other unremarkable characteristics of a growing population, thriving job market, and vibrant but evolving community largely replaced the suite of “environmental” impacts at issue when CEQA was adopted, such as causing the extinction of a an endangered species, spewing vast quantities of pollution into the air or water, or destroying the scenic vista of a national park.<sup>59</sup>

As CEQA reached middle-age (forty years old in 2010), as shown in the first two of our *In the Name of the Environment* series, CEQA lawsuits were far more likely to be used in “micro-environment” neighborhood disputes, like challenging the renovation of an elementary school cafeteria, the installation of all-weather turf on a public park soccer field, remodels of single family homes, the construction of apartments in existing neighborhoods, and even the addition of neighborhood-conforming single family homes on infill sites like former elementary schools and golf courses. As one commenter has noted in *The Atlantic*, CEQA has evolved into “a system that subjects even humdrum infill proposals to obtuse multi-binder reports and shady dealings, leaving a housing-affordability crisis in its wake.”<sup>60</sup>

CEQA lawsuits only challenge approved projects: CEQA follows investment capital.<sup>61</sup> In the 2010–2012 Study, for example, we showed that during the state’s first major federal infusion of public funding for transit and renewable energy during the Obama Administration, more CEQA lawsuits challenged solar projects than natural gas power, industrial, and mining projects combined—and more CEQA lawsuits challenged public transit than public highway projects.<sup>62</sup>

But blocking housing remains CEQA’s most fecund litigation practice. California’s housing crisis has been an acute problem for decades.<sup>63</sup> In both earlier studies, we showed that housing was the top target of CEQA lawsuits challenging private

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<sup>59</sup> See, e.g., Hernandez, *In the Name of the Environment II: 2013-2015*, *supra* note 1, at 68–71.

<sup>60</sup> M. Nolan Gray, *How Californians Are Weaponizing Environmental Law And How to Fix It*, ATLANTIC, <http://www.theatlantic.com/ideas/archive/2021/03/signature-environmental-law-hurts-housing/618264/> (last visited Apr. 15, 2023).

<sup>61</sup> See Hernandez, *In the Name of the Environment I: 2010-2012*, *supra* note 22, at 43; *cf. id.* at 22 (“It should come as no surprise that banks making construction loans, and government agencies making time-sensitive grant and appropriations decisions, usually decline to fund projects while a CEQA lawsuit is pending.”).

<sup>62</sup> See Hernandez, *In the Name of the Environment I: 2010-2012*, *supra* note 22, at 43–44, 52–53.

<sup>63</sup> See *LAO Housing Publications*, LEGIS. ANALYST’S OFF., <http://lao.ca.gov/laoecontax/housing> [<http://perma.cc/UKH9-N4Z5>] (last visited Mar. 23, 2023).

projects.<sup>64</sup> Public agency plans and zoning decisions that allowed new housing—as well as public agency school and water infrastructure needed for new homes—were the top target of CEQA lawsuits challenging public agency projects.<sup>65</sup> In a deep-dive into anti-housing CEQA lawsuits in the state’s most populous Southern California region, in our 2018 Study we also showed that CEQA lawsuits against housing were more likely to be filed against apartments located near public transit in the region’s wealthier, whiter, and healthier neighborhoods. As has now been widely recognized, CEQA is the most formidable legal obstacle to restoring an adequate housing supply to California.<sup>66</sup>

This third installment in our In the Name of the Environment series again affirms the ongoing pattern of CEQA lawsuits filed against environmental benign and environmentally beneficial housing, renewable energy, and climate resilient infrastructure projects. We first recap the 2023 Study findings, as part of this ongoing pattern, in Part I.

## II. CEQA V. HOUSING

In our preview of Anti-Housing CEQA Lawsuits filed in 2020, we tabulated all approved housing units that were challenged in CEQA lawsuits: nearly 48,000 individual housing units were challenged, which, in turn, is nearly half of all of the housing produced statewide in 2020.<sup>67</sup>

An even more startling anti-housing CEQA lawsuit statistic that emerged from a review of all three years in our dataset are lawsuits targeting regional and local agency plans to allow more housing; both the amount of housing needed, and the timing and content of these agency plans, are prescribed by state housing laws. For example, in a 2008 climate bill (SB 375), the regional agencies responsible for managing transportation improvements were charged with developing “Sustainable Communities Strategies” (“SCS”) for coordinating land use and transportation,

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<sup>64</sup> See Hernandez, In the Name of the Environment I: 2010-2012, *supra* note 22, at 10, 12–15; see also Hernandez, In the Name of the Environment II: 2013-2015, *supra* note 1, at 29–34.

<sup>65</sup> See *id.* at 26 fig.1. Public services and infrastructure account for 15% of CEQA lawsuits, agency plan/regulation accounts for 19%, and water accounts for 3%. *Id.* These three categories total 37% of all CEQA lawsuits. *Id.* Only some of these three categories allow for new housing, totaling about 27% of this 37%. *Id.* Housing challenges were 29%. *Id.*

<sup>66</sup> See Hernandez, In the Name of the Environment I: 2010-2012, *supra* note 22, at 36–37.

<sup>67</sup> JENNIFER HERNANDEZ, ANTI-HOUSING CEQA LAWSUITS FILED IN 2020 CHALLENGE NEARLY 50% OF CALIFORNIA’S 100,000 ANNUAL HOUSING PRODUCTION 1 (2022), <http://centerforjobs.org/wp-content/uploads/Full-CEQA-Guest-Report.pdf> [<http://perma.cc/W7CR-ES44>].

while providing for planned residential and economic growth, all while achieving the state's aggressive climate change and GHG reduction targets.<sup>68</sup> Notoriously NIMBY advocates targeted the 9-county Bay Area SCS, which accommodated 441,176 new housing units.<sup>69</sup> A separate group targeted the Sacramento SCS in a CEQA lawsuit; that SCS included 133,512 new housing units.<sup>70</sup> Using CEQA to target climate-friendly new housing is a solid example of how CEQA is no longer in alignment with current state environmental priorities.

Cities and counties are also required to adopt “housing elements” in their General Plans, and make other conforming General Plan changes, to accommodate the housing assigned to that jurisdiction under state housing laws.<sup>71</sup> This 2019-2021 study tabulates these anti-housing lawsuits targeting state-mandated General Plan Housing Element updates, which ranged from the massive (City of Los Angeles, assigned 456,643 housing units), to the miniscule (anti-housing opponents in Del Rey Oaks in Monterey County objected to adding 86 new housing units). These lawsuits challenged housing in mid-size cities (Moreno Valley, 11,627 units), and in rural and mountain counties where housing demand surged with COVID refugees from high-cost tiny apartments in San Francisco, such as Calaveras (1,096 units), Placer (7,854 units), and El Dorado (5,353 units).

Anti-housing CEQA lawsuits challenging just two regional SCS climate plans, and six county and city general plans collectively sought to block 1,079,347 new housing units—and nearly a third of Governor Newsom's inaugural proclamation of a 3.5 million housing shortfall.<sup>72</sup>

To put this in perspective, it is important to recognize that “housing delayed is housing denied”<sup>73</sup> for those unable to find

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<sup>68</sup> See *Sustainable Communities & Climate Protection Program*, CAL. AIR RES. BD., <http://ww2.arb.ca.gov/our-work/programs/sustainable-communities-climate-protection-program/about> [<http://perma.cc/&C9Z-V3AN>].

<sup>69</sup> *Yerba Buena Neighborhood Consortium, L.L.C. v. Metro. Transp. Comm'n et al.*, CPF-21-517627 (S.F. Super. Ct. Nov. 22, 2021).

<sup>70</sup> *California Clean Energy Committee v. Sacramento Area Council of Governments*, No. 2019-80003278 (Cal. Super. Ct. Dec. 10, 2019).

<sup>71</sup> See *What is the Housing Element of the General Plan*, CITY OF L.A., <http://planning.lacity.org/blog/what-housing-element-general-plan> [<http://perma.cc/F26V-AS6G>] (last visited Mar. 30, 2023).

<sup>72</sup> See Newsom, *supra* note 18.

<sup>73</sup> YIMBY Riverside, FACEBOOK (Sept. 20, 2021), <http://www.facebook.com/YIMBYRiverside/posts/3086828581639163/> [<http://perma.cc/E4UG-8UGM>]; Brian Hodges, *Housing Delayed is Housing Denied*, OC REG. (Sept. 17, 2021), <http://www.ocregister.com/2021/09/17/housing-delayed-is-housing-denied/> [<http://perma.cc/7J3E-438L>].

housing they can afford for themselves and their families, and that meets their household's needs for good schools, accessible jobs, and homeownership. California's failure to build about three million new homes over the past decades has caused the state to have the highest poverty rate in the nation (inclusive of housing costs), according to the U.S. Census Bureau.<sup>74</sup>

The housing crisis inflicts the most direct harm on younger Californians, and communities of color, who struggle to pay routine monthly costs even with median and above-median incomes.<sup>75</sup> Even older homeowners experience the housing crisis, as children and grandchildren move to states with more balanced housing markets.

Essential workers like teachers, healthcare, construction, and retail workers depart for states that still offer attainable homeownership for middle-income households.<sup>76</sup> The housing crisis has also infected every segment of the California economy, with high housing costs cited as the leading reason why hundreds of thousands of people (net of in-migration) have moved out of California in recent years—a historic reversal of the state's longtime population growth pattern.<sup>77</sup>

Our comprehensive three-year evaluation reveals that tabulating actual approved housing units severely undercounts the magnitude of anti-housing CEQA lawsuits. Of the 512 CEQA lawsuits filed during the study period, Figure 1 shows that 198 challenged housing. Of these, 164 challenged housing in cities or on University of California campuses. Only 34 challenged housing on unincorporated county lands outside city boundaries; these

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<sup>74</sup> Morgan Keith, *California has the Highest Poverty Level of all States in the US, According to US Census Bureau Data*, BUS. INSIDER (Sept. 14, 2021), <http://www.businessinsider.com/california-has-highest-poverty-level-in-the-us-census-bureau-2021-9> [<http://perma.cc/6T7M-BHKX>].

<sup>75</sup> *The Real Cost Measure in California 2021*, UNITED WAYS OF CAL., <http://www.unitedwaysca.org/the-real-cost-measure-in-california-2021> [<http://perma.cc/MV8W-7Z5S>] (last visited Apr. 15, 2023) (explaining that “[h]ouseholds of all races struggle, but is highest for Latino and Black Families” and for those with less education, and households led by single mothers).

<sup>76</sup> See, e.g., *Not the Golden State Anymore: Middle- and Low-Income People Leaving California*, CALMATTERS, <http://calmatters.org/california-divide/2020/01/not-the-golden-state-anymore-middle-and-low-income-people-leaving-california/> [<http://perma.cc/R5U8-BHAB>] (last updated May 19, 2020); *Who's Leaving California—and Who's Moving In*, PUB. POL'Y INST. OF CAL., [http://www.ppic.org/blog/whos-leaving-california-and-whos-moving-in/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=whos-leaving-california-and-whos-moving-in?utm\\_source=ppic&utm\\_medium=email&utm\\_campaign=blog\\_subscriber](http://www.ppic.org/blog/whos-leaving-california-and-whos-moving-in/?utm_source=rss&utm_medium=rss&utm_campaign=whos-leaving-california-and-whos-moving-in?utm_source=ppic&utm_medium=email&utm_campaign=blog_subscriber) [<http://perma.cc/2MVP-QKH4>].

<sup>77</sup> See Sam Khater & Kristine Yao, *In Pursuit of Affordable Housing: The Migration of Homebuyers Within the U.S.—Before and After the Pandemic*, FREDDIE MAC (June 22, 2022), <http://www.freddiemac.com/research/insight/20220622-pursuit-affordable-housing-migration-homebuyers-within> [<http://perma.cc/FUR4-F53D>].

county projects include multi-family housing projects located in higher density unincorporated county neighborhoods (including neighborhoods interspersed between incorporated cities which are served by public transit).

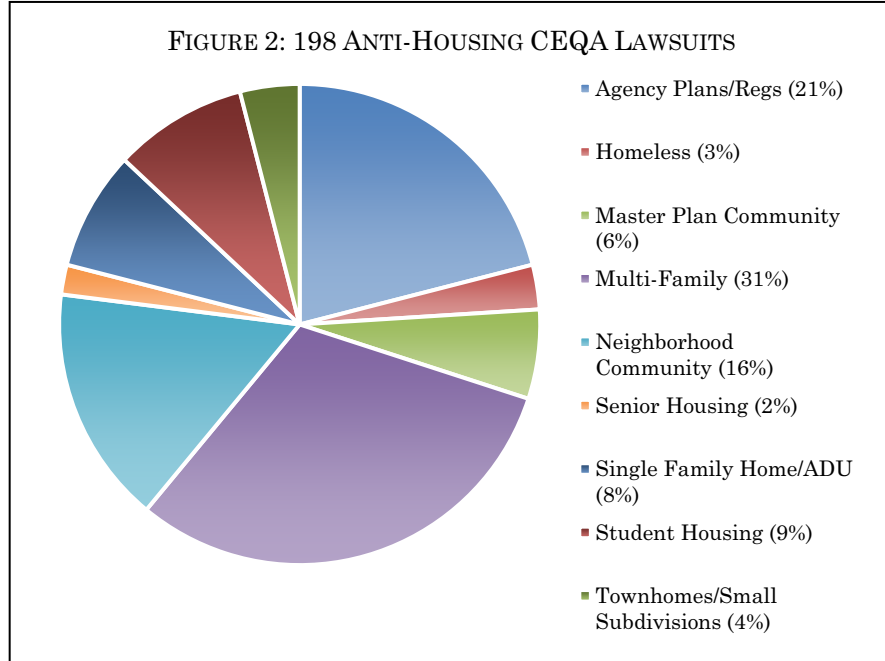
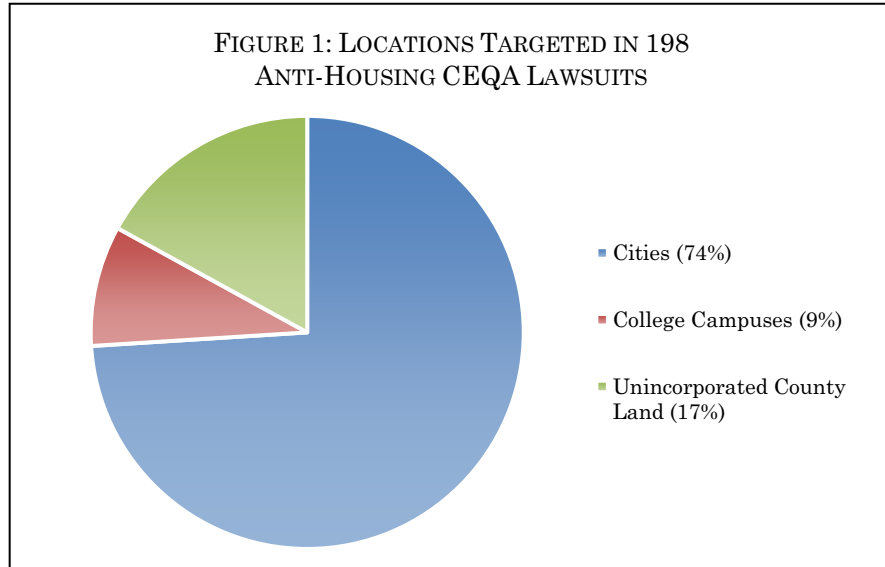


Figure 2 includes all categories of housing approvals challenged under CEQA, including student dormitories, residential facilities restricted to seniors, housing for those experiencing homelessness, income-restricted housing affordable to low and very low-income households, and housing for everyone else. It also includes regional and local agency housing approvals mandated by state laws, notably:

- State climate law<sup>78</sup> requiring regions to adopt Sustainable Communities Strategies to reduce GHG contributing to global climate change;
- Regional Housing Needs Allocation (“RHNA”)<sup>79</sup> laws requiring regions, cities, and counties to adopt land use plans and zoning ordinances to accommodate a state-assigned allocation of new housing units every eight years; and
- Affirmatively Furthering Fair Housing (“AFFH”),<sup>80</sup> requiring that new housing be dispersed throughout a community, including in wealthier neighborhoods that have traditionally been regulated to allow only more costly single-family homes.

#### A. CEQA v. Apartments

Figure 2 shows that the top target of all CEQA lawsuits filed against housing during the study period are multi-family apartment projects, and Figure 3 shows that anti-housing CEQA lawsuits are the largest category of all lawsuits filed under CEQA. This apartment category includes all housing projects that are restricted to low-income residents, as well as “mixed income” apartments that reserve a percentage of units for lower income households, and “mixed use” projects in urban markets that may include retail or office space on the ground floor. All of these challenged apartment projects are located within urbanized neighborhoods of cities and almost all displace an existing use like a parking lot or single-story commercial or retail building.

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<sup>78</sup> S. 375, 2008 Leg., Reg. Sess. (Cal. 2008).

<sup>79</sup> See *California Department of Housing and Community Development Approves Bay Area’s RHNA*, ASS’N OF BAY AREA GOV’TS (Jan. 27, 2022), <http://abag.ca.gov/our-work/housing/rhna-regional-housing-needs-allocation> [<http://perma.cc/X69W-VA8R>].

<sup>80</sup> See *Affirmatively Furthering Fair Housing*, CAL. DEPT OF HOUS. & CMTY. DEV. (April 2021), [http://www.hcd.ca.gov/community-development/affh/docs/affh\\_document\\_final\\_4-27-2021.pdf](http://www.hcd.ca.gov/community-development/affh/docs/affh_document_final_4-27-2021.pdf) [<http://perma.cc/8UQM-KAB3>].

As we showed in our 2013-2015 Study,<sup>81</sup> which dove deeply into CEQA lawsuits where most Californians live (the Los Angeles region), most (78%) of these challenged multi-family projects were located in wealthier, Whiter neighborhoods, and many (70%) are proximate to existing or planned public transit (bus or train/BART/metro stops). As explained in greater detail in *Green Jim Crow*,<sup>82</sup> land costs, agency-imposed fees, and exactions are generally higher in these urbanized areas. High housing costs are inherent with high cost urban land in desirable locations that displaces existing uses.<sup>83</sup> The building costs to construct “mid-rise” multi-family projects of up to six stories and “high-rise” apartments over six stories are three to seven times higher due to far more costly structural and operational components, such as elevators and utility systems under various building, earthquake safety, emergency, accessibility, energy, and other mandated components.<sup>84</sup> These transit rich neighborhoods are also located in cities with outsized job centers such as downtowns and are more likely to impose higher housing fees and more costly exactions.<sup>85</sup> Apartment projects tend to be most economically feasible in higher wage, higher amenity (e.g., restaurants and other retail services), and neighborhoods with high housing prices and severe housing supply shortfalls for both low income and market rate residents. These apartment projects are also more likely to be in wealthier communities with incumbent homeowners or businesses with an interest in protecting “their” environmental status quo, and the resources to file CEQA lawsuits. Due to high insurance rates, and demanding mortgage rules, almost all multi-family projects are built as rental apartments instead of for-sale condominiums.<sup>86</sup> Even “affordable” apartments built for low income families in these locations, with this multi-family building typology, cost in excess of \$1 million each to produce.<sup>87</sup> Monthly rental costs for non-subsidized households top \$4,000, often without parking, and are “affordable” using the standard benchmark of spending no

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<sup>81</sup> See generally Hernandez, *In the Name of the Environment II: 2013-2015*, *supra* note 1.

<sup>82</sup> See Hernandez, *Green Jim Crow* *supra* note 12.

<sup>83</sup> *Id.*

<sup>84</sup> See *id.* at n.14.

<sup>85</sup> See Keith, *supra* note 74.

<sup>86</sup> Michael Neal & Laurie Goodman, *The Housing Market Needs More Condos. Why Are So Few Being Built?*, URBAN INST. (Jan. 31, 2022), <http://www.urban.org/urban-wire/housing-market-needs-more-condos-why-are-so-few-being-built> [<http://perma.cc/9J78-Y3CV>].

<sup>87</sup> Liam Dillon & Ben Poston, *Affordable Housing in California Now Routinely Tops \$1 Million Per Apartment to Build*, L.A. TIMES (June 20, 2022), <http://www.latimes.com/homeless-housing/story/2022-06-20/california-affordable-housing-cost-1-million-apartment> [<http://perma.cc/NKJ7-T6KP>].



more than thirty percent of gross income on housing only to households earning in excess of \$150,000. These housing costs are unaffordable to even the state's wealthiest median income county (Santa Clara), and provides no wealth-creation pathway commensurate with homeownership for working families. Simply, the state's housing policy preferences are not affordable, even for the state's middle-class residents, like teachers, nurses, firefighters, and welders. State housing policies favor the wealthy, and taxpayer funded high-cost housing for the affordable lottery winners among the poor.

#### B. CEQA v. Agency Plans and Ordinances Allowing More Housing

The second most frequent target of anti-housing lawsuits is land use and zoning code approvals that make it easier to build more housing, including apartments, as required by state laws like SB 375, RHNA, and AFFH. Under SB 375, two of the state's regional climate plans were targeted by CEQA lawsuits: these plans collectively allowed the two challenged regions (Bay Area and Sacramento) to accommodate a minimum of 594,688 new housing units as required by state law.<sup>88</sup> Cities and counties are also required to update their local land use plans and zoning codes to accommodate RHNA-mandated housing allocations.<sup>89</sup> The General Plan Housing Element approved by the City of Los Angeles, which was required to accommodate 456,643 housing units, was also targeted by a CEQA lawsuits. More than one million planned housing units were challenged in just eight of the 514 CEQA lawsuits filed during the study period. Just three CEQA lawsuits launched against agencies during our study period challenge more than one million new homes required to be built under state laws other than CEQA. Typical CEQA practice requires a housing project applicant to fund all compliance and defense costs, which increase housing costs for soon-to-be residents. Housing lawsuits filed against agency approvals of plans and ordinances that allow more housing are paid for by

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<sup>88</sup> S. 375, 2008 Leg., Reg. Sess. (Cal. 2008).

<sup>89</sup> For a primer on California's regional housing needs assessment, affirmatively furthering fair housing civil rights law, and local housing element update laws, from YIMBY Law, see *RHNA & Housing Elements, Explained*, YIMBY ACTION, <http://static1.squarespace.com/static/5fcea2bac5ab4f3059545081/t/603808983de3d440cb746a3f/1614284956326/RHNA-Housing-Elements-Explainer.pdf> [<http://perma.cc/GT4C-WALE>].

taxpayers, from the same pool of funding that pays for city parks, libraries, personnel, and other expenses.<sup>90</sup>

We tabulated for this housing category only agency-approved plans and ordinances that allowed more housing units to be constructed. In Part III (CEQA v. Everything Else), we included challenges to agency approvals of plans, regulations, and ordinances that do not allow new housing—and, in some cases, actually make housing economically infeasible, even when the housing at issue fully complies with local General Plans, zoning, and regional SCS climate plans.

For example, one lawsuit sought to force San Diego County to use a methodology for demanding CEQA mitigation of “vehicles miles travelled” (“VMT”), the newest category of CEQA impact included in the CEQA Guidelines in the closing hours of the Brown Administration in 2017.<sup>91</sup> VMT is measured only for miles driven by people in cars, mini-vans, and pickup trucks. Under CEQA, a housing project’s “VMT impact” is calculated by estimating how many miles these vehicles will be driven by construction workers, and then by future residents, guests, delivery and repair services, etc., over a thirty year home occupancy period. CEQA’s new VMT impact is separate from air pollution and greenhouse gas emission, which have long been estimated based on VMT. Even an all-electric car has the same VMT impact as a smog-belching 1970 Cadillac.<sup>92</sup> Although

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<sup>90</sup> Cal. PUB. RES. CODE § 21089(a), (c) (Deering 2022) (stating public agencies may charge applicants to prepare CEQA documents); Att’y Gen. Bill Lockyer, Cal. Dep’t Just., Opinion Letter on Municipal Authority to Demand Indemnification from Third Party Lawsuits from CEQA Applicants (Feb. 4, 2002) (confirming municipalities may demand indemnification from third party CEQA lawsuits from applicants). *But see* Bryan Wenter, *Game Changer: Public Agency Cannot Mandate Payment of Attorney Fees Under Indemnity Agreement Without Specific Statutory Authority*, JDSUPRA (Mar. 9, 2021), <http://www.jdsupra.com/legalnews/game-changer-public-agency-cannot-4713368/> [<http://perma.cc/5CV5-Q9GB>] (last visited Mar. 28, 2023); *see also* Stephen Kostka & Michael Zischke, PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT § 2.9 (2d ed. 2022) (noting that the Council on California Competitiveness, California’s Jobs and Future concluded that “[t]he higher cost of some EIRs often reflects the likelihood of litigation rather than the degree of environmental damage associated with a particular project”).

<sup>91</sup> *Technical Advisory on Evaluating Transportation Impacts in CEQA*, GOVERNOR’S OFF. OF PLAN. & RSCH. 1 (Dec. 2018), [http://opr.ca.gov/docs/20190122-743\\_Technical\\_Advisory.pdf](http://opr.ca.gov/docs/20190122-743_Technical_Advisory.pdf) [<http://perma.cc/W2CU-GY4V>]; *Proposed Updates to the CEQA Guidelines*, GOVERNOR’S OFF. OF PLAN. & RSCH. (Nov. 2017), [http://opr.ca.gov/docs/20171127\\_Comprehensive\\_CEQA\\_Guidelines\\_Package\\_Nov\\_2017.pdf](http://opr.ca.gov/docs/20171127_Comprehensive_CEQA_Guidelines_Package_Nov_2017.pdf) [<http://perma.cc/B8RT-9CLT>]; *Berkeley Hillside Pres. v. City of Berkeley*, 343 P.3d 834 (Cal. 2015).

<sup>92</sup> *See Technical Advisory on Evaluating Transportation Impacts in CEQA*, GOVERNOR’S OFF. OF PLAN. & RSCH. 4 (Dec. 2018), [http://opr.ca.gov/docs/20190122-743\\_Technical\\_Advisory.pdf](http://opr.ca.gov/docs/20190122-743_Technical_Advisory.pdf) [<http://perma.cc/W2CU-GY4V>].

adding VMT to CEQA was originally justified as a GHG reduction mandate to address climate change, the correlation between VMT and GHG was substantially eroded following California's mandated phase-out of internal combustion vehicles in favor of electric vehicle ("EV") technology, along with its mandated transition to a 100% renewable energy grid. VMT's regulatory promoters at the OPR pivoted to assertions that reducing vehicular use would improve water quality based on avoided use of vehicular brake pads, and reduce conventional air pollutants causing smog (although EPA had concluded that tailpipe emissions of smog had been reduced ninety-nine percent as of 2016).<sup>93</sup> VMT promoters also extolled the health benefits—"wellness"—of people living in high density, walkable neighborhoods near existing job centers, and asserted that achieving these health outcomes through newly-defined impacts was within CEQA's public health protection scope.<sup>94</sup> In practice, CEQA's VMT focus converted to imposing higher CEQA mitigation costs—to mitigate "VMT impacts"—on new housing built outside "transit priority areas" ("TPAs").<sup>95</sup> A TPA is defined as the half mile radius around high frequency bus stops, which in turn must have a minimum of four separate buses providing service for each weekday morning and afternoon peak commute as well as minimum evening and weekend service, or are near commuter rail stations or ferry terminals.<sup>96</sup> Since these are the suburban scale and master planned community neighborhoods where most housing—especially for homes that middle income Californians can afford to buy—are located, and continue to be

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<sup>93</sup> *Id.*; see also *California Air Resources Board 2022 Scoping Plan, Appendix D Local Actions section 3.1 and 3.2*, CAL. AIR RES. BD. (May 2022), [http://ww2.arb.ca.gov/sites/default/files/2022-05/2022-draft-sp-appendix-d-local-actions\\_0.pdf](http://ww2.arb.ca.gov/sites/default/files/2022-05/2022-draft-sp-appendix-d-local-actions_0.pdf) [<http://perma.cc/G3HR-8YX4>]; Louise Wells Bedsworth, *Climate Change Challenges Vehicle Emissions and Public Health in California*, PUB. POL'Y INST. OF CAL., [http://www.ppic.org/wp-content/uploads/content/pubs/report/R\\_310LBR.pdf](http://www.ppic.org/wp-content/uploads/content/pubs/report/R_310LBR.pdf) [<http://perma.cc/MGV8-MC9R>] (last visited Mar. 25, 2023).

<sup>94</sup> See *Technical Advisory on Evaluating Transportation Impacts in CEQA*, GOVERNOR'S OFF. OF PLAN. & RSCH. 4 (Dec. 2018), [http://opr.ca.gov/docs/20190122-743\\_Technical\\_Advisory.pdf](http://opr.ca.gov/docs/20190122-743_Technical_Advisory.pdf) [<http://perma.cc/W2CU-GY4V>]; see also *California Air Resources Board 2022 Scoping Plan, Appendix D Local Actions section 3.1 and 3.2*, CAL. AIR RES. BD. (May 2022), [http://ww2.arb.ca.gov/sites/default/files/2022-05/2022-draft-sp-appendix-d-local-actions\\_0.pdf](http://ww2.arb.ca.gov/sites/default/files/2022-05/2022-draft-sp-appendix-d-local-actions_0.pdf) [<http://perma.cc/G3HR-8YX4>]; Louise Wells Bedsworth, *Climate Change Challenges Vehicle Emissions and Public Health in California*, PUB. POL'Y INST. OF CAL., [http://www.ppic.org/wp-content/uploads/content/pubs/report/R\\_310LBR.pdf](http://www.ppic.org/wp-content/uploads/content/pubs/report/R_310LBR.pdf) [<http://perma.cc/MGV8-MC9R>] (last visited Mar. 25, 2023).

<sup>95</sup> CAL. PUB. RES. CODE § 21099 (West 2023).

<sup>96</sup> *Id.*

built at attainable prices.<sup>97</sup> TPAs were defined as neighborhoods located within a half mile of a metro or rail station, commuter ferry, or high frequency bus routes that met minimum standards of one bus every fifteen minutes during morning and evening peak commute hours (eight drivers and four buses for each routes), with further minimum service thresholds for weekends and evenings.<sup>98</sup> Public transit generally, and TPAs more specifically, occur on a minute fraction of California's one hundred million-acre footprint.<sup>99</sup>

A report prepared for the Southern California Association of Governments ("SCAG") region illustrates how rare TPAs are in California.<sup>100</sup> The SCAG region includes all Southern California counties and cities except those in San Diego county—transit accounts for only 5% of total trips in the region.<sup>101</sup> However, both transit service and actual transit utilization occur in just a fraction of the region: 82% of these transit trips occurred in Los Angeles County, 8% in Orange County, and the remaining 10% distributed between Riverside, San Bernadino, Inyo, and Ventura counties.<sup>102</sup> Most of the region's transit commuters live on only 1-3% of SCAG land, located overwhelmingly in Los Angeles county, and commuter transit use correlates to higher quality reliable transit service provided by TPAs.<sup>103</sup> Los Angeles county is approximately 4,750 square miles—3% of the county is 1,410 square miles.<sup>104</sup> The SCAG region is more than 38,000 square miles – transit ridership is either unavailable, or infrequent, for the vast majority of the region.<sup>105</sup>

A spacial map of TPAs in the state's next most populous region, the San Francisco Bay Area, further illustrates the mismatch between the amount and distribution of land in TPAs in this nine-county 6,900 square mile region:

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<sup>97</sup> See *CEQA Transportation Impacts (SB 743)*, GOVERNOR'S OFF. OF PLAN. & RSCH., <http://opr.ca.gov/ceqa/sb-743/> [<http://perma.cc/2MCL-NFNB>].

<sup>98</sup> See *id.*

<sup>99</sup> See Hernandez, *Green Jim Crow*, *supra* note 12.

<sup>100</sup> MICHAEL MANVILLE ET AL., *FALLING TRANSIT RIDERSHIP: CALIFORNIA AND SOUTHERN CALIFORNIA* 17, 21 (2018), [http://scag.ca.gov/sites/main/files/file-attachments/its\\_scag\\_transit\\_ridership.pdf](http://scag.ca.gov/sites/main/files/file-attachments/its_scag_transit_ridership.pdf) [<http://perma.cc/U3V3-5XZZ>].

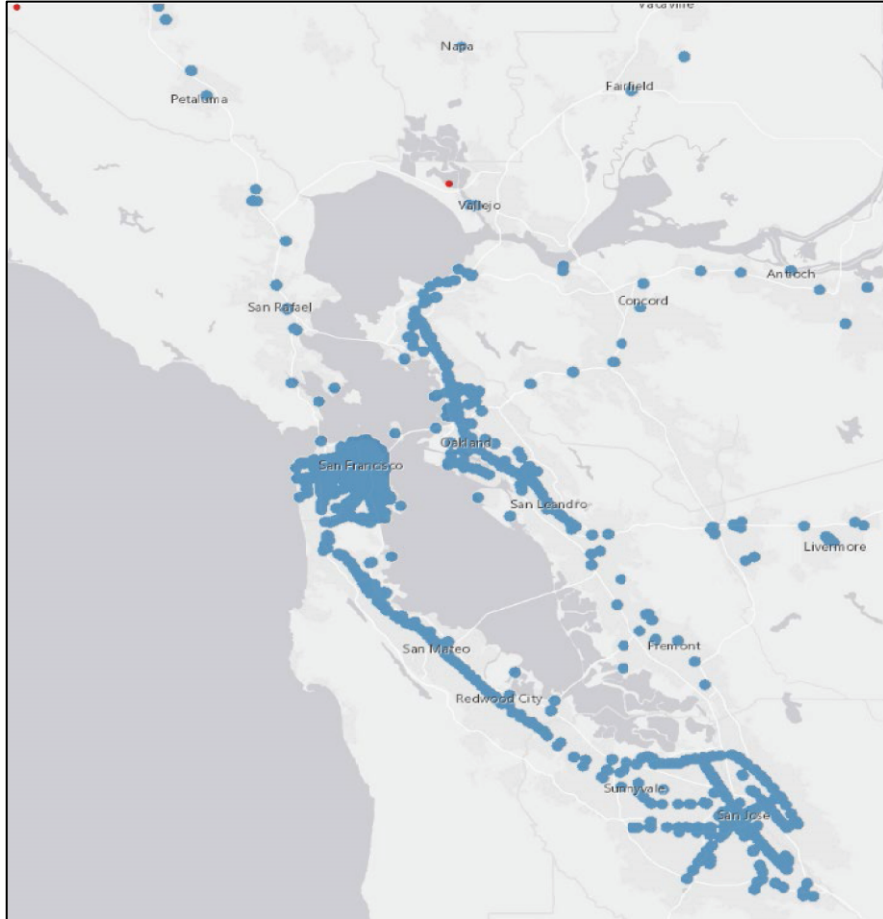
<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

MAP OF TRANSIT PRIORITY AREAS SAN FRANCISCO BAY AREA (2021)<sup>106</sup>

Only San Francisco, a forty-nine-square mile peninsula, is almost entirely a TPA. The region's other TPAs largely follow corridors on both sides of the cities fronting San Francisco Bay, and add mile-wide donuts in the downtowns of some larger cities and towns. Encouraging higher density housing in TPA—for those who can afford \$3,500 monthly rents or condos over \$1 million—may reduce VMT, but so does remote and hybrid work facilitated by high quality broadband as we learned during COVID. Using CEQA to add housing costs—VMT mitigation costs—in the vast

<sup>106</sup> *Transit Priority Areas (2021)* (illustration), in BAY AREA METRO. TRANSP. COMM'N, [http://opendata.mtc.ca.gov/datasets/370de9dc4d65402d992a769bf6ac8ef5\\_1/explore?location=37.773000%2C-122.191730%2C9.74](http://opendata.mtc.ca.gov/datasets/370de9dc4d65402d992a769bf6ac8ef5_1/explore?location=37.773000%2C-122.191730%2C9.74) (last visited Apr. 15, 2023).

majority of the region that is located outside the TPA circles and lines just adds housing cost burdens to the region's notoriously costly housing market, where high housing prices have driven more than 100,000 daily commuters outside the region into the adjacent San Joaquin county.<sup>107</sup> Only 1.5% of San Joaquin county residents take public transit to work or school.<sup>108</sup> Driving housing costs further higher in the the non-TPA Bay Area to "mitigate" VMT impacts makes it even less likely that a Bay Area worker can afford a home near work.

At a statewide scale, VMT is even more punitive: California is about 163,695 square miles.<sup>109</sup> As shown by the SCAG study, TPAs are scarce to non-existent in counties and cities outside already-urbanized, higher density locations.

Under the OPR VMT Guidance, which was new housing projects in cities are currently required to have VMT that is fifteen percent lower VMT than the "average" VMT for the city. For housing and other projects subject to CEQA review and discretionary approvals in the unincorporated areas of counties outside city boundaries, OPR has directed that VMT should be fifteen percent lower than the combined VMT average of all cities plus the unincorporated county.<sup>110</sup> This methodology, which has been most heavily litigated in San Diego county, means that even higher density housing in the county cannot meet this standard because so much of the population lives in the cities along the coast where driving distances are shorter and, in some locations, TPAs do exist and provide meaningful transit services.

The fallacy of the metric, which was invented by a consulting firm that has subsequently earned many millions of dollars selling its VMT analytical services to cities and counties statewide, is that a new apartment or home built in an existing neighborhood presents occupants with the exact same suite of transportation needs and solutions as their new neighbors in the existing housing next door. The class- and race-based discrimination inherent in this new CEQA metric is that high wealth neighborhoods, with better schools and parks, have little or no public transit – and no TPAs. State housing laws, like Affirmatively Furthering Fair

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<sup>107</sup> *Commute*, SAN JOAQUIN COUNCIL OF GOVERNMENTS CALIFORNIA, <http://www.sjog.org/230/Commute> [<http://perma.cc/Q6PB-9SEK>] (last visited Apr. 15, 2023).

<sup>108</sup> *Id.*

<sup>109</sup> See *How Big is California*, SpareFoot, <http://www.sparefoot.com/moving/moving-to-los-angeles-ca/how-big-is-california/> [<http://perma.cc/4BFL-PDMX>].

<sup>110</sup> See David Taub, *State Law Could Push Middle Class Out of Housing*, GV WIRE (Mar. 5, 2020), <http://gvwire.com/2020/03/05/state-law-could-push-middle-class-out-of-housing/> [<http://perma.cc/3HSB-WSA8>].

Housing, mandate distribution of new housing throughout the community, including, for example, adding apartments and affordable housing in “high resource areas.”<sup>111</sup> This is based on decades of civil rights studies demonstrating that poor and minority residents of high opportunity neighborhoods achieve higher educational attainment and income levels than those who grew up in poor neighborhoods with poor schools and fewer parks and other amenities.<sup>112</sup>

San Diego County, which is required to accommodate 6,700 new housing units,<sup>113</sup> was sued under CEQA to require strict adherence to non-regulatory state “guidance” on how VMT should be addressed under CEQA—one of the lawsuits included in this Study. The County Board of Supervisors, the majority of whom are aligned with open space and urban limit line advocates, opposed to new development in the County, directed staff to fully enforce the state VMT guidance. The result: for the three quarters of 2022, the County approved about 60 housing units per month. Once the VMT CEQA mitigation regime became effective in September 2022, permitting dropped to 8 units per month. In testimony provided on March 1, 2023, County staff reported that VMT mitigation fees, which can cost \$50,000 or more per apartment, are likely making much of the housing outside of TPAs economically infeasible.<sup>114</sup> The imposition of VMT as a CEQA impact effectively negates much of the County’s state-mandated and approved Housing Element, which is required to equitably distribute housing across the County (including within the County’s high opportunity but high VMT neighborhoods), as well as provide for housing solutions affordable to the region’s residents, including aspiring

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<sup>111</sup> See *Affirmatively Furthering Fair Housing*, CAL. DEPT HOUS. & CMTY. DEV. 15, [http://www.hcd.ca.gov/community-development/affh/docs/affh\\_document\\_final\\_4-27-2021.pdf](http://www.hcd.ca.gov/community-development/affh/docs/affh_document_final_4-27-2021.pdf) [<http://perma.cc/G9G7-T32B>] (last visited Mar. 26, 2023).

<sup>112</sup> See, e.g., *How do Neighborhoods Affect Economic Opportunity?*, EQUAL OPPORTUNITY PROJECT, <http://www.equality-of-opportunity.org/neighborhoods/> [<http://perma.cc/5Z4M-CFRM>] (last visited Mar. 26, 2023) (“Studying the experiences of seven million children who moved across areas while growing up, we document that every year of exposure to a better environment improves a child’s chances of success.”).

<sup>113</sup> See *Housing Blueprint*, SAN DIEGO CNTY., <http://engage.sandiegocounty.gov/housing-blueprint/widgets/59719/faqs#question9590> [<http://perma.cc/PH2A-WMN6>] (last visited Mar. 26, 2023); Jeremy Epstein, *Changing Transit Ridership and Service During the COVID-19 Pandemic*, UCLA (Oct. 31, 2022), <http://www.its.ucla.edu/publication/changing-transit-ridership-and-service-during-the-covid-19-pandemic/> [<http://perma.cc/G2UA-PKG2>].

<sup>114</sup> Email from Matt Adams, BIA of San Diego to San Diego Board of Supervisors (Mar. 1, 2023) (on file with author).

homeowners seeking to close the racial and generational wealth gap created by California's anti-homeownership/housing policies.

Bus ridership was crashing in Southern California (and the rest of the nation) even before COVID.<sup>115</sup> Since COVID, and with the advent of remote and hybrid work patterns, bus ridership in much of the state has yet to recover to even sixty percent of its pre-COVID levels.<sup>116</sup> As noted above, CEQA VMT mitigation costs such as \$50,000 per apartment (and more for the cost of a home) even though future residents will use the same transportation options as their next-door neighbors is particularly punitive and disproportionate as a climate strategy, particularly since new homes must be built to stringent Green Building Code compliance standards and for example will use far less water and energy than the existing homes<sup>117</sup> occupied by the legacy residents of these "nice" neighborhoods.<sup>118</sup>

VMT is one of the environmental/climate redlining metrics discussed in *Green Jim Crow*.<sup>119</sup> It is also an example of an anti-housing CEQA metric embraced by environmental agency staff and anti-housing NIMBYs and advocates to continue to structurally embed in CEQA anti-housing mandates that undermine housing and civil rights laws, like Affirmatively Furthering Fair Housing.

### C. CEQA v. Homeownership for Middle Income Families

In third place are neighborhood community housing projects, which generally include a mix of single family homes as well as townhomes or condominiums, "accessory dwelling units" ("ADUs"), either in the form of backyard cottages or granny flats located within the main home structure, and small project subdivisions of fifty or fewer homes. These neighborhood-scale community housing projects also include, or are proximate to, parks and retailers, and may include new elementary schools, fire stations, or other public services. The largest of this home type is a "Master Planned Community" ("MPC"), which is planned at a larger scale and typically includes several thousand housing units in different

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<sup>115</sup> See *supra*, MANVILLE ET AL., *supra* note 101; see also SANDAG *Infobits 2019 State of the Commute Report*, SAN DIEGO ASS'N GOV'TS (Apr. 2020), <http://www.sandag.org/-/media/SANDAG/Documents/PDF/data-and-research/applied-research-and-performance-monitoring/performance-monitoring/infobits-2019-state-of-the-commute-report-2020-04-01.pdf> [<http://perma.cc/WS83-JT9X>].

<sup>116</sup> See Epstein, *supra* note 113.

<sup>117</sup> CAL. CODE REGS. tit. 24, part 11 (2022).

<sup>118</sup> See Adams, *supra* note 114.

<sup>119</sup> See Hernandez, *Green Jim Crow*, *supra* note 12.



housing types at different levels of affordability, as well as new infrastructure,<sup>120</sup> and—for purposes of our studies—is large enough to include a new high school. These are all projects that typically primarily include for-sale homes of varying sizes — given the importance of homeownership as part of the California Dream of working families — and help produce sufficient new homes to close the racial wealth gap created by more than a century of racial redlining that persisted into the 2008 recession with predatory loans and foreclosures<sup>121</sup> that disproportionately targeted homeowners of color. As compiled by affordable housing producer Habitat for Humanity, homeownership has long been recognized as the nation’s most successful pathway to build inter-generational wealth, as well as housing stability and other civic benefits such as higher educational attainment, higher rates of community volunteer activities and voter participation, etc.<sup>122</sup> The wealth gap between renters and homeowners is staggering: a September 2020 report from the Federal Reserve found that, on average, a homeowner had forty times more wealth than a renter.<sup>123</sup> A legacy of racial discrimination, which persisted into and beyond the 2008 Great Recession’s foreclosure crisis, has resulted in far lower homeownership rates for California’s Black and Latino families — and in 2022, fewer than one in five Black or Latino families in California could afford to own a median priced home.<sup>124</sup> California environmental policies favor high density urban rental apartments that are unaffordable, and strongly disfavor building new homes on lower cost land, in lower cost locations, with lower cost structures that are actually affordable for either purchase or rent by working families. California’s climate-based policies double down on these NIMBY environmental policies, expressly acknowledging the disproportionately higher economic burdens

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<sup>120</sup> This infrastructure may include: public services, like new fire stations and schools; job-creating commercial, retail, and institutional uses; renewable energy; and other sustainability features.

<sup>121</sup> See *Attorney General Brown Announces Landmark \$8.68 Billion Settlement with Countrywide*, OFF. ATT’Y GEN. (Oct. 6, 2008), <http://oag.ca.gov/news/press-releases/attorney-general-brown-announces-landmark-868-billion-settlement-countrywide> [<http://perma.cc/S3WD-9QRA>].

<sup>122</sup> See *Research Series: Outcomes Associated with Homeownership*, HABITAT FOR HUMAN., <http://www.habitat.org/our-work/impact/research-series-outcomes-associated-with-homeownership> [<http://perma.cc/D496-A87R>] (last visited Mar. 28, 2023).

<sup>123</sup> See Brett Holzauer, *Here’s the Average Net Worth of Homeowners and Renters*, CNBC (Feb. 27, 2023), <http://www.cnbc.com/select/average-net-worth-homeowners-renters/> [<http://perma.cc/CZF7-UMED>].

<sup>124</sup> Alejandro Lazo, *More Black and Latino Californians Face Out-of-Reach Home Prices* (Mar. 24, 2022), <http://calmatters.org/california-divide/2022/03/california-home-prices-black-latino-households/> [<http://perma.cc/PP94-PNQM>].

placed on median and lower wage (more likely Latino and Black) households while favoring wealthier (Whiter and Asian) households.<sup>125</sup> Neither Californians nor state elected leaders have voted to end attainable homeownership or kill the California Dream for anyone but the wealthy, but state leaders and bureaucrats have enthusiastically embraced or enabled policies that have caused exactly this outcome for decades, including most recently by voting to approve the CARB climate plan's<sup>126</sup> \$5.3 billion wealth transfer scheme to increase climate cost for households making \$100,000 or less while reducing \$5.3 million in climate costs from higher income households.<sup>127</sup> California has the second worst homeownership rate in the nation,<sup>128</sup> morphing the California Dream for a fading Baby Boomer legacy generation of median income households to lifelong renters for all but their wealthiest successors.

The underlying policy debate is an epithet: "Sprawl." Californians despise "sprawl" as causing traffic gridlock, but disagree as to what sprawl actually is and where new housing should actually be located.<sup>129</sup> On one end of the spectrum, because state housing and environmental laws mandate that new development be "green," require dispersal of housing throughout communities under Affirmatively Further Fair Housing, and have not rescinded the civil rights and equity laws and regulations to make homeownership attainable to communities of color and middle class families of all colors, local governments and housing applicants continue to plan for and approve this housing and families continue to save for, and buy, their first new home.<sup>130</sup> On the other end of the spectrum, environmentalists—long committed to blocking development even on proximate urban lands and

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<sup>125</sup> CAL. AIR RES. BD., 2022 SCOPING PLAN FOR ACHIEVING CARBON NEUTRALITY 125–26 (2022).

<sup>126</sup> *CARB Approves Unprecedented Climate Action Plan to Shift World's 4th Largest Economy from Fossil Fuels to Clean and Renewable Energy*, CAL. AIR RES. BD. (Dec. 15, 2022), <http://ww2.arb.ca.gov/news/carb-approves-unprecedented-climate-action-plan-shift-worlds-4th-largest-economy-fossil-fuels#:~:text=The%20California%20Air%20Resources%20Board,achieves%20carbon%20neutrality%20in%202045> [http://perma.cc/6PBK-6QUN].

<sup>127</sup> See e.g., Lazo, *supra* note 124.

<sup>128</sup> *Homeownership Trends in California*, PUB. POLY. INST. OF CAL. (June 14, 2022), <http://www.ppic.org/blog/homeownership-trends-in-california/> [http://perma.cc/5BVF-UP5X].

<sup>129</sup> See Wendell Cox, *California's Dense Suburbs and Urbanization*, NEWGEOGRAPHY (Mar. 14, 2018), <http://www.newgeography.com/content/005908-californias-dense-suburbs-and-urbanization> [http://perma.cc/2FQF-PSPD].

<sup>130</sup> See, e.g., 2022 STATE OF HISPANIC HOMEOWNERSHIP REPORT, <http://nahrep.org/downloads/2022-state-of-hispanic-homeownership-report.pdf> [http://perma.cc/LT2G-DQKY].

phasing out automobile use (even electric automobiles)—oppose single family and other lower density housing even when long-planned in existing cities needing workforce housing.<sup>131</sup> At the most extreme end of this environmentalist spectrum are Malthusians who believe that California (and Earth) are at risk of reaching their holding capacity, and “de-growth” of California is necessary<sup>132</sup> (fewer people overall, and no more housing growth except expensive, high density, small rental apartments in transit-dependent neighborhoods) to ward off climate change and the mass extinction of species.<sup>133</sup>

In fact “sprawl” is generally used to refer to single family homes built in suburbs to satisfy consumer demand for “homes with more square footage and yard space” and avoid the “traffic, noise, crime, and other problems” of cities.<sup>134</sup> “Smart growth” emerged in opposition to “sprawl,” and promotes building new homes only by substantially increasing densities in existing cities and towns.<sup>135</sup>

Smart-growth-only advocates underestimated voter resistance to density, the much higher cost (and reduced homeownership opportunities) of an all-densification urban limit line regulatory regime, and the continued desire by people to have more living and outdoor space away from the noise and bustle of high density cities for at least some portion of their life (e.g., when raising children).

In my view, neither sprawl nor smart growth have worked well: Baby Boomer battle lines that are decades old have resulted in massive housing shortages, obscene housing prices in the most “progressive” Green anti-housing political enclaves like San

<sup>131</sup> See *id.*

<sup>132</sup> See Brian Becker, *Degrowth: An Environmental Ideology with Good Intentions, Bad Politics*, LIBERATION SCH. (July 20, 2021), <http://www.liberationschool.org/degrowth-a-politics-for-which-class/> [<http://perma.cc/3MJG-UZCK>]; see also Paige Curtis, *Can we Address the Climate Crisis by “Degrowing”?*, SIERRA CLUB (Dec. 29, 2022), <http://www.sierraclub.org/sierra/can-we-address-climate-crisis-degrowing> [<http://perma.cc/3FEA-GSAB>]; see also Stuart M. Flashman, *Smart Growth vs. Wisely Planned Communities*, stufdash, <http://stufdash.com/smart-growth-vs-wisely-planned-communities/> [<http://perma.cc/FXL5-2UW7>] (last visited Apr. 16, 2023) (arguing against density increases that exceed the “carrying capacity” of a region; the author has served as a CEQA lawyer for those filing CEQA lawsuits to block housing and projects).

<sup>133</sup> See, e.g., *Policy Priorities to Build Needed Housing and Reduce Urban Sprawl*, ALL FOR HOUS. & CLIMATE SOL., <http://www.housingclimatealliance.org/policy-priorities> [<http://perma.cc/E7WR-TZGW>].

<sup>134</sup> David B. Resnik, *Urban Sprawl, Smart Growth, and Deliberate Democracy*, 100 AM. J. PUB. HEALTH 1852, 1853 (2010).

<sup>135</sup> See, e.g., *Our History*, SMART GROWTH AMERICA, <http://smartgrowthamerica.org/about-us/our-history/> [<http://perma.cc/T5F2-Z2YG>] (last visited Apr. 16, 2023).

Francisco and Marin county, and fragile or dysfunctional transportation, water, and energy infrastructure notwithstanding California’s exceptionally high tax and fee burdens. Like many “Zero Sum” debates promoted by partisan special interests, neither “sprawl” nor “smart growth” can provide solutions for the fact that California’s population is about twice as large today as it was when CEQA was enacted in 1970.<sup>136</sup>

Harvard University’s Education Department published an influential study of solutions for affordable and sustainable housing in Mexico (“Harvard Study”), which first suggests strategies for increasing infill density but then goes on to explain that “even in metropolitan areas with successful records of infill development, infill as a percentage of total area growth remains a minor portion of total growth” and “[g]reenfield development, or development on previously undeveloped sites, must be an *equally important aspect of city-building* in the 21st century if urban areas are to properly and adequately house new generations of city-dwellers.”<sup>137</sup> As summarized on the next table, with information from the Harvard Study, Sustainable Greenfield Development—often referred to in practice as Master Planned Communities—substantially differs from “sprawl.”

TABLE 1: DIFFERENCES BETWEEN URBAN SPRAWL AND SUSTAINABLE GREENFIELD DEVELOPMENT<sup>138</sup>

Characteristics of Urban Sprawl	Characteristics of Sustainable Greenfield Development
Low residual density	Higher overall residential density with a variety of housing types, not just single-family houses
Unlimited outward extension of new development	Outward extension of development is limited by numerous factors, including municipalities’ ability to provide infrastructure and services, open space preservation, and environmental protection considerations, etc.

<sup>136</sup> *California Population 1900-2022*, MACROTRENDS, <http://www.macrotrends.net/states/california/population> [http://perma.cc/5VQH-FLEU] (last visited Apr. 16, 2023).

<sup>137</sup> *Part 2: Improving Greenfield Development*, HARV. 94, [http://research.gsd.harvard.edu/socialhousingmexico/files/2016/09/RP\\_Part2\\_090716\\_LP.pdf](http://research.gsd.harvard.edu/socialhousingmexico/files/2016/09/RP_Part2_090716_LP.pdf) [http://perma.cc/QHS7-SMYM] (last visited Apr. 16, 2023).

<sup>138</sup> *Id.* at 95.

Spatial segregation of different types of land uses through regulations	Land use types are mixed and integrated, with town centers, office parks, and other employment and commercial centers easily accessible from residential areas
Leapfrog development (or development that leaps out onto new land, not connected to existing urban areas)	Contiguous urban expansion
No centralized ownership of land or planning of land development	Land development happens in accordance to well-defined plans or in cooperation among landowners
All transportation dominated by privately owned motor vehicles	Infrastructure and development supportive of many modes of transportation are created, including bus, rapid transit, bicycles, and pedestrians
Fragmentation of governance authority of land uses among many local governments	Governance of land use is coordinated among all municipalities in a region
Great variation in fiscal capacity of local governments	Commercial development is concentrated in nodes or town centers, serviced by a multi-modal transport network, not just roads for automobiles
Widespread commercial strip development along major roadways	Affordable housing is provided through a combination of an increased supply of housing, a variety of housing types, government requirements (like inclusionary zoning) and government programs, among others
Major reliance on filtering process to provide housing for low-income households. Filtering occurs when wealthier people move into new homes and low-income people move into the older and lower-quality houses left behind.	

My selection of this Harvard Study is intentional: the country lacks the wealth of California, and the study is designed to promote an equitable, as well as environmentally and financially sustainable, solution to an even more severe housing and poverty crisis. Mexico is getting wealthier,<sup>139</sup> with job and income growth,

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<sup>139</sup> *The World Bank in Mexico*, THE WORLD BANK GRP., [http://www.worldbank.org/en/country/mexico/overview#:~:text=The%20Mexican%20economy%20grew%20by,GDP\)%20pre%20pandemic%20levels](http://www.worldbank.org/en/country/mexico/overview#:~:text=The%20Mexican%20economy%20grew%20by,GDP)%20pre%20pandemic%20levels) [<http://perma.cc/V745-D7J9>] (last updated Apr. 4, 2023).

and advocates are seeking to use that wealth to promote a positive outcome for people—and the environment.

In citing the Harvard Study, I hope to, at least in part, bypass the fractious and pessimistic stand-off between strident anti-single family home environmentalists, and equally strident anti-densification environmentalists, who have used tools like CEQA to elevate legal procedure and process over solutions to our housing, infrastructure, and climate challenges. This stand-off, and the labor movement's willingness to tolerate this stand-off, even as it hurts middle income labor union households the most, have mostly “preserved” the increasingly imperfect status quo (unless you are already a wealthy donor who owns a home).

The housing crisis would be much easier to solve (and the state would reduce its greenhouse gas emissions and save the planet) if only we had far fewer Californians. That is not a racially-just outcome—it just honors Boomer nostalgia for free-flowing roadways and climate catastrophists convinced that getting America's lowest per-capita greenhouse gas emission state to “net zero” requires making the state unaffordable to all but its wealthiest residents (and their NGO and academic grantees).

In the world of CEQA lawsuits, Californians are losing and the Malthusians are winning: favored housing is unaffordable and sued under CEQA, disfavored housing is affordable and sued under CEQA, California's population is decreasing, and CEQA lawsuits to block even planned and approved housing that meet all of California's stringent green standards are the favored tool to achieve the anti-housing policy objectives of both Malthusians and environmentalists.

#### D. CEQA v. Students

CEQA lawsuits to block student dormitories were a major new target in this Study, even as colleges and universities have recognized that the absence of proximate, affordable student housing is causing massive harms such as homelessness, anxiety, and high drop-out rates.<sup>140</sup> Housing insecurity also causes greater

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<sup>140</sup> See U.S. DEPT. HOUS. & URB. DEV, INSIGHTS INTO HOUSING AND COMMUNITY DEVELOPMENT POLICY 1 (2015); Michael Burke et al., *How California is Responding to Dire Student Housing Shortage*, EDSOURCE (Sept. 28, 2022), <http://edsource.org/2022/how-california-is-responding-to-dire-student-housing-shortage/678616> [<http://perma.cc/KFT9-9Q4J>]; see also Brief for The Two Hundred for Homeownership as Amici Curiae, *Make UC a Good Neighbor v. The Regents of the University of California et al.*, Case No. A165451

harms to students of color, and students who are the first in their family to attend a four year college, just as they begin an educational journey that has in all past generations promised upward mobility and higher incomes.<sup>141</sup>

Rents that students pay to live in dormitories serve as a viable financing source to pay for the construction of new housing, allowing dorms to be built without triggering the need for tuition increases or budget cuts to other college programs. Because these dormitory projects are also generally required to pay higher wages to construction workers, similar to other public agency infrastructure projects, organized labor has not filed CEQA lawsuits against student dorms. A fierce and unapologetic constituency of literal NIMBYs campus neighbors has turned to CEQA: tens of thousands of new student beds are challenged in seventeen anti-dorm CEQA lawsuits filed during the Study Period.

Although reporting on the outcome of these CEQA lawsuits is beyond the scope of these studies (typically because the final resolution of CEQA lawsuits is not known for three to five years), it is noteworthy that UC Berkeley was the target of more of these anti-student housing lawsuits than any other campus. In one of several different CEQA lawsuit decisions, UC Berkeley was ordered to admit three thousand fewer undergraduates, a trial court decision that the California Supreme Court declined to review just a few days before student admission letters were scheduled to be mailed.<sup>142</sup> The Legislature instantly stepped in, decrying the concept that students were “pollution” or “anti-environment”—but the enacted “fix” Legislation was exceptionally narrow,<sup>143</sup> and did nothing to block pending anti-university CEQA lawsuits. For the first time in CEQA’s fifty-three-year old history, an appellate court had determined that the “social noise” of future student occupants of future student dormitories was indeed an “environmental impact” requiring evaluation and “all feasible mitigation” under

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(Cal. Ct. App., Jan. 3, 2023), <http://www.hklaw.com/media/files/insights/publications/2023/01/letterbriefucb1323.pdf>.

<sup>141</sup> See Maya Brennan et al., *The Impacts of Affordable Housing on Education: A Research Summary*, NAT’L HOUS. CONF. (Nov. 2014), <http://nhc.org/wp-content/uploads/2017/03/The-Impacts-of-Affordable-Housing-on-Education-1.pdf> [<http://perma.cc/J5X4-56QD>].

<sup>142</sup> Josh Moody, *Berkley Must Cap Enrollment, California Supreme Court Says*, INSIDE HIGHER ED (Mar. 4, 2022), <http://www.insidehighered.com/news/2022/03/04/calif-supreme-court-leaves-berkeley-enrollment-cap-place> [<http://perma.cc/QQ69-ZH2X>].

<sup>143</sup> See Shawn Hubler, *California Lawmakers Have Solved Berkley’s Problem. Is CEQA Next?*, N.Y. TIMES (Mar. 15, 2022), <http://www.nytimes.com/2022/03/15/us/berkeley-enrollment.html> [<http://perma.cc/9LX9-DYB5>].

CEQA.<sup>144</sup> This decision creates a broad path for future lawsuits against housing for teenagers (music!), families (babies who cry!), and others who do not live the quiet life of the retirees who chose to purchase a home next to the University of California's oldest campus and now want it to be "QUIETER! Gosh darnit!"

#### E. CEQA v. Old People

More CEQA lawsuits were filed against housing for the elderly than housing for the homeless. On even the most benign scale of housing "impacts" to the environment, senior housing ranks at the rock bottom: it generates far fewer traffic trips overall and during commute hours, it generates no "students" to crowd parks and schools, and "social noise" impacts of future residents are likely limited to the volume setting of an individual TV. Building senior housing also plays an outsized role in helping alleviate the housing crisis: seniors are most likely to move from existing single family homes, making those homes available for purchase by younger families who are otherwise renting, which in turn creates a new unit on the rental market.<sup>145</sup>

#### F. CEQA v. Homelessness

The Legislature enacted numerous CEQA exemptions designed to streamline the construction of shelters and other housing for those experiencing homelessness, including a statutory exemption from CEQA for converting hotels and motels into housing for unsheltered residents. As reported by scholars at UC Berkeley, this worked:<sup>146</sup> Project Roomkey provided temporary housing to 22,000 people as of the end of 2020,<sup>147</sup> and Project Homekey has funded 12,676 hotel conversion permanent housing units.<sup>148</sup> To the legions

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<sup>144</sup> See *Make UC a Good Neighbor v. Regents of Univ. of Cal.*, 384 Cal. Rptr. 3d 834, 850, 861 (Ct. App. 2023).

<sup>145</sup> See *While Seniors Age in Place, Millennials Wait Longer and May Pay More for their First Homes*, FREDDIE MAC (Feb. 6, 2019), <http://www.freddiemac.com/research/insight/20190206-seniors-age-millennials-wait> [<http://perma.cc/66XF-E8SL>].

<sup>146</sup> *California's Homekey Program Unlocking Housing Opportunities for People Experiencing Homelessness*, TERNER CTR. FOR HOUS. INNOVATION, <http://turnercenter.berkeley.edu/wp-content/uploads/2022/03/Homekey-Lessons-Learned-Final-March-2022.pdf> [<http://perma.cc/KC5K-FSAX>].

<sup>147</sup> Shannon McConville, *What Lessons Can Be Learned from Project Roomkey?*, PUB. POL'Y INST. OF CAL. (Dec. 4, 2020), <http://www.ppic.org/blog/what-lessons-can-be-learned-from-project-roomkey/> [<http://perma.cc/5J6Z-CEF3>].

<sup>148</sup> *Governor Newsom Awards an Additional \$36 Million for New Homeless Housing*, OFF. OF GOVERNOR GAVIN NEWSOM (Dec. 1, 2022), <http://www.gov.ca.gov/2022/12/01/governor-newsom-awards-an-additional-36-million-for-new-homeless-housing> [<http://perma.cc/TMJ6-D4E2>].



of anti-housing CEQA defenders, however, a statutory exemption just sets the legal framework for CEQA lawsuits asserting that the exemption does not (or should not) apply.

#### G. CEQA v. Single Family Homes/Casitas

The final noteworthy category of anti-housing CEQA lawsuits involves single family home projects, including new homes on existing lots and home remodels. The most notorious of these lawsuits languished in court for eleven years, including two trips to the California Supreme Court, in a gadfly v. homeowner dispute over the rebuild of a single family home on a single family lot in Berkeley.<sup>149</sup> The home rebuild was unanimously supported by the Berkeley Planning Commission and City Council.<sup>150</sup> There is a longstanding regulatory exemption (called “categorical exemption” in CEQA-ese”) finding that building a single family home on a single family lot does not cause environmental impacts warranting further study under CEQA.<sup>151</sup> A “community activist” sued anyway, decrying the size of the home and asserting that the Berkeley Hills were susceptible to landslide risks (they are, and buildings must meet stringent standards to protect against landslide risks).<sup>152</sup>

The same CEQA housing opponent lawyer in Berkeley Hillside sued on behalf of NIMBY neighbors to block another single family home rebuild in the small Marin County community of San Anselmo<sup>153</sup> (median home price, \$2.1 million).<sup>154</sup> The neighbors unsuccessfully argued that the home and neighborhood were entitled to historic preservation status, in a year-long dispute

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<sup>149</sup> Arthur F. Coon, *First District Upholds CEQA Class 3 Categorical Exemption for Single Family Residence Projects in Beverly Hills, Rejects Claim that “Location” Exception Applies Based on Site’s Location Within Mapped Earthquake Fault and Landslide Areas*, MILLER STARR REGALIA (Feb. 12, 2019), <http://www.ceqadevelopments.com/2019/02/12/first-district-upholds-ceqa-class-3-categorical-exemption-for-single-family-residence-projects-in-berkeley-hills-rejects-claim-that-location-exception-applies-based-on-site/> [http://perma.cc/8GH3-PQCE].

<sup>150</sup> Arthur F. Coon, *California Supreme Court Construes CEQA’s “Unusual Circumstances” Exception to Categorical Exemptions in Berkeley Hillside Preservation v. City of Berkeley Decision*, MILLER STARR REGALIA (Mar. 3, 2015), <http://www.ceqadevelopments.com/2015/03/03/california-supreme-court-construes-ceqas-unusual-circumstances-exception-to-categorical-exemptions-in-berkeley-hillside-preservation-v-city-of-berkeley-decision/> [http://perma.cc/37WD-7694].

<sup>151</sup> CAL. CODE REGS. tit. 14 § 15303(a) (2023).

<sup>152</sup> See Chelsea Maclean, *California Supreme Court Issues CEQA Ruling Regarding Categorical Exemptions*, HOLLAND & KNIGHT (Mar. 11, 2015), <http://www.hklaw.com/en/insights/publications/2015/03/california-supreme-court-issues-ceqa-ruling-regard> [http://perma.cc/52ZZ-MSJ4].

<sup>153</sup> See *Jenkins v. Brandt-Hawley*, 302 Cal. Rptr. 3d 883 (Ct. App. 2022).

<sup>154</sup> *San Anselmo Housing Market*, REDFIN, <http://www.redfin.com/city/16526/CA/San-Anselmo/housing-market> [http://perma.cc/BUP4-Z3BW] (last visited Jan. 28, 2023).

that included expert reports and contested hearings, before the elected city council approved the project.<sup>155</sup> The neighbors then sued under CEQA; many months later, their lawsuit was found to have no merit in an exceptionally detailed trial court decision.<sup>156</sup> The neighbors then filed two appeals, offered to drop their then-pending appeal only if the homeowner agreed not to seek to recover the modest court costs the neighbors would have otherwise had to pay, then waited until the last day to drop their appeal even when their cost-avoidance request was rejected.<sup>157</sup> Their courtroom tactics cost another year's delay during COVID.<sup>158</sup>

In an unusual twist to the normal CEQA lawsuit story, where the losing NIMBY-side's lawyer—having cost the project applicant years and hundreds of thousands of dollars—simply slips away quietly and with no financial consequences to the next anti-housing CEQA lawsuit, the homeowner applicant sued the CEQA lawyer for engaging in “malicious prosecution” in bringing a meritless lawsuit alleging that the city had violated CEQA and land use law and then manipulating the appellate process to avoid court costs.<sup>159</sup> The target of the malicious prosecution lawsuit has herself argued multiple cases before the California Supreme Court and has been hired by the state judiciary to teach CEQA to state judges in its mandatory CEQA education program.<sup>160</sup> The appellate court reviewing the malicious prosecution issue, in the context of the lawyer's motion that the lawsuit should be dismissed as an “Anti-SLAPP” (strategic lawsuit against public participation) infringement of her protected Constitutional right to engage in the challenged conduct, found that the lawyer's conduct was indeed grave enough that it demonstrated “a probability of prevailing” on the malicious prosecution claim, meeting all three required criteria:<sup>161</sup>

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<sup>155</sup> See *Jenkins*, 302 Cal. Rptr. 3d at 889–92.

<sup>156</sup> See *id.* at 892, 894.

<sup>157</sup> See *id.* at 895.

<sup>158</sup> See *id.* at 892, 895.

<sup>159</sup> *Id.* at 895–96.

<sup>160</sup> See generally *id.* at 895; see also *Susan Brandt-Hawley*, BRANDT-HAWLEY L. GRP., <http://www.preservationlawyers.com/pub/staff/1> [<http://perma.cc/QBX5-XRLM>] (last visited Apr. 16, 2023); *Berkeley Hillside Pres. v. City of Berkeley*, 343 P.3d 834 (Cal. 2015); *Friends of Coll. of San Mateo Gardens v. San Mateo Cty. Cmty. Coll. Dist.*, 378 P.3d 687 (Cal. 2016); *Sierra Club v. County of Fresno*, 431 P.3d 1151 (Cal. 2018).

<sup>161</sup> Breana Inoshita & Kathryn Oehlschlager, *First District Affirms Denial of Anti SLAPP Motion in a Malicious Prosecution Action Filed Against CEQA Petitioner's Attorney*, JDSUPRA (Jan. 6, 2023), <http://www.jdsupra.com/legalnews/first-district-affirms-denial-of-anti-8055204/> [<http://perma.cc/BK2E-44GK>].

- The claims were without merit, as had been exhaustively explained by the trial court.<sup>162</sup>
- There was no “probable cause” that the claims would prevail. On the land use claim, the appellate court was persuaded that a deliberate and highly misleading argument, and related record reference, about whether a standard was mandatory (petitioner wins) or permissive (discretionary, and petitioner loses) showed the absence of probable cause as to the existence of a meritorious claim. On the CEQA claim, the appellate court found that it was barred for failure to exhaust administrative remedies: a known, and jurisdictional, bar to filing a CEQA lawsuit. Further, the appellate court found the CEQA argument to be invalid even had the argument been timely made to the city because it was directly at odds with the Supreme Court’s decision in *Berkeley Hillside*, the eleven-year CEQA anti-single family home rebuild saga described above that the same lawyer had litigated on behalf of a different anti-housing NIMBY, and lost.<sup>163</sup>
- Most remarkably, the appellate court found that the lawyer had acted with “malice” based on the “subjective intent or purpose.” The Court noted:

Defendants’ failure to present the record fairly supports a finding they knew their claims were untenable, Defendants made misleading arguments, Defendants filed and swiftly dismissed the Writ of Supersedeas, and Defendants maintained their appeal for three months and offered to dismiss the appeal only if Plaintiffs agreed to waive any claim to fees and costs.<sup>164</sup>

While it may be tempting to dismiss this San Anselmo lawsuit against a single-family home rebuild with a tiny granny cottage in the backyard as an anomaly in CEQA lawsuits, it is, in fact, the entirely “unremarkable” pattern of CEQA lawsuits. Two of the most ardent defenders of the CEQA status quo, UCLA Law Professor Sean Hecht (who has since moved on to work for Earthjustice) and former Chief of Staff for the California Attorney General (under Jerry Brown) and current UC Davis Law Professor Rick Frank filed an amicus brief in support of the

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<sup>162</sup> See *Jenkins*, 302 Cal. Rptr. 3d 893.

<sup>163</sup> See generally *id.*

<sup>164</sup> *Id.* at 905.

lawyer sued for malicious prosecution in this case.<sup>165</sup> Their amicus argued that this lawsuit was entirely “unremarkable,” that the outcome of CEQA lawsuits was massively uncertain, and the record showing what the court determined to be erroneous and misleading factual and legal arguments raised by the attorney in her court pleadings was simply a “ubiquitous” feature of CEQA lawsuits.<sup>166</sup>

The appellate court reviewed this and other amici in its decision. The court specifically rejected arguments raised by amici that the lawyer was simply working to protect “the environment,” noting that “the Jenkinses’s situation has nothing to do with environmental protection and everything to do with the privacy and aesthetic design concerns of several of the Jenkinses’s neighbors.”<sup>167</sup> The court also rejected amici arguments asserting that CEQA was critical to protecting disadvantaged communities of color, arguing that “the Jenkinses’s lawsuit has nothing to do with ‘disadvantaged communities,’ ‘underserved communities,’ ‘marginalized communities,’ ‘pollution,’ ‘human health consequences,’ or ‘urban decay,’ to name just a few of the topics raised” by amici. Instead, the court found “apt” the Jenkinses’ brief, which argued that this CEQA lawsuit:

involved a group of well-off, ‘NIMBY’ neighbors living in one of the most expensive zip codes in the country trying to prevent their fellow neighbor from rebuilding a decrepit and dangerous residence on their property because the neighbors were concerned about privacy the design aesthetics of the new build. It had nothing to do with significant or negative environmental effects under CEQA.<sup>168</sup>

### III. CEQA V. EVERYTHING ELSE (NON-HOUSING)

Although housing is the top target of CEQA lawsuits, at 39% of all lawsuits filed during the study period, 30% of CEQA lawsuits target public infrastructure and other non-residential community construction projects, 26% target non-residential private sector construction projects, and 5% target agency plans and regulations that do not approve specific construction projects, as shown in Figure 3.

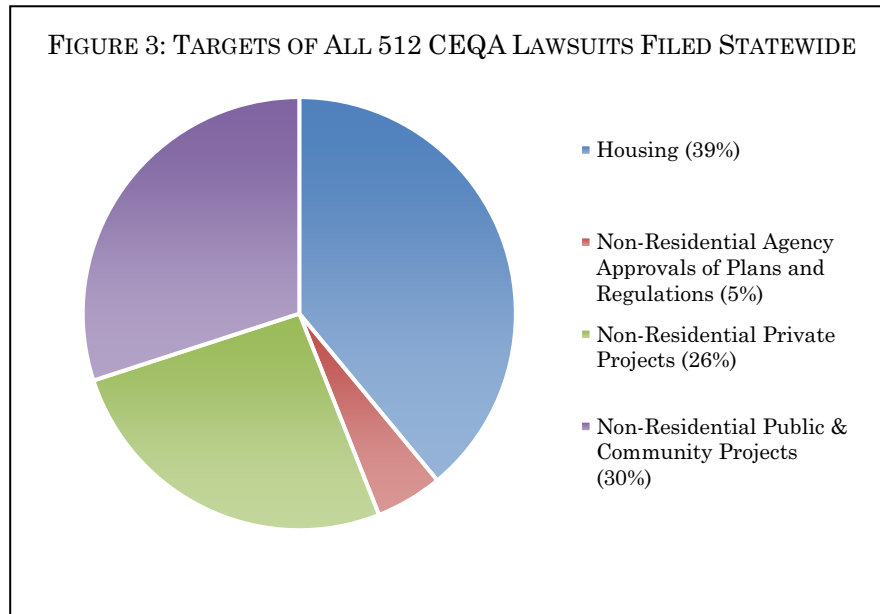
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<sup>165</sup> Brief for Brandt-Hawley as Amici Curae Supporting Appellant, *Jenkins v. Brandt-Hawley*, 302 Cal. Rptr. 3d 883 (Ct. App. 2022) (No. A162852).

<sup>166</sup> *Id.* at 9, 11, 20.

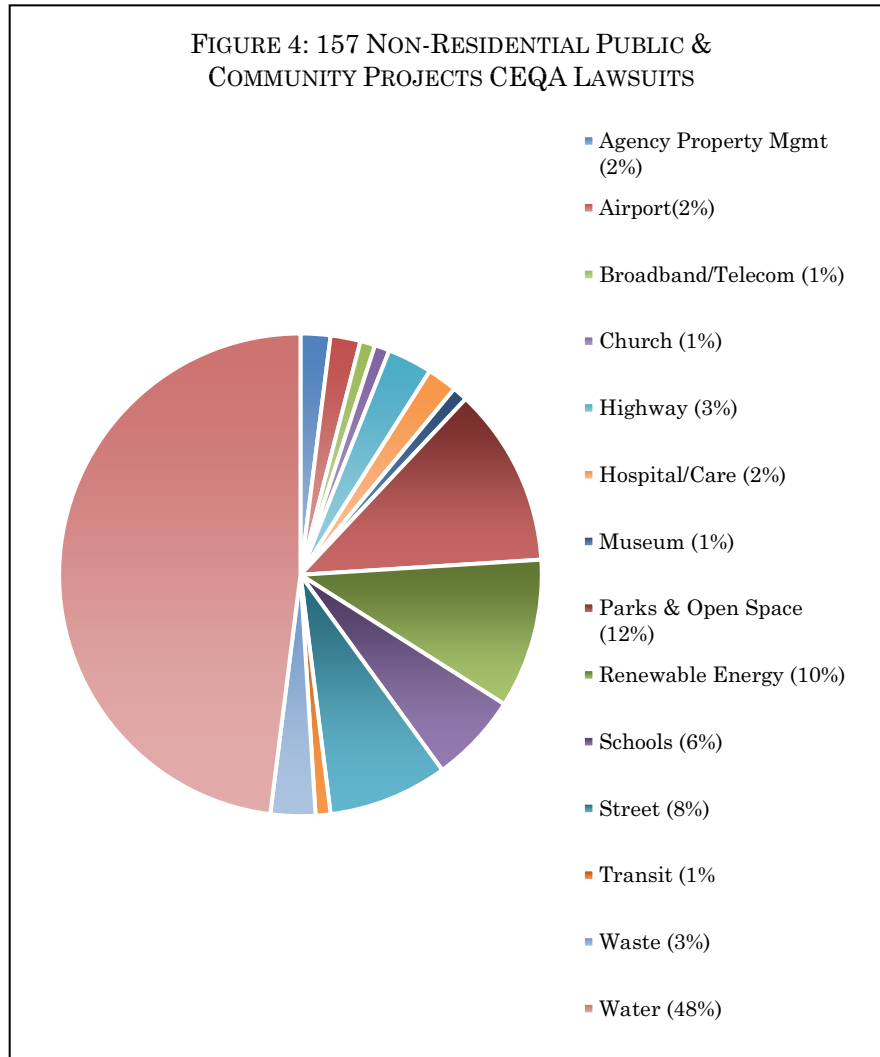
<sup>167</sup> *Jenkins*, 302 Cal. Rptr. 3d at 907.

<sup>168</sup> *Id.*



We have categorized these into Non-Residential Public and Community Projects (Figure 4), Private Sector Non-Residential Projects (Figure 5), and Public Agency Non-Residential Plans and Regulations (Figure 6). Collectively, these non-housing CEQA lawsuits demonstrate the power of one CEQA lawsuit to thwart laws and decisions that would change the status quo, either by those seeking to preserve the status quo (NIMBYs or other incumbent stakeholders opposed to change), or by those seeking to leverage CEQA lawsuits for economic benefits (competitor or wage lawsuits). We discuss each in turn below.

A. CEQA v. Public Infrastructure, Public Services, Utility, and Renewable Energy Projects

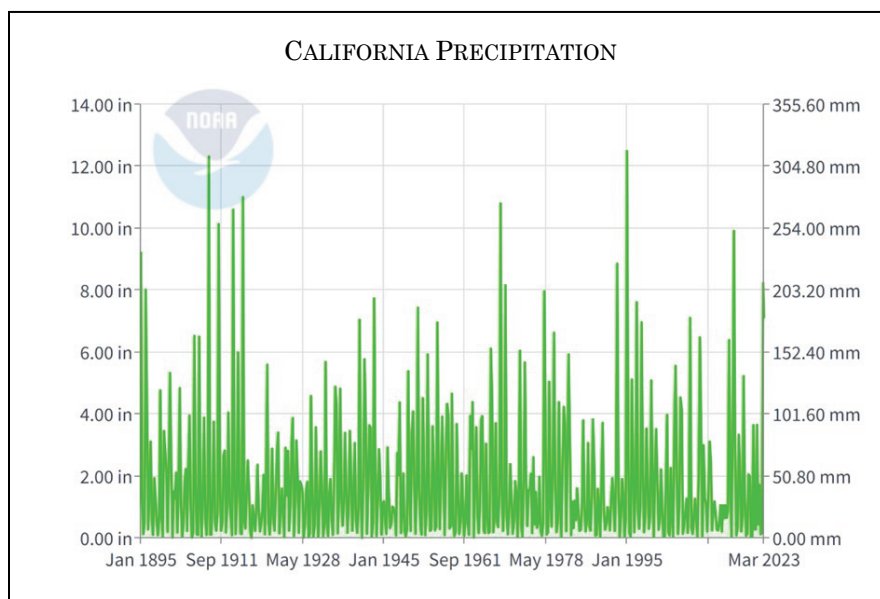


These projects all involve agency decisions to authorize some physical change to the environment at a particular location.

1. CEQA v. Water Equity

By far the largest target of CEQA lawsuits in this public project category are agency decisions to manage or increase water supplies, as shown in Figure 4. Although climate change is routinely blamed for weather events, including droughts, California's over 130 year

record of annual precipitation and droughts shows massive variability year-over-year, as published by the National Oceanic and Atmospheric Administration as part of their National Integrated Drought Information System and National Center for Environmental Information, and reprinted below:<sup>169</sup>



This historic pattern, which includes many decades not attributed to the post-1960 decades most associated with higher carbon content in the atmosphere and climate change, demonstrates that California cannot rely on any “natural” condition to provide itself with an adequate “natural” year-round water supply in the right locations based on rainfall. California’s major population centers have always relied on imported water to meet demand, with its oldest and wealthiest cities in the Bay Area, importing most of its water from a dam built in a canyon of Yosemite National Park<sup>170</sup> and its wealthiest cities in Southern California, importing water from the Eastern Sierras, the

<sup>169</sup> *California Precipitation* (illustration), in NAT’L OCEANIC & ATMOSPHERIC ADMIN., <http://www.ncei.noaa.gov/access/monitoring/climate-at-a-glance/statewide/time-series/4/pcp/all/1/1895-2023> [<http://perma.cc/ME8H-MS8F>] (last visited Apr. 18, 2023).

<sup>170</sup> *South Bay*, WATER EDUC. FOUND., <http://www.watereducation.org/south-bay> [<http://perma.cc/XWS9-RVAU>] (last visited Apr. 14, 2023).

Sacramento Bay Delta, and the Colorado river.<sup>171</sup> Water management infrastructure facilities—storage, conveyance, treatment, and distribution—are absolutely critical public infrastructure all along the California coast, with, for example, a new generation of de-salination plants installed or approved (and delayed) with CEQA lawsuits, along with recycled, reclaimed, and other local water storage, levee, and environmental enhancement, water quality, and other water management projects approved—and sued under CEQA in cases included in this dataset.

Simply, California needs water storage and conveyance solutions for both normal and drought years.<sup>172</sup> There is nothing new about the need to manage water: from localized irrigation built by early human farmers to the famous aqueducts of the Roman Empire and beyond, access to reliable water supplies have been a core societal need. In California, public agencies are charged with meeting that need—either directly through water agencies, or indirectly through the regulation of private water utilities and companies.<sup>173</sup> Massive federal and state water projects, and smaller-scale local water projects, were partially or mostly completed—sometimes nefariously—for more than a century after statehood, from San Francisco damming a portion of Yosemite National Park<sup>174</sup> to Los Angeles draining much of the Owens Valley east of Yosemite.<sup>175</sup>

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<sup>171</sup> *Los Angeles*, WATER EDUC. FOUND., <http://www.watereducation.org/los-angeles-1> [<http://perma.cc/EY9S-98KX>] (last visited Apr. 16, 2023); see also Joseph W. Kane et al., *Population Surging in Drought-Stricken Areas*, BROOKINGS (June 3, 2015), <http://www.brookings.edu/blog/the-avenue/2015/06/03/population-surging-in-drought-stricken-areas/> [<http://perma.cc/3ZTG-XUP9>].

<sup>172</sup> See Cindy Tuck, *Weather Extremes Drive Home the Case for Water Infrastructure*, ACWA (Jan. 23, 2023), <http://www.acwa.com/news/weather-extremes-drive-home-the-case-for-water-infrastructure/> [<http://perma.cc/KZ8A-7D4P>]; see also PUBLIC POLICY INSTITUTE OF CALIFORNIA WATER POLICY CENTER, *STORING WATER* (2018).

<sup>173</sup> See CAITRIN CHAPPELLE, ELLEN HANAK & ANNABELLE ROSSER, PUBLIC POLICY INSTITUTE OF CALIFORNIA WATER POLICY CENTER, *PAYING FOR CALIFORNIA'S WATER SYSTEM* (2021).

<sup>174</sup> See *Hetch Hetchy Environmental Debates*, NAT'L ARCHIVES, <http://www.archives.gov/legislative/features/hetch-hetchy#:~:text=Between%201908%20and%201913%2C%20Congress,provide%20a%20steady%20water%20supply> [<http://perma.cc/CER4-Q67L>] (last visited Apr. 8, 2023); see also *Exploring Hetch Hetchy: Where to Go, What to Do, and Where to Stay*, YOSEMITE MARIPOSA CNTY. (Mar. 3, 2020), <http://www.yosemite.com/hetch-hetchy/> [<http://perma.cc/ZW3P-HPRJ>].

<sup>175</sup> See Caitlin Shamberg, *Part 2: What Happened to the Owens Valley?*, KCRW (Nov. 5, 2013), <http://www.kcrw.com/news/articles/part-2-what-happened-to-the-owens-valley> [<http://perma.cc/7MS7-2ST6>]; see also *Los Angeles Aqueduct*, HIST. (Mar. 7, 2019), <http://www.history.com/topics/landmarks/los-angeles-aqueduct> [<http://perma.cc/J5KP-Z9PY>].



By the early 1970s, the state's first twenty million overwhelmingly white residents<sup>176</sup> built and prospered from a world-class network of reservoirs and aqueducts indispensable for living in a desert with massively variable precipitation.<sup>177</sup> Since then, the state added nearly another twenty million people,<sup>178</sup> almost entirely Latino, Asian and other minorities.<sup>179</sup> Starting in the 1970's, though, politically influential white activists have blocked virtually all major new water storage and distribution system improvements, including those that are essential for providing new, less affluent families with affordable, reliable water.<sup>180</sup>

The state's two biggest water projects (the federal<sup>181</sup> and state water projects<sup>182</sup>) were never completed, and remain stressed by competing water demands, insufficient water supplies, and increasingly fragile physical facilities like deteriorating levees in the Delta and deteriorating dams—both at risk of catastrophic failures in heavy storms<sup>183</sup> or

<sup>176</sup> See Hans Johnson et al., *California's Population*, PPIC, <http://www.ppic.org/publication/californias-population/> [<http://perma.cc/77WR-2CCS>] (last visited Mar. 21, 2023); Matt Rosenberg, *California Population: The Most Populous State in America*, THOUGHTCO, <http://www.thoughtco.com/california-population-overview-1435260> [<http://perma.cc/MRR2-ZL76>] (last updated Sept. 6, 2019).

<sup>177</sup> See *The California Water System*, CAL. DEPT OF WATER RES., <http://water.ca.gov/water-basics/the-california-water-system> [<http://perma.cc/4Z65-PA8N>] (last visited Mar. 21, 2023).

<sup>178</sup> See Melody Gutierrez, *California's Population: 20 Million in 1970, Nearly 40 Million Now*, SFGATE (Dec. 21, 2017, 5:36 PM), <http://www.sfgate.com/politics/article/California-population-grows-to-nearly-40-million-12448737.php> [<http://perma.cc/8AG4-PU7K>].

<sup>179</sup> See Johnson et al., *supra* note 176.

<sup>180</sup> See, e.g., Dan Walters, *Newsom Is Shrinking Brown's Pet Projects*, CAL MATTERS (May 8, 2019), <http://calmatters.org/commentary/2019/05/newsom-shrinks-brown-bullet-train-delta-tunnels/> [<http://perma.cc/79R2-MBPZ>]; Dan Walters, *Jerry Brown Wasn't All Wrong Especially on the Peripheral Canal*, THE MERCURY NEWS (Apr. 3, 2007, 12:07 AM), <http://www.mercurynews.com/2007/04/03/jerry-brown-wasnt-all-wrong-especially-on-the-peripheral-canal/> [<http://perma.cc/DTJ6-6X5W>].

<sup>181</sup> See Central Valley Project, BUREAU OF RECLAMATION (Jan. 3, 2023), <http://www.usbr.gov/mp/cvp/> [<http://perma.cc/B72J-YEWA>]; see also Hernandez, In the Name of the Environment II: 2013-2015, *supra* note 1.

<sup>182</sup> See *State Water Project*, WATER EDUC. FOUND., <http://www.watereducation.org/aquapedia/state-water-project> [<http://perma.cc/6C6W-FSQJ>] (last visited Mar. 2, 2023) ("The SWP originally was conceived as a much larger project, but only its first phase was completed."); see also Hernandez, In the Name of the Environment II: 2013-2015, *supra* note 1.

<sup>183</sup> See Alastair Bland, *California Storms Create Paradox: Too Much Water in Reservoirs, Too Soon*, CAL MATTERS (Mar. 10, 2023), <http://calmatters.org/environment/2023/03/california-storm-reservoirs-flooding/> [<http://perma.cc/F758-YHVB>].

earthquakes<sup>184</sup> which would result in multi-month water supply and delivery shortfalls.<sup>185</sup> Voter-approved funding to increase water availability and reliability (including water storage facilities<sup>186</sup>) has instead been spent primarily on open space acquisition and conservation and agency/consultant staff, with no appreciable increase in reliable and affordable water supply deliveries.<sup>187</sup> Regulatory hurdles to transferring water from willing sellers to thirsty buyers remain daunting,<sup>188</sup> and water conveyance facilities are also stressed in many parts of the state.<sup>189</sup> Non-partisan reports by public agencies and academics have estimated that over one million Californians, primarily poor and non-White, do not have access to safe drinking water from the taps in their homes.<sup>190</sup> Although the Legislature enacted a “Human Right to Water” law in 2012,<sup>191</sup> none of the water storage facilities approved by the voters are anywhere near approval, and have instead been sidelined by ever-

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<sup>184</sup> See Charles Wilson, *Earthquakes Can Dry Water Supply. Californians Must Prepare*, CAL MATTERS (July 25, 2019), <http://calmatters.org/environment/water/2019/07/water-earthquakes/> [<http://perma.cc/VQY2-42U3>].

<sup>185</sup> For a short primer on California water supplies, see Alastair Bland, *Water Is Life. It's Also a Battle. So What Does the Future Hold for California?*, CAL MATTERS (Aug. 4, 2021), <http://calmatters.org/explainers/water-policy-explained-california-delta-reservoir-water-conservation/> [<http://perma.cc/8Z5V-P3W5>].

<sup>186</sup> See *Proposition 1 Water Storage Investment Program: Funding the Public Benefits of Water Storage Projects*, CAL. WATER COMM'N, <http://cwc.ca.gov/Water-Storage> [<http://perma.cc/Q9L3-JW5K>] (last visited Mar. 24, 2023) (“Proposition 1 of 2014 dedicated \$2.7 billion for investments in water storage projects.”); see also Annabelle Rosser & Caitrin Chappelle, *How Water Bonds Plug Spending Holes*, PPIC (June 7, 2021), <http://www.ppic.org/blog/how-water-bonds-plug-spending-holes/> [<http://perma.cc/MXV5-GQQF>].

<sup>187</sup> See Kurtis Alexander, *Californians Approved Billions for New Water Storage. Why Hasn't It Gotten Built?*, S.F. CHRON. (Jan. 18, 2023, 6:06 PM), <http://www.sfchronicle.com/climate/article/california-water-storage-17719807.php> [<http://perma.cc/WEK4-SQ6Z>].

<sup>188</sup> See, e.g., *Water Transfers Program*, CAL. WATER BDS. (Mar. 6, 2023), [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/petitions/transfers.html](http://www.waterboards.ca.gov/waterrights/water_issues/programs/petitions/transfers.html) [<http://perma.cc/ZRW3-4KHN>]; SOAR WATER TRANSFERS ACTION TEAM, PROPOSALS TO STREAMLINE WATER TRANSFERS (2014). Both materials reveal that the transfer process is lengthy, and attempts at streamlining this process are ongoing.

<sup>189</sup> See ELLEN HANAK ET AL., MANAGING CALIFORNIA'S WATER 151–52 (2011).

<sup>190</sup> See GABRIEL PETEK, EXPANDING ACCESS TO SAFE AND AFFORDABLE DRINKING WATER IN CALIFORNIA 1, 4 (2020); Emily Hoeven, *1 Million Californians Lack Safe Drinking Water*, CAL MATTERS (July 27, 2022), <http://calmatters.org/newsletters/whatmatters/2022/07/california-drinking-water-safe/> [<http://perma.cc/H5WQ-GAQ9>]; Eileen Sobek, *Audit Results*, AUDITOR OF THE STATE OF CAL. (July 26, 2022), <http://www.auditor.ca.gov/reports/2021-118/index.html#section4> [<http://perma.cc/M92E-6WQD>]; Kathleen Ronayne, *State Audit: California Too Slow to Fix Unsafe Tap Water for More than 900,000 Residents*, KQED (July 26, 2022), <http://www.kqed.org/news/11920517/report-state-too-slow-to-fix-unsafe-tap-water-for-more-than-900000-residents> [<http://perma.cc/X32F-NP9P>].

<sup>191</sup> See CAL. WATER CODE § 106.3 (West 2013).

escalating costs and ongoing opposition.<sup>192</sup> Although the water system failures in Flynt, Michigan made headlines—and resulted in criminal charges against those responsible—in 2022 the California Legislative Analyst’s Office concluded that the key state water agency in charge of these issues was not acting with any urgency to solve state water equity, reliability, safety and affordability legal mandates.<sup>193</sup> In short, beginning with the era of modern environmental laws, including CEQA in the 1970’s, California stopped building the water infrastructure needed for its growing population and highly and persistently erratic rainfall patterns.

Today, even moderately dry conditions (sixty to eighty percent)<sup>194</sup> of “normal” rainfall years are enough to trigger yet another emergency declaration, demand for water use cutbacks, and panicked polls ranking water supply as the top environmental concern instead of wildfires and climate change.<sup>195</sup> CEQA requires that significant new housing projects demonstrate sufficient water supplies during normal, dry, and multiple dry-year periods.<sup>196</sup> These housing projects cannot be built without adequate water supplies. Blocking “new” water supplies is a potent anti-housing tool that has long been used in infamously NIMBY green communities like Marin County to block new housing.<sup>197</sup>

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<sup>192</sup> See Dan Walters, *Finally, Progress on Vital Sites Reservoir Project*, CAL MATTERS (Mar. 22, 2022), <http://calmatters.org/commentary/2022/03/finally-progress-on-vital-sites-reservoir-project/> [<http://perma.cc/V2HG-AE2J>].

<sup>193</sup> See PETEK, *supra* note 190, at 11–12.

<sup>194</sup> See Jan Null, *2022-2023 California Rainfall Season*, GOLDEN GATE WEATHER SERVS., [http://www.ggweather.com/seasonal\\_rain.htm](http://www.ggweather.com/seasonal_rain.htm) [<http://perma.cc/7MV9-RD3D>] (last visited Mar. 20, 2023).

<sup>195</sup> See Mark Baldassare et al., *PPIC Statewide Survey: Californians and the Environment*, PPIC (July 2022), <http://www.ppic.org/publication/ppic-statewide-survey-californians-and-the-environment-july-2022/> [<http://perma.cc/5XEV-9GFT>]; see also Nick Cahill, *Californians Growing More Anxious About Water Supply, Drought, and Wildfires*, COURTHOUSE NEWS SERV. (July 28, 2021), <http://www.courthousenews.com/californians-growing-more-anxious-about-water-supply-drought-and-wildfires/> [<http://perma.cc/9UG8-WY89>] (noting that 70% of likely voters in the San Francisco Bay Area said water supply was a significant problem; 67% of Central Valley Voters, 60% of Los Angeles voters, 59% of Inland Empire voters, and 57% of San Diego voters agreed).

<sup>196</sup> See CAL. WATER CODE § 10910; S. 610, 2001 Leg., Reg. Sess. (Cal. 2001); S. 221, 2001 Leg., Reg. Sess. (Cal. 2001); see also *Water Supply Assessments and Verifications*, COACHELLA VALLEY WATER DIST., <http://www.cvwd.org/579/Water-Supply-Assessments-Verifications> [<http://perma.cc/SFD6-BE8V>] (last visited Mar. 20, 2023).

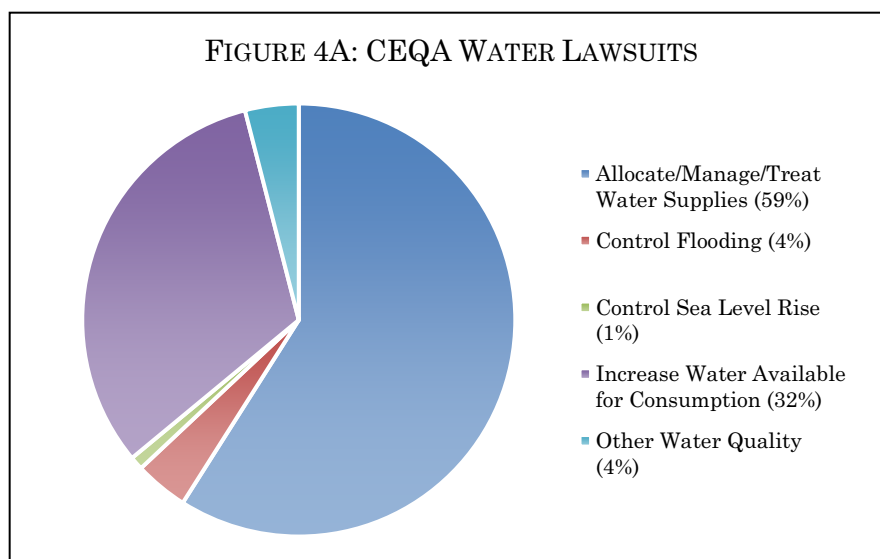
<sup>197</sup> See Dan Walters, *Marin County’s Guerilla War Against Housing*, CAL MATTERS (May 31, 2021), <http://calmatters.org/commentary/2021/05/marin-county-housing-water-quota/> [<http://perma.cc/YSR7-CJDW>].

As shown in Figure 4A, below, CEQA lawsuits are most frequently used to target agency decisions to allocate existing water supplies among users. Such decisions typically increase costs to existing users and divert a greater percentage of water deliveries to the environment to support fish and other habitat values. In the lawsuits reviewed for this article, incumbent water consumers, including cities such as San Francisco and farmers in the Central Valley, sued to block new agency decisions to allocate (or change allocations) water. Figure 4A shows that the next most likely water project to be targeted by CEQA lawsuits are those that would increase the availability of water supplies to people. In the lawsuits reviewed for this article, these included projects to treat and use recycled water, desalination projects, groundwater basin recharge projects, and projects to convey water to people by pipeline. Also, famously anti-growth advocates in Monterey County have “enjoyed” a full moratorium on the construction of new housing (even granny flats) based on an insufficient water supply.<sup>198</sup> It appears from our study that every significant water supply augmentation project in that region is sued under CEQA. A small category of flood control projects is sued, including floodwater management that would increase groundwater storage or stormwater use, along water quality improvement projects and an emerging new climate category of sea level rise projects. The sea level rise climate debate pits those advocating for a “managed retreat”—abandonment of shoreline infrastructure and development—to those advocating for engineered solutions like sea walls to protect against storms and sea level rise.<sup>199</sup>

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<sup>198</sup> See Water Rights Prosecution Team, No. WR 2009-0060 at 57 (Cal. 2009), [http://www.waterboards.ca.gov/waterrights/board\\_decisions/adopted\\_orders/orders/2009/wro2009\\_0060.pdf](http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2009/wro2009_0060.pdf) [<http://perma.cc/WCV2-Z857>] (prohibiting diversion for new service connections which necessarily prevents construction of new housing that requires a new service connection); see also Dennis L. Taylor, *State Regulators Deny Request for More Water for Monterey Peninsula Housing*, MONTEREY HERALD, <http://www.montereyherald.com/2022/07/29/state-regulators-deny-request-for-more-water-for-monterey-peninsula-housing/> [<http://perma.cc/W8MU-D62U>] (last updated July 29, 2022) (documenting that the prohibition on new water hookups in the California American Water Co.’s service area prevented the construction of new housing on the peninsula and prevented the area from meeting RHNA targets).

<sup>199</sup> See *FAQ: The California Coastal Commission and Sea Level Rise*, CAL. COASTAL COMM’N 2–3, <http://documents.coastal.ca.gov/assets/slr/CC-SLR-FAQ-Release.pdf> [<http://perma.cc/A2U8-8YS4>] (last updated June 2021).



Parks, schools, and streets make up the other more significant categories of these public and community projects, comprising just under ten percent of total CEQA lawsuits filed in this category.

## 2. CEQA v. Streets and Sidewalks

Figure 4 shows that streets and sidewalks are sued more under CEQA, typically for projects that remove street parking or trees to make way for bike paths, bus lanes, or “complete” streets that slow down traffic and promote pedestrian use. The “complete street” program was intensely criticized for narrowing the four-lane highway through the town of Gold Rush mountain community of Paradise to a two-lane road to facilitate downtown “walkability”—a project that left the town with woefully insufficient evacuation capacity, which in turn contributed to the catastrophic death toll for the Paradise wildfire.<sup>200</sup> Bike paths

<sup>200</sup> See Paige St. John et al., *Paradise Narrowed Its Main Road by Two Lanes Despite Warnings of Gridlock During a Major Wildfire*, L.A. TIMES (Nov. 20, 2018), <http://www.latimes.com/local/california/la-me-ln-paradise-evacuation-road-20181120-story.html> [<http://perma.cc/UJ3Y-YLKR>]. The newest anti-housing tool, currently most often used to block funding access and approvals of affordable and workforce housing in rural and resort areas, is wildfire risk of the scale that engulfed Paradise and other forested communities. Expert foresters have repeatedly cautioned that more than a century of forest mismanagement, which ended the sustainable forest conditions maintained by burns every ten years or so, coupled with predictable drought conditions,

also continue to be contentious targets of CEQA lawsuits,<sup>201</sup> notwithstanding various partial legislative CEQA exemptions.<sup>202</sup> A bike path resulting in the closure of a full lane of bridge highway traffic to accommodate a handful of Marin County daily bike riders, while delaying tens of thousands of daily workforce commuters into Marin County (where they cannot afford to live), lengthened commuter time for workers like teachers,<sup>203</sup> and added to vehicular emissions stacked in disadvantaged communities outside of Marin County; the four-year pilot run of this bike path was not challenged in a CEQA lawsuit, but is likely to be targeted if made permanent.

### 3. CEQA v. Schools

Figure 4 demonstrates that projects regarding K-12 schools and colleges show the same pattern of NIMBY/incumbent status quo defense, and economic use, of CEQA. About two-thirds of school projects challenged student dorms (and are included in the anti-housing CEQA lawsuit challenges included in Figure 2, and thus excluded from Figure 3). The next biggest CEQA lawsuit targets are charter and religious schools (often opposed by public school parents and teachers), improvements to public school playfields (opposed by NIMBYs), and an only-in-San-Francisco COVID story of a CEQA lawsuit to block obliteration of historic murals painted by a socialist artist during the Great Depression in a San Francisco High School following a controversial vote by now-recalled School Board Members who asserted the mural

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have converted California's "natural" forests to entirely unnatural dense, multi-storied explosive fire risks. *See, e.g.*, LITTLE HOOVER COMM'N., FIRE ON THE MOUNTAIN: RETHINKING FOREST MANAGEMENT IN THE SIERRA NEVADA, No. 242, at 12–15 (Cal. 2018), <http://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/242/Report242.pdf> [<http://perma.cc/TS3J-GRKF>]. Sustainable vegetation removal and burn cycles change the status quo, however, and are delayed by CEQA challenges and environmental (species, habitat, emission) disputes. *See* Julie Cart, *Thinning California's Fire-Prone Forests: 5 Things to Know as Lawmakers Approve a Plan*, CAL MATTERS, <http://calmatters.org/environment/2018/08/california-forest-management-fires/> [<http://perma.cc/JDB7-P97C>] (last updated June 23, 2020). Far more stringent fire codes were adopted for buildings built after 2010. Along with modern resilient community designs with adequate fire prevention and response service, vegetation management, and evacuation routes, those stricter fire codes have stopped or survived wildfires that engulfed older structures and older narrow roadways in areas with opponents of road safety projects. *Id.*

<sup>201</sup> *See, e.g.*, Cmty. Venture Partners v. Marin Cnty. Open Space Dist., No. A154867, 2020 LEXIS 527, at \*1 (Ct. App. Jan. 24, 2020).

<sup>202</sup> *See* CAL. PUB. RES. CODE § 21080.20 (2020); CAL. PUB. RES. CODE § 21080.25 (2020).

<sup>203</sup> *See* Rachel Swan, *Bike Lane Causes Traffic Misery for Teachers on Richmond-San Rafael Bridge*, S.F. CHRON., <http://www.sfchronicle.com/bayarea/article/Traffic-is-misery-for-teachers-who-cross-the-15024783.php> [<http://perma.cc/K7VS-EHGN>] (last updated Feb. 3, 2020).

“glorifies slavery, genocide, colonization, manifest destiny, white supremacy [and] oppression.”<sup>204</sup>

#### 4. CEQA v. Parks/Trails

CEQA lawsuits are the favored tool used by passionate advocates for change, or not, to California’s parks and open space. Most park litigants are seeking to limit public use, or access, to parks (and block trails). The most productive source of CEQA lawsuits in all of California history is a narrow slice of Los Angeles land ending on the ocean immediately south of Marina Del Rey, where Howard Hughes built his aerospace empire, including the Spruce Goose.<sup>205</sup> More than thirty CEQA lawsuits were filed over more than two decades to block development on the now-completed Playa Vista residential and office project west of Lincoln Boulevard, and the coastal strip from Lincoln to the ocean was required to set aside permanent open space including coastal wetland restoration in the Ballona Wetlands.<sup>206</sup> CEQA lawsuits against this property have been a staple in all of our CEQA lawsuits,<sup>207</sup> and this is no exception, as multiple advocacy groups filed CEQA lawsuits against the California Department of Fish and Wildlife over the management of this Ballona Wetlands open space.

#### B. CEQA v. Non-Residential Private Projects

The agency approvals in this category are for private sector projects that involve a physical change to the environment in a particular project location, as shown in Figure 5.

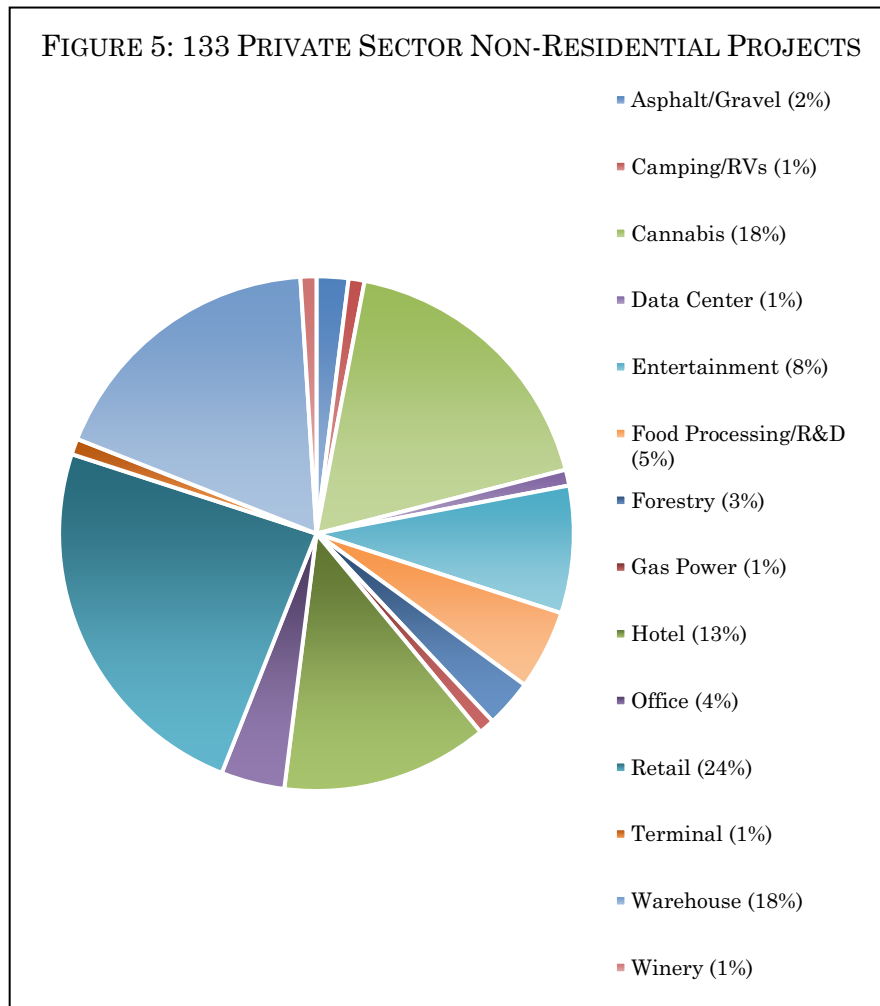
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<sup>204</sup> See Amna Khalid & Jeffrey Aaron Snyder, *Activists Want a San Francisco High School Mural Removed, Saying Its Impact Today Should Overshadow the Artist’s Intentions*, THE CONVERSATION, <http://theconversation.com/activists-want-a-san-francisco-high-school-mural-removed-saying-its-impact-today-should-overshadow-the-artists-intentions-116574> [<http://perma.cc/69UN-43P4>] (last visited Mar. 20, 2023).

<sup>205</sup> See *The Village at Playa Vista Project*, CEQANET WEB PORTAL, <http://ceqanet.opr.ca.gov/2002111065/4> [<http://perma.cc/FFK4-FEC7>] (last visited Apr. 8, 2023); *Ballona Wetlands Restoration Project*, CEQANET WEB PORTAL, <http://ceqanet.opr.ca.gov/2012071090/2> [<http://perma.cc/7LTK-PCRK>] (last visited Apr. 8, 2023); *Our Story*, PLAYA VISTA, <http://playavista.com/our-story/#:~:text=In%20the%201930s%20and%2040s,of%20any%20plane%20ever%20built> [<http://perma.cc/75YY-Z4PG>] (last visited Apr. 8, 2023).

<sup>206</sup> See Ryan Lue, *Held Up by Environmental Litigation, Playa Vista Finally Gets Its Own Downtown*, PLANETIZEN (Apr. 8, 2012), <http://www.planetizen.com/node/55975> [<http://perma.cc/FLH2-WG7Q>]; *Playa Vista Gets the Green Light to Phase II*, THE PLANNING REP. (Apr. 26, 2012), <http://www.planningreport.com/2012/04/26/playa-vista-gets-green-light-phase-ii> [<http://perma.cc/KQ7L-TWT6>].

<sup>207</sup> See, e.g., Hernandez, In the Name of the Environment I: 2010-2012, *supra* note 22, at 21 n. 50, 41 n. 103, 46 n. 161; Hernandez, In the Name of the Environment II: 2013-2015, *supra* note 1, at 69 n. 147.



### 1. CEQA v. Cannabis

In 2016, fifty-seven percent of California voters decided to legalize cannabis for adult, non-medical use.<sup>208</sup> Proposition 64 established a comprehensive and ambitious program to tax and regulate the cultivation and sale of cannabis.<sup>209</sup> However, it did not make growing or selling cannabis permissible uses in

<sup>208</sup> *California Proposition 64 — Legalize Marijuana — Results: Approved*, N.Y. TIMES (Aug. 1, 2017, 11:24 AM), <http://www.nytimes.com/elections/2016/results/california-ballot-measure-64-legalize-marijuana> [<http://perma.cc/X4EY-5YV8>].

<sup>209</sup> See *California Proposition 64, Marijuana Legalization (2016)*, BALLOTEDIA, [http://ballotpedia.org/California\\_Proposition\\_64\\_Marijuana\\_Legalization\\_\(2016\)](http://ballotpedia.org/California_Proposition_64_Marijuana_Legalization_(2016)) [<http://perma.cc/94PC-5XBF>] (last visited Mar. 21, 2023).



California's hundreds of cities and fifty-eight counties, nor did it regulate (for air pollution or water quality purposes) cannabis facilities.<sup>210</sup> In the most remarkable new pattern to emerge from our earlier two CEQA studies, cannabis-related projects exploded into the second most likely to be targeted non-residential project in a CEQA lawsuit. Cannabis growers, retail outlets, and agency regulations and ordinances applicable to cannabis were equally likely to be targeted in CEQA lawsuits. Illegal cannabis operations, which do not obtain agency authorizations, are not sued under CEQA. State cannabis tax revenues are a fraction of what was promised by legalization advocates, the price of cannabis has plummeted since adult personal possession became fully legal, and sales are far less likely to be targeted by law enforcement.<sup>211</sup> The cannabis regulatory framework was recently revised in an attempt to achieve more of the revenue and other objectives promised to voters in the legalization initiative.<sup>212</sup>

## 2. CEQA v. Warehouse/E-Commerce

Figure 5 shows that warehouse projects are the most likely target of non-residential private sector projects to be sued under CEQA. Anti-warehouse CEQA lawsuits have evolved over a multi-year trajectory that displays the broad range of CEQA litigation status quo defenders.

Warehouse projects are relatively easy to assemble, with most of the work performed by laborers. In the first round of warehouse CEQA lawsuits, a union representing laborers would sue<sup>213</sup> and settle with a "Project Labor Agreement" ("PLA") in which the warehouse applicant would agree to use union members, and pay union wages and benefits, for warehouse construction. Another labor CEQA litigant has been a union representing truck drivers,<sup>214</sup> prompted in part by a national

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<sup>210</sup> *See id.*

<sup>211</sup> *See* Susan Wood, *California Cannabis Tax Revenue Dips in Early 2022; North Coast Firms Blame Regulation*, N. BAY BUS. J. (June 7, 2022), <http://www.northbaybusinessjournal.com/article/article/california-cannabis-tax-revenue-dips-in-early-2022-north-coast-firms-blame/> [<http://perma.cc/5Y93-FY5P>].

<sup>212</sup> *See id.*

<sup>213</sup> *See Documented Construction Union Abuse of California Environmental Quality Act (CEQA) 2014-2023*, PHONY UNION TREE HUGGERS (Jan. 15, 2023), <http://phonyuniontreehuggers.com/unions-abusing-ceqa/union-abuse-of-california-environmental-quality-act-ceqa/> [<http://perma.cc/S88R-KEPS>].

<sup>214</sup> *See Kara Deniz, Teamsters Launch New Amazon Division*, INT'L BHD. OF TEAMSTERS (Sept. 6, 2022), <http://teamster.org/2022/09/teamsters-launch-new-amazon-division/> [<http://perma.cc/3ZXV-RELW>].

Amazon campaign<sup>215</sup> and a concurrent explosion of e-commerce supercharged during COVID.<sup>216</sup>

Another round of CEQA warehouse litigants, which continues to grow, has been a coalition of advocacy groups and local officials arguing that warehouse projects near residences (or that use roads near residences) are causing localized adverse air pollution conditions causing disparate harms to disadvantaged communities. The state's Attorney General has aligned with groups focused on localized air pollution and other impacts.<sup>217</sup> One less reported cause of the massive increase in warehouse facilities in Southern California is the fact that the ports of Long Beach/Los Angeles (the nation's largest by cargo volume) is underserved by rail transport at the ports, and highly reliant on trucking.<sup>218</sup> A multi-modal cargo facility that would have expanded rail capacity was blocked, in part by CEQA lawsuits included in our earlier studies, and a modified facility has been newly proposed but remains in the EIR process (pre-litigation).<sup>219</sup>

California has the largest number of truck driver jobs by state.<sup>220</sup> The Inland Empire (east of Los Angeles and Orange Counties) the state's fastest growing economy, is itself more populous than half of U.S. states,<sup>221</sup> and presently has a high percentage (more than 78%) of residents who do not have bachelors' degrees.<sup>222</sup> A recent Brookings Institute Report found

<sup>215</sup> See *id.*

<sup>216</sup> See *Study: Ontario Is the Hub for Logistics Warehouses in the IE*, *THEREALDEAL* (Dec. 29, 2022, 8:30 AM), <http://therealdeal.com/la/2022/12/29/study-ontario-is-the-hub-for-logistics-warehouses-in-the-ie/> [<http://perma.cc/9KBL-8BFV>].

<sup>217</sup> *Warehouses Pose a Dilemma for the Inland Empire*, *SUN* (Oct. 13, 2022, 9:00 AM), <http://www.sbsun.com/2022/10/13/warehouses-pose-a-dilemma-for-the-inland-empire/> [<http://perma.cc/5YML-ERG7>]; see also Press Release, Rob Bonta, California Attorney General, Attorney General Bonta Announces \$10 Million in Grants to Research Vehicle-Related Air Pollution and Mitigate Impacts to Environmental Justice Communities Across California (Sept. 23, 2021), <http://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-10-million-grants-research-vehicle-related-air> [<http://perma.cc/2SDM-YRYN>].

<sup>218</sup> Lori Ann LaRocco, *Railroad Bottleneck at Nation's Busiest West Coast Ports Reaches Inflection Point*, *CNBC* (July 8, 2022, 9:42 AM), <http://www.cnn.com/2022/07/08/railroad-bottleneck-at-west-coast-ports-reaches-inflection-point.html> [<http://perma.cc/S3ZQ-VJLR>].

<sup>219</sup> Jason Ruiz, *New Environmental Analysis Revives Controversial Rail Yard Project*, *LONG BEACH POST* (June 29, 2021, 9:00 AM), <http://lbpost.com/news/new-environmental-analysis-revives-controversial-rail-yard-project> [<http://perma.cc/4USQ-AWWJ>].

<sup>220</sup> *Local Truck Driver Demographics and Statistics in the US*, *ZIPPIA* (Sept. 9, 2022), <http://www.zippia.com/local-truck-driver-jobs/demographics/> [<http://perma.cc/Z59J-C5RY>].

<sup>221</sup> CHAD SHEARER ET AL., *ADVANCING OPPORTUNITY IN CALIFORNIA'S INLAND EMPIRE* 12 (2019), [http://www.brookings.edu/wp-content/uploads/2019/02/Full-Report\\_Opportunity-Industries\\_Inland-California\\_Final\\_Shearer-Shah-Gootman.pdf](http://www.brookings.edu/wp-content/uploads/2019/02/Full-Report_Opportunity-Industries_Inland-California_Final_Shearer-Shah-Gootman.pdf) [<http://perma.cc/B6LY-GSCX>].

<sup>222</sup> *GROWING INLAND ACHIEVEMENT, GIA TOGETHER 5-YEAR REPORT* 8 (2020), [http://inlandempiregia.org/wp-content/uploads/2021/10/GIA\\_5YearReport\\_Official\\_HQ.pdf](http://inlandempiregia.org/wp-content/uploads/2021/10/GIA_5YearReport_Official_HQ.pdf) [<http://perma.cc/9HY4-46SV>].

that a high percentage (about 40%) of Inland Empire residents were challenged in making ends meet each month, and that the logistics industry (including warehousing and trucking) was the region's fourth largest employer (102,553 jobs).<sup>223</sup>

A recent high profile clash pitted air quality regulators advocating for a transition to presently available ultra-low polluting fossil-fuel truck fleets to achieve air quality standards against climate and environmentalist advocates demanding a transition to an all-electric truck fleet,<sup>224</sup> which for heavy duty trucks is a decade or more away from being commercially available. The air quality regulators lost—currently unavailable EV heavy duty trucks are mandated by CARB<sup>225</sup> and older trucks will remain in service until new technology becomes commercially available.

Legislators, meanwhile, are seeking to ban warehouses and/or truck routes to and from warehouses in much of the region.<sup>226</sup> Into this policy, economic, equity, and environmental scrum marches the CEQA lawyers, including an infamous group which pursues a “sue and settle” CEQA business plan and was unable to identify, in a sworn deposition, that they have spent any of their CEQA settlement dollars on any identified environmental improvement projects.<sup>227</sup>

### 3. CEQA v. Renewable Energy

Perhaps nothing better highlights CEQA's antiquated, anti-environmental rigidity than its use against renewable energy projects, which the state's climate laws and policy demand be built at an unprecedented scale and pace to avoid planetary catastrophe.<sup>228</sup> All but one of the energy projects sued during the Study Period was for renewable energy not generated from fossil

<sup>223</sup> SHEARER ET AL., *supra* note 221, at 32–33.

<sup>224</sup> See *SCAQMD Chief's Criticism of EJ Groups over Trucks Draws New Line*, INSIDE EPA (Aug. 12, 2021), <http://insideepa.com/daily-news/scaqmd-chief-s-criticism-ej-groups-over-trucks-draws-new-line> [<http://perma.cc/8Z59-N5T5>].

<sup>225</sup> Reuters, *California to Require Zero-Emissions Heavy Trucks*, AUTO BLOG (June 26, 2020, 10:59 AM), <http://www.autoblog.com/2020/06/26/california-zero-emissions-trucks-mandate/> [<http://perma.cc/9BV3-6YJ9>].

<sup>226</sup> Assemb. 2840, 2022 Leg., Reg. Sess. (Cal. 2022), [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=202120220AB2840](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2840) [<http://perma.cc/3JNC-572F>]; see *Warehouse Ban Job Killer Bill Faces House of Origin Deadline on Friday*, CALCHAMBER (May 25, 2022), <http://advocacy.calchamber.com/2022/05/25/warehouse-ban-job-killer-bill-faces-house-of-origin-deadline-on-friday/> [<http://perma.cc/LM5L-KH2U>].

<sup>227</sup> See Depo. of Joseph Bourgeois, *Golden State Environmental Justice Alliance v. City of Los Angeles*, No. BS168429 (Sup. Ct. Cal., Cnty. of L.A.) (on file with author).

<sup>228</sup> See ERM, FINAL ASSESSMENT REPORT - POTENTIAL IMPACTS OF CALIFORNIA'S HIGH ELECTRIFICATION SCENARIO 1–4 (2021).

fuels. The only exception was yet another delay in the long-mandated, long-postponed shut-down of water-cooling systems needed to operate older natural gas electric generating plants; these plants continue to provide “base load” reliable electricity supplies to California when the sun does not shine and the wind does not blow. The state has an increasing, but still trivial, amount of battery capacity to meet power needs when intermittent renewables are not generating electricity. Regulatory backlash against renewable energy projects has grown in other states (particularly in opposition to wind),<sup>229</sup> but CEQA lawsuits provide another potent anti-renewable tool for ready use by project opponents.

#### 4. CEQA v. Agriculture

The most noteworthy CEQA lawsuits against agriculture were dubbed “the Pistachio wars” after the state’s largest pistachio processor used CEQA to sue competing pistachio processors.<sup>230</sup> In an unusual but welcome decision, the competitor was denied standing to use CEQA to advance its competitive agenda;<sup>231</sup> an appeal was subsequently filed, then dropped. Multiple lawsuits were also filed against winery projects, and one feedlot.

#### 5. CEQA v. Fun

Entertainment and recreational projects that draw more people to a community are an ever-present category of CEQA lawsuits. This Study Period included lawsuits challenging bungee jumping, a golf course’s ongoing existence owed to its new use of recycled water, and sports stadium gifted with project-specific CEQA Legislation in a longstanding legislative tradition resembling papal indulgences granted to naughty aristocrats in the Middle Ages. This CEQA lawsuit category is particularly challenging for seasonal festivals sponsored by local government and community groups that operate on a shoestring budget; both CEQA compliance costs and litigation defense costs can be

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<sup>229</sup> Robert Bryce, *Backlash Against Renewables Surged in 2021, with 31 Big Wind and 13 Big Solar Projects Vetoed Across US*, FORBES (Jan. 27, 2022, 10:24 AM), <http://www.forbes.com/sites/robertbryce/2022/01/27/backlash-against-renewables-surged-in-2021-with-31-big-wind-and-13-big-solar-projects-vetoed-across-us/?sh=b9235f03bb79> [<http://perma.cc/T8X9-R5T3>].

<sup>230</sup> John Lindt, *Touchstone Advances Position in Pistachio War*, SUN-GAZETTE (Jan. 5, 2022, 7:24 AM), <http://thesungazette.com/article/business/agriculture/2022/01/05/touchstone-advances-position-in-pistachio-war/> [<http://perma.cc/3ECF-ULLS>].

<sup>231</sup> Ruling on Petition for Writ of Mandate at 5–6, *Wonderful Citrus II, LLC v. County of Tulare*, 2021 Cal. Super., No. VCU283508 (“Wonderful’s interest in this litigation is as a direct economic competitor with direct commercial and competitive interests adverse to Touchstone’s farming operations, not a party motivated by concerns relating to public rights . . .”).

permanent festival killers. Festivals were again challenged in CEQA lawsuits filed during the Study Period.

#### 6. CEQA v. Retail

Non-union and discount retailers—from Costco to the corner gas station—were targeted by these lawsuits. CEQA lawsuits can be filed anonymously by never-before-in-existence “ad hoc associations” that do not have to disclose any individual member or funding source.<sup>232</sup> Retail CEQA lawsuits have long been associated with unions seeking to block non-unionized big box retailers and economic competitors. In this Study Period, the retail sector is no longer experiencing explosive growth of new stores and is, in many cases, retracting, so these CEQA lawsuits were more likely to challenge additions to existing stores (e.g., gas fueling stations). Small business competitors also use CEQA lawsuits against each other.

#### 7. CEQA v. Hotels

The union representing hotel workers has been much more active during this Study Period. These lawsuits target non-union hotels (and projects that include a hotel but for which no hotel owner/operator has been identified). These typically settle with union hotel worker hiring agreements. While national labor laws preclude most unions (except, for example, construction trades and agricultural workers) from engaging in workforce bargaining tactics with non-employers, this union use of CEQA against non-employers has remained a longstanding staple of CEQA lawsuits. Some hotels include one or more apartments reserved exclusively for occupancy of hotel staff, but in our study methodology, hotels with employee-only housing units were not counted as residential projects.

#### 8. CEQA v. Not Much Else

Not on the list: new manufacturing, mining (lithium valley for batteries), transit, forestry, highways, airports, hospitals, or much of anything else. California has lagged far behind the rest of the country in creating new manufacturing jobs<sup>233</sup> (typically higher wage jobs available to workers without college degrees). California’s population has continued to decline: the state lost

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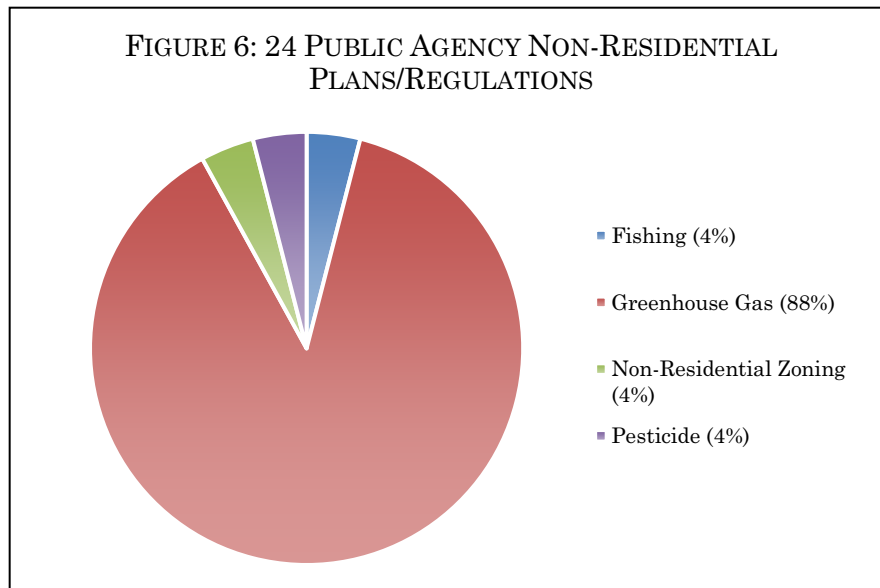
<sup>232</sup> See Hernandez, *In the Name of the Environment I: 2010-2012*, *supra* note 22, at 24, 78 (finding that only 13% of CEQA lawsuits filed between 2015 and 2018 were filed by known advocacy groups with a history thereof).

<sup>233</sup> Christopher Arns, *California’s Manufacturing Jobs Lag Nation*, SACRAMENTO BUS. J. (June 25, 2013), <http://www.bizjournals.com/sacramento/news/2013/06/25/californias-manufacturing-jobs-lag.html> [<http://perma.cc/9SMR-QTRL>].

500,000 residents between 2020 and 2022,<sup>234</sup> and San Francisco logs in as having the steepest population drop in homebuyers of any large city in the nation, down to its pre-tech boom 2012 level.<sup>235</sup> Mine applications—for gold<sup>236</sup> and lithium<sup>237</sup>—are deep in the CEQA compliance (pre-permit approval) stage.

### C. CEQA v. Non-Residential Agency Plans and Regulations

As shown in Figure 6, public agency approvals of plans and regulations that do not allow or incentivize additional housing, and do not approve physical construction activities for any one project or location, but instead result in foreseeable changes to the environment as these plans and ordinances are implemented, were also targeted in our smallest category of CEQA lawsuits.



<sup>234</sup> Terry Castleman, *California's Population Dropped by 500,000 in Two Years as Exodus Continues*, L.A. TIMES (Feb. 15, 2023), <http://www.latimes.com/california/story/2023-02-15/californias-population-has-dropped-by-more-than-half-a-million-in-about-two-years-why> [<http://perma.cc/2E4M-E3DS>].

<sup>235</sup> See Tessa McLean, *San Francisco Population Declines Again, Hitting Lowest Level Since 2012*, SFGATE (Jan. 27, 2023), <http://www.sfgate.com/bayarea/article/san-francisco-population-declines-17746756.php> [<http://perma.cc/5A95-FQR8>].

<sup>236</sup> See Matt Kelley, *Idaho Maryland Mine - Rise Grass Valley*, NEV. CNTY. CAL., <http://www.nevadacountyca.gov/3195/Idaho-Maryland-Mine---Rise-Grass-Valley> [<http://perma.cc/JZP4-EMZU>] (last visited Mar. 16, 2023).

<sup>237</sup> See Janet Wilson & Erin Rode, *Lithium Valley: A Look at the Major Players Near the Salton Sea Seeking Billions in Funding*, DESERT SUN (May 13, 2022), <http://www.desertsun.com/story/news/2022/05/13/lithium-valley-look-major-players-near-salton-sea-seeking-billions-funding/9665978002/> [<http://perma.cc/MP9F-NLL4>].

### 1. CEQA v. Climate Change

There is one stand-out category of public agency approvals for non-residential plans and regulations, and it is climate. California's climate change commitments made renewable energy—electricity generated by the sun, wind, biogas, or hydropower—second only to water as the top target of CEQA lawsuits in the public/infrastructure/community project category (Figure 4). California's climate change plans and regulations—especially those aimed at phasing out or banning continued extraction of oil and banning use of natural gas in new homes, restaurants, and other buildings—are the top targets of regulatory agency plans and activities that result in physical changes to the environment only from subsequent plan implementation and regulatory compliance activities.

California has historically pursued both oil and gas extraction, and various longstanding statutes continue to require state and local agencies to authorize these activities.<sup>238</sup> At issue are billions of dollars in oil and gas reserves, most of which are now owned by families or smaller companies as many of the major energy companies have liquidated their California holdings.<sup>239</sup> Also at issue are hundreds of thousands of jobs, mostly held by those without college degrees, mostly paying above-median wages and benefits in areas where replacement higher wage jobs are unavailable for comparably skilled workers.<sup>240</sup> Government agencies also derive hundreds of millions of dollars in tax revenues from this industry, and from related construction, maintenance, and support services and business.<sup>241</sup> Shutting down California's oil industries, long sought by environmentalist “keep it in the ground” advocates, simply means that more oil will be imported from other countries, most notably Saudi Arabia and Venezuela (and, until recently, Russia), with considerably less regard for environmental protections, worker safety, and the rights of disadvantaged communities.<sup>242</sup> An authoritative study by the California Council

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<sup>238</sup> See *Oil and Gas*, CAL. DEP'T OF CONSERV., <http://www.conservation.ca.gov/calgem/Pages/Oil-and-Gas.aspx> [<http://perma.cc/62EK-5LGS>] (last visited Mar. 16, 2023).

<sup>239</sup> See KERN ECON. DEV. FOUND., *THE ECONOMIC CONTRIBUTION OF THE OIL AND GAS INDUSTRY IN KERN COUNTY* 3–4 (2021), [http://kernedc.com/wp-content/uploads/2021/04/KEDF-Economic-Contribution-of-the-Oil-and-Gas-Industry-in-Kern-County\\_-2021.pdf](http://kernedc.com/wp-content/uploads/2021/04/KEDF-Economic-Contribution-of-the-Oil-and-Gas-Industry-in-Kern-County_-2021.pdf) [<http://perma.cc/PDM3-7YC2>].

<sup>240</sup> *Better Jobs, Better Lives in the Oil and Gas Industry*, W. STATES PETROL. ASS'N (Jan. 10, 2023), <http://www.wspa.org/resource/buildbetterlives/> [<http://perma.cc/YN5G-Q97A>].

<sup>241</sup> See KERN ECON. DEV. FOUND., *supra* note 239, at 4.

<sup>242</sup> See *generally id.* at 7.

of Science and Technology concluded that more GHG emissions would be produced from less environmentally stringent oil production practices overseas, and still more would be emitted in transporting oil thousands of miles across multiple oceans and seas.<sup>243</sup> The historically most productive oil reserves on land are located more than 1500 feet below ground on parched lands used intermittently for grazing, and therefore likely have minimal impacts on groundwater.<sup>244</sup>

California has long suffered from the highest gasoline prices in the nation<sup>245</sup> (excepting on occasion Hawaii, which imports all of its oil),<sup>246</sup> and high gas prices have a regressive impact on lower income workers who are more likely to need to be physically present at work to be paid, and to live in less costly areas and have longer commutes.<sup>247</sup> California's EPA has concluded that, "[t]he highest levels of diesel PM are near ports, rail yards and freeways," and, as depicted in the CalEnviroScreen4.0 mapping tool, are contrasted with proximity to stationary industrial

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<sup>243</sup> See JANE LONG ET AL., AN INDEPENDENT SCIENTIFIC ASSESSMENT OF WELL STIMULATION IN CALIFORNIA VOLUME II 40–41 (Cal. Council on Sci. & Tech. et al. eds., 2015), <http://ccst.us/wp-content/uploads/160708-sb4-vol-II-7.pdf> [<http://perma.cc/A4W6-QPX3>] (“Oil produced in California using hydraulic fracturing also emits less greenhouse gas per barrel than the average barrel imported to California. If the oil and gas derived from stimulated reservoirs were no longer available, and demand for oil remained constant, the replacement fuel could have larger greenhouse emissions.”); see also CAL. DEPT OF CONSERVATION, ENVIRONMENTAL IMPACT REPORT, ANALYSIS OF OIL AND GAS WELL STIMULATION TREATMENTS IN CALIFORNIA 12.2-37, 12.2-67 (2015), [http://www.conservation.ca.gov/calgem/Pages/SB4\\_Final\\_EIR\\_TOC.aspx](http://www.conservation.ca.gov/calgem/Pages/SB4_Final_EIR_TOC.aspx) [<http://perma.cc/6QP3-683H>] (rejecting a hydraulic fracturing ban alternative because it “would create much greater significant and unmitigable (Class I) impacts to greenhouse gas emissions” due to increased oil imports which are not subject to California cap and trade requirements, “resulting in an overall net increase in GHG emissions” compared with the status quo).

<sup>244</sup> See generally KERN ECON. DEV. FOUND., *supra* note 239.

<sup>245</sup> Zack Budryk, *Why California Has the Highest Gas Prices in the Nation*, THE HILL (Mar. 17, 2022, 3:52 PM), <http://thehill.com/policy/energy-environment/598655-taxes-mystery-surchage-intensify-californians-pain-at-the-pump/> [<http://perma.cc/YKP3-NU9A>]; see also *State Gas Price Averages*, AAA, <http://gasprices.aaa.com/state-gas-price-averages/> [<http://perma.cc/HS79-KMQ5>] (last visited Mar. 17, 2023); Dan Walters, *Who's To Blame for California's High Gas Prices?*, CAL MATTERS (Oct. 11, 2022), <http://calmatters.org/commentary/2022/10/whos-to-blame-for-californias-high-gas-prices/> [<http://perma.cc/7P3U-GN7K>].

<sup>246</sup> See Julian Spector, *Hawaii Relies on Russian Oil - But Clean Energy Could Change That*, CANARY MEDIA (Feb. 25, 2022), <http://www.canarymedia.com/articles/fossil-fuels/hawaii-relies-on-russian-oil-but-clean-energy-could-change-that#:~:text=Hawaii%20imports%20all%20of%20its,of%20it%20from%20Russia%20itself> [<http://perma.cc/PA9B-V8AF>].

<sup>247</sup> Isabel V. Sawhill, *How Higher Gas Prices Hurt Less Affluent Consumers and the Economy*, BROOKINGS INST. (Mar. 6, 2012), <http://www.brookings.edu/opinions/how-higher-gas-prices-hurt-less-affluent-consumers-and-the-economy/> [<http://perma.cc/RA5Q-Z4S9>].



facilities such as factories and refineries.<sup>248</sup> Localized health impacts from oil and gas activities have long been alleged, but recent “citizen science” data from thousands of air quality sensors distributed throughout the state and monitored under the supervision of air quality agencies, has confirmed that ground-level pollution exposures are higher for a key fossil fuel combustion pollutant (diesel particulate matter) nearest ports and freeways—not refineries or oil fields.<sup>249</sup> Local agencies have imposed actual or de facto bans (e.g., with mile-wide “buffer” mandates), on continued oil extraction activities,<sup>250</sup> and environmentalists have sued state and local agencies that continue to allow oil and gas extraction as required by existing state law.<sup>251</sup> Opponents to oil and gas extraction agency actions use CEQA to thwart existing legislative mandates, property rights, and the jobs and revenue expectations of tens of thousands of families, in pursuit of speeding up California’s “just transition” to a future without fossil fuel use.<sup>252</sup> California’s gasoline use declined only 1.3% below 2018 levels.<sup>253</sup>

Banning the use of natural gas in new homes, restaurants, and other structures is also a climate policy priority, but natural gas is the last of the less costly energy supplies available to Californians as California’s electricity prices have soared far higher than other states in recent years to fund renewable energy and retrofit existing electricity infrastructure long-neglected by state and utility leaders. A recent study linking natural gas appliances to adverse health outcomes, like asthma, was disavowed by the organization that sponsored the study, which belatedly acknowledged that the study did not assume or

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<sup>248</sup> *Diesel Particulate Matter*, OEHHA, <http://oehha.ca.gov/calenviroscreen/indicator/diesel-particulate-matter> [<http://perma.cc/QG54-WLGM>] (last visited Apr. 8, 2023).

<sup>249</sup> See generally *id.*

<sup>250</sup> See Ethan N. Elkind & Ted Lamm, *Legal Grounds: Law and Policy Options to Facilitate a Phase-Out of Fossil Fuel Production in California*, BERKELEY CTR. FOR L., ENERGY & THE ENV’T (Apr. 2020), <http://www.law.berkeley.edu/wp-content/uploads/2020/04/Legal-Grounds.pdf> [<http://perma.cc/57WF-X4GA>].

<sup>251</sup> See, e.g., *Center for Biological Diversity v. California Geological Energy Management Division*, U.S. CLIMATE CHANGE LITIG., <http://climatecasechart.com/case/center-for-biological-diversity-v-california-geological-energy-management-division/> [<http://perma.cc/BCG2-MNAZ>].

<sup>252</sup> See generally CAL. PUB. RES. CODE §§ 21000–21177 (West 2023).

<sup>253</sup> See Ted Goldberg, *Strong California Gas Demand Unlikely to Return, as Even Refineries Go Renewable*, KQED (Sept. 24, 2020), <http://www.kqed.org/news/11839077/strong-california-gas-demand-unlikely-to-return-as-even-refineries-go-renewable> [<http://perma.cc/KP6A-BW2B>]. That same article reports that, as a result of COVID, demand “fell off a cliff.” *Id.* But that was as of 2020 and does not account for the increasing use of fuel after COVID-related travel restrictions and limitations were lifted.

estimate any causation between natural gas appliance use and asthma rates.<sup>254</sup> Asthma rates have long been known to be higher in communities of color, but researchers have identified access to healthcare and other factors (not use of gas stoves, heaters, clothes driers, and water heaters) as key culprits.<sup>255</sup> Older homes do not have adequate electricity systems to allow for a simple replacement of natural gas with electric appliances,<sup>256</sup> and civil rights advocates as well as small businesses—such as restaurants reliant on the availability and use of natural gas appliances—have objected and, in some cases, sued to block local “gas ban” ordinances.<sup>257</sup> There is no current plan in California on how to improve the electric grid to accommodate all-electric homes.<sup>258</sup>

Even as the globally tectonic tactics of climate change and a just transition are debated in Congress, the state Legislature, and among a plethora of experts in academia, government, and the non-governmental organizations and private sectors, CEQA lawsuits against agencies seeking to ban or allow fossil fuel extraction and use in California are by far the most frequently targeted agency regulatory action in our Study Period.

#### IV. CEQA AND THE RULE OF LAW

CEQA is a statute: it was enacted by the Legislature in 1970, and has been amended by hundreds of subsequent statutes over

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<sup>254</sup> See Nicole Jacobs, *Under Scrutiny, Author of Activists Study on Asthma and Gas Stoves Admit No ‘Casual Relationship’*, ENERGY IN DEPTH (Jan. 13, 2023), <http://energyindepth.org/under-scrutiny-authors-of-activist-study-on-asthma-and-gas-stoves-admit-no-causal-relationship/> [<http://perma.cc/L5NB-SGYE>].

<sup>255</sup> See ASTHMA AND ALLERGY FOUND. OF AM., *ASTHMA DISPARITIES IN AMERICA: A ROADMAP TO REDUCING BURDEN ON RACIAL AND ETHNIC MINORITIES* (2020), <http://aafa.org/wp-content/uploads/2022/08/asthma-disparities-in-america-burden-by-race-ethnicity-executive-summary.pdf> [<http://perma.cc/C7J6-FHNY>].

<sup>256</sup> See Julie Johnson, *‘I’d Have to Gut My House’: Plan to Phase Out Natural Gas Devices Sparks Fierce Debate in Bay Area*, S.F. CHRON. (Feb. 13, 2023), <http://www.sfchronicle.com/climate/article/bay-area-gas-heater-debate-17769394.php> [<http://perma.cc/7HPJ-AQF8>]; Rebecca Leber, *The Most Annoying Barrier to Getting Your Home Off Fossil Fuels*, VOX (Oct. 8, 2022), <http://www.vox.com/energy-and-environment/2022/10/8/23387530/home-electrification-heat-pumps-gas-furnace-contractors> [<http://perma.cc/4HE8-KAHP>].

<sup>257</sup> See Mallory Moench, *As Bay Area Natural Gas Bans Sped, Lawsuits Mount*, S.F. CHRON. (Dec. 3, 2019), <http://www.sfchronicle.com/business/article/As-Bay-Area-natural-gas-bans-spread-lawsuits-14877008.php> [<http://perma.cc/8YQC-G6RK>].

<sup>258</sup> See Mallory Moench, *As Bay Area Natural Gas Bans Sped, Lawsuits Mount*, S.F. CHRON. (Dec. 3, 2019), <http://thehill.com/changing-america/sustainability/energy/3663271-what-does-a-ban-on-natural-gas-appliances-mean-for-homeowners/> [<http://perma.cc/5A4V-5R56>].

more than fifty years.<sup>259</sup> Section 21083 of CEQA directs the Governor’s OPR to adopt “guidelines” that:<sup>260</sup>

- “include objectives and criteria for the orderly evaluation of projects and the preparation of environmental impact reports and negative declarations in a manner consistent with” CEQA;<sup>261</sup>
- “specifically include criteria for public agencies to follow in determining whether or not a proposed project may have a ‘significant effect on the environment’”;<sup>262</sup>
- be reviewed and amended “at least once every two years.”<sup>263</sup>

Guidelines are required to be adopted in compliance with specified sections of the California Administrative Procedure Act (“APA”).<sup>264</sup> In 1993, the APA was amended to include legislative findings which, among other provisions, concluded that there had been “an unprecedented growth in . . . regulations” including a “complexity and lack of clarity in many regulations” and accordingly directed procedural and substantive requirements for adopting and amending regulations.<sup>265</sup>

The APA’s procedural requirements include, for example, a mandatory public notice and comment process, and a mandatory evaluation of the economic consequences of regulations, before a new or amended regulation can be approved.<sup>266</sup> The APA also includes substantive requirements for new and amended regulations:<sup>267</sup>

- (a) “Necessity” means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.
- (b) “Authority” means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.

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<sup>259</sup> See CAL. PUB. RES. CODE § 21050 (West 2023); Amanda Daams, *Recent and Upcoming Changes to CEQA*, BBK (May 10, 2018), <http://www.bbknowledge.com/news-events/insights/2018/authored-articles/05/recent-and-upcoming-changes-to-ceqa> [<http://perma.cc/E6R7-MN8Z>].

<sup>260</sup> See CAL. PUB. RES. CODE § 21083 (West 2005).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> CAL. GOV’T CODE tit. 2, §§ 11340.1–11340.5 (West 2023).

<sup>265</sup> CAL. GOV’T CODE tit. 2, § 11340 (West 2023).

<sup>266</sup> CAL. GOV’T CODE tit. 2, §§ 11346, 11346.2–11346.3 (West 2023).

<sup>267</sup> CAL. GOV’T CODE tit. 2, § 11349 (West 2001).

(c) "Clarity" means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.

(d) "Consistency" means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.

(e) "Reference" means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.

(f) "Nonduplication" means that a regulation does not serve the same purpose as a state or federal statute or another regulation. This standard requires that an agency proposing to amend or adopt a regulation must identify any state or federal statute or regulation which is overlapped or duplicated by the proposed regulation and justify any overlap or duplication. This standard is not intended to prohibit state agencies from printing relevant portions of enabling legislation in regulations when the duplication is necessary to satisfy the clarity standard in paragraph (3) of subdivision (a) of Section 11349.1. This standard is intended to prevent the indiscriminate incorporation of statutory language in a regulation.

Section 15000 of the Guidelines<sup>268</sup> state that they are "binding on all public agencies in California." The CEQA Guidelines have been held to have the same status as regulations.<sup>269</sup> The California Supreme Court has affirmed that, "[a]t a minimum . . . courts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA."<sup>270</sup>

Collectively, CEQA and the Guidelines comprise "The Rule of Law" governing how state and local agencies are supposed to disclose, evaluate, and minimize the significant adverse environmental impacts of discretionary agency decisions to undertake, fund or approve projects, plans, regulations.

#### A. Administrative Law Jurisprudence v. CEQA Jurisprudence

Under long established principles governing how courts should interpret and enforce statutes and regulations, ordinary administrative law practice is for courts to use an orderly set of "rules" or "canons" to properly interpret and apply the law to

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<sup>268</sup> CAL. CODE REGS. tit. 14, § 15000 (2023).

<sup>269</sup> See, e.g., *Union of Med. Marijuana Patients, Inc. v. City of San Diego*, 446 P.3d 317, 323 (Cal. 2019) ("CEQA is implemented by an extensive series of administrative regulations promulgated by the Secretary of the Natural Resources Agency, ordinarily referred to as the 'CEQA Guidelines.'").

<sup>270</sup> *Laurel Heights Improvement Ass'n. v. Regents of Univ. of Cal.*, 764 P.2d 278, 282 n.2 (Cal. 1988) (citing *Rural Landowners Ass'n. v. City Council*, 143 Cal. App. 3d 1013, 1022 (Ct. App. 1983)).

particular situations in dispute.<sup>271</sup> To illustrate both ordinary administrative law jurisprudence and the distinctly different direction CEQA judicial jurisprudence has taken, we will review a 2023 appellate court decision that concluded, for the first time in CEQA's history, that the noise of future student occupants of an unbuilt dormitory on campus property is an "environmental impact" that was improperly excluded from the EIR prepared by the University of California.<sup>272</sup> Residential neighbors near the campus had produced noise studies confirming the occurrence of late-night student noise, and the record also showed that the campus dopted rules against late night student parties and the campus, city police, and other officials implemented measures (including enforcement of noise ordinance restrictions) to address excessive student noise.<sup>273</sup> The record also included extensive evidence of the absence of proximate student housing for students, high rates of college student homelessness, and the fact that the unavailability of proximate, affordable student housing caused higher student drop-out rates and poorer educational outcomes, especially to students of color and first generation college student.<sup>274</sup>

### 1. Student Noise and Conventional Administrative Law Practice

In CEQA's sixty-three year history, there has never been a statute or guideline requiring a noise evaluation of human occupancy of future housing. Some housing—especially housing suitable for families—is more likely to have late noise from colicky-infants, ebullient children playing (and sometimes shouting) during long summer nights, and teenagers fond of loud music even before matriculating to college. In the ordinary administrative law course, a court could not have reasonably concluded that "social noise" from future undergraduate behavior at future dorms was a CEQA impact, using just the most basic canons of administrative law jurisprudence.

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<sup>271</sup> VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, & TRENDS (2023) <http://crsreports.congress.gov/product/pdf/R/R45153#:~:text=First%2C%20judges%20often%20begin%20by,how%20courts%20ordinarily%20read%20statutes>.

<sup>272</sup> See *Make UC a Good Neighbor v. Regents of Univ. of Cal.*, 304 Cal. Rptr. 3d 834, 857 (Cal. Ct. App 2023).

<sup>273</sup> *Id.* at 858–59.

<sup>274</sup> See Respondents' the Regents of the Univ. of Cal. and Real Party in Int. Res. for Cmty. Development's Joint Opposition to Appellants' Opening Brief at 16–21, *Make UC a Good Neighbor v. Regents of Univ. of Cal.*, 304 Cal. Rptr. 3d 834 (2023) (No. A165451); see generally *Study of Student Basic Needs*, THE CAL. STATE UNIV. (Jan. 2018), [http://www.calstate.edu/impact-of-the-csu/student-success/basic-needs-initiative/Documents/BasicNeedsStudy\\_phaseII\\_withAccessibilityComments.pdf](http://www.calstate.edu/impact-of-the-csu/student-success/basic-needs-initiative/Documents/BasicNeedsStudy_phaseII_withAccessibilityComments.pdf) [<http://perma.cc/YVW2-5RH2>].

### a. Plain Language Rule

Section 21083.1 states “that courts not ‘impose’ any ‘substantive requirements beyond those explicitly stated’ provides ‘plain language’ that the Legislature did not intend for the court to expand CEQA to cover social noise. . . .” from future occupants of future housing.<sup>275</sup>

### b. Deference to Expert Administrative Agency Interpretation

OPR, charged with developing the CEQA Guidelines, is the expert CEQA agency in California. The CEQA Guidelines underwent a comprehensive revision in 2018, which, among other features, addressed noise impacts. In Appendix G, Section XI.d, the Guidelines note that “[a] substantial temporary or periodic increase in ambient noise levels in the project vicinity above levels existing without the project” could result in a significant adverse noise impact under CEQA.<sup>276</sup> OPR plays a key role in CEQA’s statutory scheme, but it is nevertheless constrained by the statute and, therefore, cannot create a requirement that does not exist in the statute.<sup>277</sup> The CEQA Guidelines did not, however, make a shouting college student or illegal late-night loud party a CEQA impact. “Social noise”—if excessive—violates local noise ordinances in public and is a law enforcement issue, not a CEQA impact issue.

### c. Deference to Lead Agency Analytical Methodology and Factual Findings

The University’s EIR disclosed the fact that undergraduates were sometimes too noisy late at night and explained what the University was doing—through dorm rules and town-gown policing—to address this unlawful behavior.<sup>278</sup> The University’s EIR also evaluated noise impacts from construction, and from post-construction operation (e.g., of building equipment).<sup>279</sup>

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<sup>275</sup> Letter Brief from Jennifer Hernandez on Behalf of Two Hundred for Homeownership at 9–10, *Make UC a Good Neighbor*, 304 Cal. Rptr.3d 834 (Jan. 3, 2023), <http://www.hklaw.com/-/media/files/insights/publications/2023/01/letterbriefucb1323.pdf> [<http://perma.cc/M4W9-E99V>].

<sup>276</sup> See CAL. CODE REGS. tit. 14, App. G § XI.d (2019).

<sup>277</sup> See CAL. GOV’T CODE § 11349(b) (West 2001) (providing that all regulations must be authorized by the provision of law that “permits or obligates the agency to adopt, amend, or repeal a regulation”).

<sup>278</sup> See *Make UC a Good Neighbor*, 304 Cal. Rptr. 3d at 858.

<sup>279</sup> *Id.*

d. Consistency with Other Statutes, and with  
Constitutional Protections

Statutes should be construed to avoid questionable constitutional outcomes, such as differentially assessing the demographics of planned new housing and then speculating as to “social noise” impacts attributable to different ages and races.<sup>280</sup>

2. CEQA Jurisprudential Deviations from Administrative Law  
Norms: Undergraduate Student Dorm Occupancy Example

In January of 2023, an appellate court decided for the first time in CEQA’s history that “social noise”—the noise that individual student occupants of dorms make in the neighborhood immediately north of the UC Berkeley campus—was a CEQA impact.<sup>281</sup> “Noise” is indeed a CEQA impact, as identified in the CEQA statute as described by the court.<sup>282</sup> The court then turned exclusively to judicial precedent to determine whether “social noise” from future student occupants of unbuilt dorms was also a CEQA impact, fully bypassing conventional administrative law jurisprudential canons in deciding whether this previously unadjudicated issue of unamplified human noise (and specifically unlawful noise from late-night shouts by partying students) was required to be evaluated, and mitigated, under CEQA.<sup>283</sup>

Following a familiar pattern of expansive judicial interpretations of CEQA, the court first cited to the California Supreme Court’s first CEQA decision, in 1972, directing that CEQA is to be interpreted by the courts so “as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”<sup>284</sup> At issue in *Mammoth* was a 184-unit condo project with a restaurant near the Mammoth Mountain ski resort in Mono County.<sup>285</sup>

The court went on to acknowledge appellate court decisions, holding that amplified music at a wedding venue in the Santa Cruz mountains, traffic and operational noise from a mining project in the Sierra foothills, and oil well drilling in Kern County were acknowledged to cause noise impacts under CEQA that were insufficiently considered in the CEQA documents (including negative declarations finding the absence of excessive noise) for

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<sup>280</sup> See, e.g., *People v. Gutierrez*, 324 P.3d 421, 435 (Cal. 2014).

<sup>281</sup> See *Make UC a Good Neighbor*, 304 Cal. Rptr. 3d at 857.

<sup>282</sup> *Id.*

<sup>283</sup> See *id.* at 857–58.

<sup>284</sup> See *Friends of Mammoth v. Bd. of Supervisors*, 502 P.2d 1049, 1056 (Cal. 1972).

<sup>285</sup> See *id.* at 1052.

those projects.<sup>286</sup> Clearly aware of the controversy the decision would create, the court referred to undisputed studies submitted by neighbor opponents to student dorms that undergraduates were sometimes noisy late at night and that town and gown police enforcement of noise and party restrictions had not eliminated this behavior.<sup>287</sup>

The court then determined that the University improperly concluded that student noise was a behavioral challenge addressed through dorm rules and policing, invalidated the EIR, kept in place an indefinite stay against allowing construction of the dorm project, and remanded the dispute to the lower court to fashion a more specific remedy about how the legally non-compliant EIR must be modified to address this new “social noise” CEQA impact.<sup>288</sup>

### 3. Next Steps with Social Noise and CEQA

If not accepted for review, and then fully overturned in pending Supreme Court petitions,<sup>289</sup> “social noise” will henceforth be added to CEQA based solely on this new UC Berkeley appellate court dorm decision. Like other CEQA judicial expansions created over the past five decades, this new CEQA impact becomes law without any authorizing action by any elected or appointed state or local officials within or outside the CEQA context.

The appellate court, using CEQA’s expansive tradition of jurisprudence instead of ordinary administrative law canons, used the statutory inclusion of “noise” in CEQA to mandate a new sub-type of unamplified, illegal, late night undergraduate student occupancy “noise.”<sup>290</sup> The court recognized that the plain language of the statute includes “noise,” but then gave no deference to expert agency interpretations in the CEQA Guidelines or a fifty year history of CEQA practice, which collectively never elevated human occupancy “social noise” into a

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<sup>286</sup> See *Keep Our Mountains Quiet v. County of Santa Clara*, 187 Cal. Rptr. 3d 96, 111–14 (Ct. App. 2015) (analyzing crowd noise at wedding venue); see also *Oro Fino Gold Mining Corp. v. County of El Dorado*, 274 Cal. Rptr. 720, 725–26 (Ct. App. 1990) (analyzing noise from mining project); see also *King & Gardiner Farms, LLC v. County of Kern*, 259 Cal. Rptr. 3d 109, 174 (Ct. App. 2020) (analyzing noise from oil well drilling).

<sup>287</sup> See *Make UC a Good Neighbor*, 304 Cal. Rptr. 3d at 859.

<sup>288</sup> See *id.* at 858, 865. The Court also held that the University failed to justify prioritizing dormitory construction and construction of a homeless shelter at one but not another of the locations identified by the University as suitable for future campus housing. *Id.* at 863. This portion of the decision is not pertinent to the illustrative example described above.

<sup>289</sup> See, e.g., *Petition for Rev., Make UC A Good Neighbor v. Regents of Univ. of Cal.*, 304 Cal. Rptr. 3d 834 (Ct. App. 2023) (No. A165451) (Mar. 28, 2023).

<sup>290</sup> See *Make UC a Good Neighbor*, 304 Cal. Rptr. 3d at 862–63.



CEQA impact.<sup>291</sup> The court also recognized that the late night student noise at issue was illegal and subject to both university and police enforcement consequences, but concluded that such enforcement had been ineffective in the past in preventing student social noise, so an unknown additional increment of “mitigation” was required by CEQA to prevent the presumptively ongoing but illegal human activities.<sup>292</sup>

Unless accepted and overturned by the California Supreme Court, this appellate court decision creates a statewide expansion to CEQA. Because neither the Legislature nor OPR required that the “social noise” of future unbuilt housing be considered an “environmental” impact under CEQA, and there was no legislative debate or APA-compliant public notice and comment process, there is no extant methodology for assessing when, and how, to evaluate and “mitigate” for the “social noise” of future housing occupants in dorms or otherwise. Using conventional CEQA compliance patterns, CEQA practitioners would respond by inventing and unpredictably requiring, for unpredictable agencies and unpredictably for various projects:

- a methodology that includes a demographic prediction of new housing occupants;
- technical methodologies for evaluating the noise of new housing (likely from commissioning studies of “baseline” conditions of noise in occupied housing, such as colicky infants, children hooting when playing tag or hide-and-seek, teenagers playing music in their bedrooms, families using outdoor picnic and play areas, and the baseline and differential frequency of ambulance visits to homes with older versus younger occupants);
- a policy judgment for determining the extent to which noise from housing occupants is “significant” under CEQA, even if otherwise lawful;
- requiring housing projects to include “all feasible mitigation measures” or alternatives to avoid such significant social noise impacts, even if that means that housing should not occur next to noise-sensitive sensitive single family homeowners seeking no change in existing ambient noise in “their” environment.

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<sup>291</sup> *See id.* at 857–61.

<sup>292</sup> *See id.* at 858, 861.

This is not an exaggerated prediction: noise is just part of the cacophony of objections raised to block new housing—in the name of the environment—to existing neighborhoods within the CEQA framework. For example, in one of the several video documentaries produced by The Two Hundred, “A California for Everyone,” a criminal defense lawyer in downtown Redwood City, who described himself as the “Darth Vader” in his anti-housing zealotry to protect his converted single-family home office in the downtown heart of Silicon Valley,<sup>293</sup> asserted that future occupants of a Habitat for Humanity affordable housing project would cause adverse noise—as well as public safety harms from, for example, leaving tricycles parked on sidewalks.<sup>294</sup> The NIMBY lawyer claimed he had no problem with “those people” [future housing residents] because he represented them in criminal cases.<sup>295</sup> Equating Habitat for Humanity residents with criminal defendants is just one of many examples of the underlying racial bias that makes anti-housing CEQA lawsuits a particular challenge in wealthier and Whiter communities, and importing the demographics of new housing occupants into CEQA invites a wealth of other “new” impact arguments (More crime! More loitering! More home-based car repairs!).

#### B. CEQA and The Rule of Law

Legislators, major media, and popular opinion have already risen against the use of CEQA by California’s cranky homeowners to block student enrollment in 2022 and to legislatively reverse course on the court’s latest social noise CEQA expansion.<sup>296</sup> Short of full statutory exemptions, however, courts have not confined their discretionary authority to decide CEQA cases to the authority they have been granted by the Legislature.

For example, the Third District Court of Appeal (sitting in Sacramento) heard a challenge to the construction of a replacement office building addition to the historic capitol in Sacramento.<sup>297</sup> An office addition that is decades old was slated

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<sup>293</sup> See The Two Hundred, *A California for Everyone*, VIMEO (2017), <http://vimeo.com/242696428> [<http://perma.cc/UHY7-H78R>].

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> See, e.g., Newsom vows to change CEQA after court ruling uses it to block housing, Long Beach Post (Feb. 27, 2023), <http://lbpost.com/news/news/newsom-vows-to-change-ceqa-after-court-ruling-uses-it-to-block-housing/> [<http://perma.cc/T68Q-ZV3Q>].

<sup>297</sup> See *Save Our Capitol! v. Dep’t of Gen. Servs.*, 303 Cal. Rptr. 3d 761, 771 (Ct. App. 2023); see also Jennifer L. Hernandez & William E. Sterling, *California Court of Appeal*

to be replaced by a sleek new glass structure—with both bolted onto the historic capitol building.<sup>298</sup> The court clearly found aesthetics of the new office building objectionable, since only projects with adverse aesthetics impacts require more analysis under CEQA.<sup>299</sup> The Legislature knew their new office project could be sued under CEQA, and they adopted a “buddy statute”—reserved for politically favored projects—that not only streamlined the CEQA judicial review scheduled, but also expressly forbade the court from requiring that the new office project approval be rescinded or that construction be otherwise halted, unless the court found the new office structure caused a significant adverse health and safety impact, or impact to a previously-unknown tribal resource.<sup>300</sup> The appellate court ignored the Legislature’s remedy restriction, finding that the Draft EIR failed to adequately depict the new office building and further held that this disclosure failure required full and indefinite cessation of building construction even though only aesthetic and historic (but not health, safety or tribal) CEQA deficiencies were at issue.<sup>301</sup>

How did courts decide they could ignore the plain language of CEQA statutes, sidestepping administrative law jurisprudence and the Rule of Law, and instead make a policy choice that favored “the environment” over other policy priorities (coupled with an entirely unbounded definition of what “the environment” actually is)? We will examine one more case illustration before we turn to the Rule of Law discussion and the concluding recommendations.

The community of Encinitas, in northern San Diego County, boasts an average home price of \$1.32 million<sup>302</sup>—a decrease of 19% from its pre-inflationary high. Quail Botanical Gardens (later transferred to a different operator) operated a visitor center and botanical garden, and sued Encinitas under CEQA for approving the construction of forty new single family homes on a 12.6 acre

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*Decision Frustrates Capitol Annex Plans*, HOLLAND & KNIGHT (Feb. 1, 2023), <http://www.hklaw.com/en/insights/publications/2023/01/california-court-of-appeal-decision> [<http://perma.cc/T8EX-DES6>].

<sup>298</sup> See *Save Our Capitol!*, 303 Cal. Rptr. 3d at 773.

<sup>299</sup> See *id.*

<sup>300</sup> See CAL. PUB. RES. CODE § 21189.53(a) (West 2018); see also *Save Our Capitol!*, 303 Cal. Rptr. 3d at 771–72.

<sup>301</sup> See *Save Our Capitol!*, 303 Cal. Rptr. 3d at 805.

<sup>302</sup> See *Encinitas Housing Market*, REDFIN, <http://www.redfin.com/city/5844/CA/Encinitas/housing-market> [<http://perma.cc/6GE3-5GM5>] (last visited Jan. 31, 2023).

lot located in its garden.<sup>303</sup> At issue was the potential that the homes could obstruct ocean views from the ‘garden’s parking lot.<sup>304</sup> The court found that there was no view obstruction impact for adults, but “noted the following:

For a child or disabled person in a wheelchair with a line of vision under a height of four feet, such a limitation would result in total obstruction of certain views of the ocean, leaving, at best, limited and amorphous “view corridors” which were not adequately identified or proven, either quantitatively or qualitatively, during the hearings [by the City to consider approval of the 40-home project].<sup>305</sup>

It is important to note that this jurisprudential pattern of expansive, unpredictable CEQA decisions—including those that are directly at odds with the plain language remedy restrictions of the Legislature—are not partisan. This is not surprising: most Californians, across party lines, strongly support protecting the state’s astounding environment—a popular preference aligned with creatively expanding the scope of “the environment” to be protected by CEQA.<sup>306</sup>

### 1. Off the Rails: Leading Court Cases Creating Modern CEQA Jurisprudence

CEQA was enacted by a nearly-unanimous, bi-partisan California Legislature in 1970 and signed into law by Governor Reagan.<sup>307</sup> CEQA was modelled closely on the National Environmental Quality Act (“NEPA”), enacted a year earlier and signed into law by President Nixon.<sup>308</sup> Both statutes were intended to be applied to projects that were directly undertaken by federal (for NEPA) and state or local (for CEQA agencies), and

<sup>303</sup> See *Quail Botanical Gardens Found., Inc. v. City of Encinitas*, 35 Cal. Rptr. 2d 470, 472 (Ct. App. 1994).

<sup>304</sup> See *id.* at 476.

<sup>305</sup> See *id.*

<sup>306</sup> See Press Release, Pub. Pol’y Inst. of Cal., *The Green State: Californians Want Environmental Protection Despite Economic, Financial Costs* (July 22, 2004), <http://www.ppic.org/press-release/the-green-state-californians-want-environmental-protection-despite-economic-financial-costs/> [<http://perma.cc/23U5-TYUE>].

<sup>307</sup> See Kip Lipper, *CEQA at 40: Midlife Crisis or Mission Accomplished*, UC DAVIS SCH. OF L. (Nov. 2011), <http://law.ucdavis.edu/centers/environmental/conferences/2011/CEQA-materials> [<http://perma.cc/XJ66-KJFB>].

<sup>308</sup> See Jennifer Hernandez & Stephanie DeHerrera, *National Environmental Policy Act (NEPA) Challenges from 1997-2012 in the First, Ninth, and Eleventh U.S. Circuit Courts of Appeals: Is NEPA Still a National Mandate or Has The Ninth Circuit Created a “Baby CEQA”?* (July 30, 2014) (unpublished manuscript at 4, 6), <http://ssrn.com/abstract=2499600> [<http://perma.cc/V5J7-U5RZ>]; see also *President Nixon Signing the National Environmental Policy Act of 1969*, DOCSTEACH, <http://www.docsteach.org/documents/document/nixon-sign-nepa> [<http://perma.cc/4FVL-RY8D>] (last visited Mar. 30, 2023).

they were not intended to be applied to private projects approved by public agencies.<sup>309</sup> Both statutes were conceived of as largely procedural mandates to evaluate, disclose, receive public input, and then thoughtfully proceed (or not) with a proposed project with full knowledge of the adverse environmental consequences the project would be expected to cause.<sup>310</sup> Both were enacted at a time of bi-partisan consensus—in California following the issuance of an “Environmental Bill of Rights”—that pollution was an acute problem (a river caught fire, a major swath of the California coastline was coated by an oil leak, and choking smog blanketed much of coastal and inland California—including San Francisco Bay and the Central Valley).<sup>311</sup> Beautiful natural places were at risk of irreversible damage (Sequoia National Park was slated to become a Disney resort, much of San Francisco Bay was to be filled to accommodate bulging new Bayfront communities, and San Francisco was to be cleaved by a multi-lane freeway bisecting the city and Golden Gate Park in half).<sup>312</sup> Nature itself (nearly extinct animal and fish species, rare plants, “undergrounded” former streams, and old growth forests) were all at risk of a morning bulldozer assault.<sup>313</sup>

For the first few years, CEQA and NEPA continued to track—as did about twenty “baby NEPAs” adopted in various forms by other states.<sup>314</sup> Over the course of the next fifty-two years, NEPA and CEQA sharply diverged. NEPA remained a largely procedural statute, imposing mandates that agencies analyze, disclose, consider feedback, and then explain why they are undertaking an action or issuing a project approval that would cause significant adverse environmental impacts.<sup>315</sup> Persistent efforts, especially in the Ninth Circuit (including California and other Western states), to convert NEPA into a substantive mandate to avoid and minimize significant adverse impacts whenever feasible, repeatedly failed to gain traction with the federal judiciary generally and the Supreme Court particularly.<sup>316</sup>

CEQA followed a different pathway, with just a handful of the key early judicial decisions that, in my experience, most shape current CEQA litigation practice and judicial outcomes, as

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<sup>309</sup> See Hernandez & DeHerrera, *supra* note 308.

<sup>310</sup> See *id.* at 4, 6.

<sup>311</sup> See *id.*

<sup>312</sup> See *id.*

<sup>313</sup> See Lipper, *supra* note 307.

<sup>314</sup> See Hernandez & DeHerrera, *supra* note 308, at 4–6.

<sup>315</sup> See *id.* at 1–4.

<sup>316</sup> See *id.*

noted below in Table 2. It is noteworthy this expansive judicial interpretation of CEQA was launched with the first Supreme Court decision interpreting CEQA, which applied CEQA to a local agency approval of only 134 condominiums at the Mammoth Mountain ski resort.<sup>317</sup>

Each of these cases fundamentally changed how CEQA works in practice; many involved judicial elevations of CEQA over other statutes and regulations, especially those directing the approval of more housing. None of these judicial changes to CEQA were required based on a plain language interpretation of any statute or regulation; none of these CEQA expansions were informed by any public notice or comment process; and each was decided in a CEQA-only legal silo that fully ignored other legal imperatives, such as civil rights, housing, and transportation laws. The CEQA directives included in each of these cases was subsequently interpreted and applied by project opponents, along with public agency staff, consultants and lawyers defending the adequacy of CEQA compliance, who collectively invented and at unpredictable intervals through subsequent caselaw modified these judicial decisions.<sup>318</sup> Such CEQA directives were interpreted using analytical methodologies, significance criteria, and mitigation measures, by a collection of CEQA practitioners in the public sector, private sector consultants, and private sector attorneys. Stakeholder interests not represented by these individual CEQA practitioners—such as the civil rights community focused on housing and jobs—were largely ignored in a CEQA-only practitioner silo that continued to attempt to prepare legally sufficient CEQA documentation with ever-evolving CEQA deficiency decisions by the more than fifty reported appellate court cases decided each year.

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<sup>317</sup> *Friends of Mammoth v. Bd. of Supervisors*, 502 P.2d 1049, 1052 (Cal. 1972).

<sup>318</sup> The state's expert CEQA agency, the Office of Planning and Research, was directed by the Legislature to regularly update the CEQA Guidelines, which largely serve as regulations implementing CEQA but are not constraints on further judicial CEQA expansion. *See* CAL. PUB. RES. CODE § 210083. CEQA Guidelines are infrequently, and only selectively, revised and do not encompass all applicable CEQA requirements as directed in evolving judicial decisions.

TABLE 2: CEQA'S FOUNDATIONAL JURISPRUDENCE

1972	<p style="text-align: center;"><b><i>Friends of Mammoth v. Board of Supervisors,</i></b> <b>502 P.2d 1049 (Cal. 1972)</b></p> <p>CEQA's applicability is expanded exponentially to state and local agency approvals of private project applications, not just projects undertaken by public agencies. The Supreme Court directs judges to use a uniquely broad judicial interpretive rule: CEQA is to be interpreted by the courts so "as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."<sup>319</sup> This first Supreme Court decision involved a <i>184-unit condo project</i>, with a restaurant, near the Mammoth Mountain ski resort in Mono County.<sup>320</sup></p> <p>This first CEQA Supreme Court decision stands in stark contrast to longstanding "canons" of judicial interpretation and enforcement of statutes, which direct the courts to weigh various factors such as legislative intent, consistency with other laws, and textual clarity or ambiguity.<sup>321</sup></p> <p>Since 1970, virtually all modern environmental laws were subsequently enacted, ranging from federal and California versions of the Clean Air and Clean Water Acts, Coastal and Desert Protection Acts, Historic Preservation and Tribal Resource Protection laws, hazardous waste and hazardous materials laws, worker and public health protection laws, earthquake and flood protection laws, wildfire prevention and protection laws, endangered and rare species and habitat protection laws, climate change laws, and scores of sustainable resource protection laws covering groundwater, public and private surface lands blanketing the entire state (except for tribal lands which remain largely under tribal sovereign control), and waters and wetlands.<sup>322</sup></p> <p>The First Appellate District, which ruled against the Regents of the University of California and, for the first time in history, concluded that CEQA required analysis and mitigation measures for illegal "social noise" from undergraduate parties, called out this 1972 quote as the "foremost principle" of CEQA and attributed it to the Legislature's intent, as reported in the 1972 Supreme Court decision.<sup>323</sup> In fact, the Legislature has not enacted this "foremost principle" as the "Legislature's intent" in</p>
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<sup>319</sup> See *Friends of Mammoth v. Bd. of Supervisors*, 502 P.2d 1049, 1056 (Cal. 1972).

<sup>320</sup> See *id.* at 1052.

<sup>321</sup> See BRANNON, *supra* note 271, at 20.

<sup>322</sup> See Richard Lazarus & Sara Zdeb, *Environmental Law & Politics*, INSIGHTS ON L. & SOC'Y (Jan. 5, 2021), [http://www.americanbar.org/groups/public\\_education/publications/insights-on-law-and-society/volume-19/insights-vol-19-issue-1/environmental-law-politics/\[http://perma.cc/YV7E-ALP5\]](http://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol-19-issue-1/environmental-law-politics/[http://perma.cc/YV7E-ALP5]); see also CAL. PUB. RES. CODE § 21065 (West 1972).

<sup>323</sup> See *Make UC a Good Neighbor v. Regents of Univ. of Cal.*, 304 Cal. Rptr. 3d 834, 843 (Ct. App. 2023).

	<p>CEQA; instead, CEQA includes several different statutes reciting the enacted intent of the Legislature, which, among other provisions, notes that <i>CEQA is intended to “[e]nsure that the long-term protection of the environment, consistent with the provision of a decent home and suitable living environment for every Californian, shall be the guiding criterion in public decisions.”</i><sup>324</sup> These and other enacted statements of legislative intent under CEQA are rarely quoted, or invoked, in judicial decisions interpreting CEQA.</p> <p>In 1972, CEQA was a short, general statute, which was of course entirely uninformed by all subsequently-enacted environmental and public health protection statutes.<sup>325</sup> The California Supreme Court did, however, expressly recognize that CEQA was simply a statute: the Court’s direction was that CEQA be broadly construed “within the reasonable scope of the statutory language.”<sup>326</sup> The 1972 decision has subsequently been relied upon to ignore administrative law jurisprudence. Statutory construction is of more than historical relevance, even as the Legislature has periodically attempted to reign in expansive court interpretations of CEQA with new statutory provisions that continue to be generally, and even expressly, ignored by courts—as discussed below.</p>
1974	<p style="text-align: center;"><b><i>No Oil, Inc. v. City of Los Angeles</i>, 529 P.2d 66 (Cal. 1974)</b></p> <p>An unprecedented new “fair argument” standard of review is established by the California Supreme Court for the less costly, streamlined “Negative Declaration” environmental compliance created by the Legislature in CEQA for projects that have no or negligible adverse impacts on the environment.<sup>327</sup> The Supreme Court held that a full EIR, which in practice cannot be completed in less than ten months and often takes two years or longer, and cannot be completed for less than \$300,000, often inclusive of technical reports and costs in excess of \$1,000,000, is required when a project opponent argues that there is a “fair argument” that there “may” be a single significant adverse environmental impact from a project.<sup>328</sup> EIRs remain subject to the “substantial evidence” standard of review, and for practitioners over the next couple of decades, unless an agency is caught in a lie or is openly defiant of a mandatory EIR component like the need to study a reasonable range of alternatives, EIRs are overwhelmingly likely to survive CEQA litigation challenges. CEQA practice evolved into doing an EIR if the project was likely to be sued by someone with money or other resources, even if the project was environmentally benign or beneficial.</p>

<sup>324</sup> CAL. PUB. RES. CODE § 21001(d) (emphasis added).

<sup>325</sup> See Lipper, *supra* note 307.

<sup>326</sup> Friends of Mammoth v. Bd. of Supervisors, 502 P.2d 1049, 1056 (Cal. 1972).

<sup>327</sup> See *No Oil, Inc. v. City of Los Angeles*, 529 P.2d 66, 75 (Cal. 1974).

<sup>328</sup> See *id.* at 74–75.



1974	<p style="text-align: center;"><b><i>San Francisco Ecology Center v. City and County of San Francisco</i>, 122 Cal. Rptr. 100 (1975)</b></p> <p>CEQA took another sharp deviation from NEPA when the First District Court of Appeal held that CEQA requires that environmental protection be elevated to a “paramount” and urgent concern, “requir[ing] decision-makers to assign greater priorities to environmental values than to economic needs.”<sup>329</sup> It is no longer enough to analyze, disclose, receive input, and have to explain why an agency is approving a project that will harm the environment. This and subsequent cases held that agencies may not approve a project unless they first require all “feasible” means of avoiding or minimizing significant adverse impacts, while achieving all or most of the project objectives, through a combination of “mitigation measures” aimed at reducing impacts and “alternative” modified projects and/or project locations.<sup>330</sup></p>
1990; 2009	<p style="text-align: center;"><b><i>Land Waste Management v. Contra Costa County Board of Supervisors</i>, 271 Cal. Rptr. 909 (1990); <i>Schellinger Brothers v. City of Sebastopol</i>, 102 Cal. Rptr. 3d 394 (2009)</b></p> <p>The Legislature enacted the Housing Accountability Act (“HAA”) in 1982, which it supported eight years later with 1990 amendments with formal legislative findings that noted that “California housing has become the most expensive in the nation,” a circumstance “partially caused by activities and policies of many local governments which limit the approval of affordable housing, increase the cost of land for affordable housing, and require that high fees and exactions be paid by producers of potentially affordable housing,” and recognized that “[t]he lack of affordable housing is a critical problem which threatens the economic, environmental, and social quality of life in California.”<sup>331</sup> After the Legislature’s housing production increase bills from the 1980’s, including acknowledgement that California’s housing supply was not keeping up with its population growth, state housing costs continued to spiral well ahead of national housing costs for the next four decades.<sup>332</sup> The national housing costs are now far beyond levels affordable to hard working California families.<sup>333</sup> The national average is that median priced homes cost about 4.5 times more than the</p>

<sup>329</sup> S.F. Ecology Ctr. v. City & County of San Francisco, 122 Cal. Rptr. 100, 103–04 (1975).

<sup>330</sup> See *id.* at 106–07, 109 n.8 (citing CAL. PUB. RES. CODE § 21100).

<sup>331</sup> See Act of Sept. 27, 1982, ch. 1438, § 2; 1982 Cal. Stat. 5483, 5484 (to be codified at CAL. GOV’T CODE § 65589.5); Act of Sept. 28, 1990, ch. 1439, § 1, 1990 Cal. Stat. 6552, 6552 (amending CAL. GOV’T CODE § 65589.5(a)).

<sup>332</sup> See *Home Price to Income Ratio (US & UK)*, LONGTERMTRENDS, <http://www.longtermtrends.net/home-price-median-annual-income-ratio/> [<http://perma.cc/P9X2-YDHF>] (last visited Mar. 24, 2023).

<sup>333</sup> See *id.*

	<p>annual median household income.<sup>334</sup> In California, homes cost 9 times more than the annual median income.<sup>335</sup></p> <p>The original version of the HAA required cities and counties to approve housing projects that complied with applicable General Plan and zoning requirements.<sup>336</sup> At the same time (and even before) this early 80s-era housing emergency, the Legislature decided that local governments were taking too long to review and approve development projects that complied with local General Plan and zoning requirements, and imposed a strict schedule for completing the application and approval process in the Permit Streamlining Act (“PSA”).<sup>337</sup> The same year it enacted the HAA, the Legislature enacted a “deemed “approv[ed]” remedy if an agency missed compliance deadlines, which allowed the applicant to proceed with construction even if a local permit was not issued.<sup>338</sup> Development critics objected to both the HAA and PSA, and, in a political compromise, the Legislature decided not to amend CEQA to conform to these new HAA and PSA mandates.<sup>339</sup> Courts thereafter concluded that the PSA’s “deemed approved” mechanism could not bypass CEQA compliance.<sup>340</sup> Courts also concluded that the time deadlines imposed under the PSA and provided under CEQA, were not effectively enforceable in court.<sup>341</sup> Courts also declined to enforce the HAA in situations where a local agency had yet to certify an EIR pursuant to CEQA.<sup>342</sup> CEQA’s ardent environmentalist supporters, in anti-housing strongholds like Marin County, had their clear first triumph as the “law that swallowed” housing law in California.<sup>343</sup></p>
1987	<p style="text-align: center;"><b><i>Friends of Westwood, Inc. v. City of Los Angeles,</i></b> <b>235 Cal. Rptr. 788 (Ct. App. 1987)</b></p> <p>In practice and in most, but not all, local jurisdictions (San Francisco being the most noteworthy exception), CEQA was not generally applied in cities to private construction projects (e.g., for residential and commercial uses) if the project complied with local General Plans, local zoning, and other code requirements; these</p>

<sup>334</sup> See *Home Price to Income Ratio (US & UK)*, *supra* note 332.

<sup>335</sup> *Id.*

<sup>336</sup> See § 2, 1982 Cal. Stat. 5484.

<sup>337</sup> See Act of Sept. 30, 1977, ch. 1200, § 1, 1977 Cal. Stat. 3993, 3993 (enacting the Permit Streamlining Act, to be codified at CAL. GOV’T CODE § 65920 et seq.); Act of Mar. 1, 1982, ch. 84, § 1, 1982 Cal. Stat. 246, 246 (reforming PSA by amending CAL. GOV’T CODE § 65940); Act of July 7, 1982, ch. 460, § 1, 1982 Cal. Stat. 1905, 1905 (reforming PSA by amending CAL. GOV’T CODE § 65956).

<sup>338</sup> See § 1, 1982 Cal. Stat. 1905.

<sup>339</sup> See CAL. GOV’T CODE § 65589.5(e) (2023); see also *Land Waste Mgmt. v. Contra Costa Cnty. Bd. of Supervisors*, 271 Cal. Rptr. 909, 915–16 (Ct. App. 1990).

<sup>340</sup> See *Land Waste Mgmt.*, 271 Cal. Rptr. at 916.

<sup>341</sup> See, e.g., *id.*; *Schellinger Brothers v. City of Sebastopol*, 102 Cal. Rptr. 3d 394, 404 (Ct. App. 2009).

<sup>342</sup> See *Schellinger Brothers*, 102 Cal. Rptr. 3d at 405–06.

<sup>343</sup> See *id.*; Nieves, *supra* note 21.

projects were considered “by right” and entitled to receive an approval. As land use planning practice evolved, however, local governments began requiring “conditional use permits” (“CUPs”) for more categories of projects, notably including apartment projects. A CUP process requires a city to notify and consider input from the public, and also allows a city to impose discretionary conditions of approval on a project,<sup>344</sup> such as specifying the location of a driveway in relation to a street when there was no express or objective zoning standard governing the driveway locations. The City of Los Angeles approved one of the first high rise multi-family housing projects—on Wilshire Boulevard near UCLA—with a CUP that included a few pages of “conditions” the project was required to meet.<sup>345</sup>

In *Friends of Westwood, Inc. v. City of Los Angeles*, the Second Appellate District held that the CUP process was a fully “discretionary” decision by the city, did trigger CEQA compliance, and ordered project approvals rescinded pending CEQA compliance.<sup>346</sup> *Friends of Westwood* set the template for CEQA’s applicability to locally authorized housing projects, which are consistent with General Plan and zoning requirements, but are nevertheless first required to complete the CEQA process. Once an agency concludes that a project will result in a “significant impact to the environment,” CEQA authorizes the agency to deny the project application even for projects that comply with the General Plan and zoning requirements.<sup>347</sup>

1987 was the second big anti-housing “win” for CEQA’s status quo defenders, subjecting even fully compliant housing to extensive study delays and excess costs as each new apartment project (among other housing types) was required to do its own CEQA studies, including studies of “cumulative impacts” that were theoretically supposed to be consistent across a jurisdiction.<sup>348</sup> In my experience, CEQA practice in a small but wealthy city (San Francisco, with forty-nine-square miles of entrenched NIMBYs), began to deviate massively from less wealthy cities where population (and housing) was still increasing significantly—especially in the thousands of square miles comprising Los Angeles, Orange, Riverside and San Bernardino counties.<sup>349</sup>

<sup>344</sup> See *Zoning and Conditional Use Permits*, INST. FOR LOC. GOV’T, <http://www.ca-ilg.org/hn-online-guide/zoning-and-conditional-use-permits> [<http://perma.cc/AVH4-UQM2>] (last visited Mar. 20, 2023).

<sup>345</sup> See *Friends of Westwood, Inc. v. City of Los Angeles*, 235 Cal. Rptr. 788, 790 (Ct. App. 1987).

<sup>346</sup> See *id.* at 800–01, 803–04.

<sup>347</sup> CAL. CODE REGS. tit. 14, § 15021 (2023).

<sup>348</sup> *Id.*

<sup>349</sup> Brian Goggin, *Research and Policy: Measuring the Housing Permitting Process in San Francisco*, TERNER CTR. FOR HOUS. INNOVATION (July 24, 2018), <http://turnercenter.berkeley.edu/research-and-policy/measuring-the-housing-permitting-process-in-san-francisco/> [<http://perma.cc/8ST5-PA63>].

	<p>Any theoretical understanding that CEQA was a state law that applied in a mostly uniform manner to the same kind of project (apartment building) statewide simply confirmed the absence of the practitioner's familiarity with other jurisdictions. I was fortunate to be the first CEQA attorney to work in-house for the University of California on all of its campus and hospital projects from 1986-1989. While UC campuses tended to be located in wealthier communities, and town-gown conflicts had already been metastasized into CEQA lawsuits near the oldest campuses near the wealthiest neighborhoods, my legal job provided a vivid education in just how differently a hot-button issue (e.g., traffic congestion) was studied and mitigated (or not) under this supposedly uniform state law.</p>
1988	<p><b><i>Citizens of Goleta Valley v. Board of Supervisors of Santa Barbara</i>, 801 P.2d 1161 (Cal. 1990)</b></p> <p>CEQA had previously been held to require that public agencies consider alternative locations for proposed projects which could avoid one or more significant adverse impacts.<sup>350</sup> In <i>Goleta</i>, the California Supreme Court held that private owners must also consider alternative locations for a proposed project (at issue was a waterfront hotel in Santa Barbara), even if the applicant did not own or control any other site.<sup>351</sup> Because of this new rule, <i>Goleta</i> spawned a cottage industry of specialists who would comb through real estate listings, find potentially suitable sites, document whether or not they were available for purchase, and then either consider them as alternative sites or conclude that no alternative sites were available.<sup>352</sup> For CEQA practitioners, <i>Goleta</i>, like all CEQA published court decisions, had an immediate and retroactive effect in that it simply interpreted existing law. Opponents of the hotel project were of course not mollified by a new EIR, and filed a second CEQA lawsuit – which they lost.<sup>353</sup> The CEQA compliance process delayed construction for more than a decade.</p>

<sup>350</sup> See *Citizens of Goleta Valley v. Bd. of Supervisors of Santa Barbara*, 801 P.2d 1161, 1169 (Cal. 1990). The Court affirmed the principle that:

[A]n EIR for any project subject to CEQA review must consider a reasonable range of alternatives to the project, or to the location of the project, which: (1) offer substantial environmental advantages over the project proposal. . . and (2) may be "feasibly accomplished in a successful manner" considering the economic, environmental, social and technological factors involved.

*Id.* at 1168 (citations and emphasis omitted).

<sup>351</sup> *Id.* at 1180.

<sup>352</sup> See Lennie Rae Cooke & Craig Stevens, *CEQA Portal Topic Paper: Alternatives*, AEP CEQA PORTAL 6 (Oct. 18, 2018), <http://ceqaportal.org/tp/Alternatives.pdf> [<http://perma.cc/X6XP-MRHY>] (providing that offsite alternatives should be considered); see also CAL. CODE REGS. tit. 14, § 15126.26(a) (2023) (providing that "[a]n EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the projec") (emphasis added).

<sup>353</sup> *Citizens of Goleta Valley v. Bd. of Supervisors*, No. S013629 (Cal. Super. Ct. Dec. 31, 1990).

The result of the Table 2 cases was to make housing—like other routine construction in ordinary communities built in compliance with California’s ever-more-stringent environmental, building, conservation, labor, and public health standards—subject to CEQA. Judges are lawyers, and most lawyers find the idea of a short delay to obtain a more comprehensive understanding to be a routine and beneficial part of law practice. CEQA also has the beguiling feature of being widely understood to just require “more study”—after all, agencies could still re-approve a project once they “fully complied” with CEQA. The consequences of those harmed by delayed projects, and projects that became more costly or were derailed entirely by delays that coincided with shifting economic and political conditions, are often not part of the “CEQA administrative record” at issue in CEQA lawsuits; even if included in the record, they would likely be considered subordinate or irrelevant to the overarching 1972 California Supreme Court directive that CEQA should be broadly interpreted by the courts to protect the environment.

## 2. 1993 and Beyond: Legislature’s Largely Failed Attempts to Restore Administrative Law Jurisprudence to CEQA

CEQA in practice is different from the CEQA lawsuit briefs about the parsed merits of any particular sub-argument involving a sub-issue of one of the scores of impact categories that have been sufficiently addressed in the CEQA process. The practical, political, economic, and policy implications of the vast expanse of CEQA through CEQA jurisprudence was accordingly considered in the Legislature, which responded in several rounds, but most broadly in 1993 with statutory amendments to CEQA designed to bring greater predictability to CEQA.<sup>354</sup>

With continued underproduction of housing, along with high profile CEQA lawsuits against infrastructure and educational projects, an environmental leader and hero in the Legislature, Senator Byron Sher of Palo Alto (also a Stanford Law School professor) led a two-bill, generally bi-partisan effort to reform CEQA in 1993 with a series of statutory changes designed to accelerate the CEQA compliance schedule, reduce compliance costs, and make judicial outcomes more predictable.<sup>355</sup> In my opinion, this 1993 Legislation was the only year, in fifty years,

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<sup>354</sup> See Dills, Allen, Sher California Environmental Quality Act Revision Act of 1993, ch. 1130, 1993 Cal. Stat. 6315; Act of Oct. 10, 1993, ch. 1131, 1993 Cal. Stat. 6334.

<sup>355</sup> See *id.*

where broadly applicable CEQA reforms were not politically killed by CEQA's most powerful status quo defenders in the State Building and Construction Trades Council ("Building Trades") and environmental advocacy groups.

For example, the Legislature amended CEQA to require that there must be "substantial evidence" in support of a "fair argument" that a project would have a one or more significant adverse environmental impacts, in an effort (largely unsuccessful) to make negative declarations more defensible.<sup>356</sup> In a fifteen-year study of CEQA lawsuit outcomes, nearly sixty percent of negative declarations<sup>357</sup> failed to withstand judicial scrutiny. Courts concluded that even air conditioner noise was enough to invalidate a negative declaration and require an EIR.<sup>358</sup> Courts also concluded that even non-expert opinion, about noise from trucks, met the "substantial evidence of a fair argument" standard.<sup>359</sup>

Also in 1993, the Legislature attempted to fix the "fit the punishment to the crime" CEQA remedy problem.<sup>360</sup> In law school, and in civil litigation, adequately analyzing and mitigating ninety-eight percent of impacts covered in two hundred pages of EIR text, supported by five hundred pages of technical appendix, could earn an "A" grade and meets all standards of review normally applied by civil courts (preponderance of the evidence, substantial evidence, etc.). Under CEQA jurisprudence, in contrast, a judicial conclusion that the agency fell short of full CEQA compliance for just two percent of the analysis (just a handful of pages comprising subparts of one or two environmental impact topics) most commonly results in the judicial remedy of rescinding all project approvals and re-doing the EIR process to fix the deficient analysis in a process that takes a year or longer. The Legislature's fix was directing the courts to order "severance" so whatever portion of a project that was not affected by the deficiency could proceed without further delay.<sup>361</sup> One appellate court district steadfastly

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<sup>356</sup> See CAL. PUB. RES. CODE § 21082.2 (West 2023).

<sup>357</sup> Hernandez, *In the Name of the Environment I: 2010-2012*, *supra* note 22, at 4.

<sup>358</sup> See *Citizens for Responsible & Open Gov't v. City of Grand Terrace*, 73 Cal. Rptr. 3d 202, 216 (Ct. App. 2008).

<sup>359</sup> See *City of Arcadia v. State Water Res. Control Bd.*, 38 Cal. Rptr. 3d 373, 390, 393 (Ct. App. 2006).

<sup>360</sup> See CAL. PUB. RES. CODE § 21168.9 (West 2023).

<sup>361</sup> See *id.* § 21167.1.

declines to authorize any severance remedies,<sup>362</sup> and the others do—but trial courts are split and the results are unpredictable. Notwithstanding this severance remedy directive, the direct practical consequence of being targeted by a CEQA lawsuit is being exposed to a potential judicial rescission remedy—enough to dissuade most lenders, investors, and grantors in funding a project while a lawsuit is pending, without regard to the lawsuit’s merits, and without any of the normal safeguards (including bond requirements) of judicially-imposed preliminary injunctions pending the merits decisions.

Section 21005(b) was also added in 1993: “It is the intent of the Legislature that, in undertaking judicial review [in CEQA lawsuits], courts shall continue to follow the established principle that there is no presumption that error is prejudicial.”<sup>363</sup> Courts largely declined to give this statute any practical effect, subsequently holding, for example, that a disclosure omission is prejudicial in precluding informed public participation,<sup>364</sup> that the burden falls on the lead agency to demonstrate that an error is not prejudicial,<sup>365</sup> and most significantly “when an agency fails to proceed’ as required by CEQA, harmless error analysis is inapplicable.”<sup>366</sup> One important California Supreme Court decision did conclude that a transit project EIR which failed to analyze any environmental impacts against the present-day “baseline” of existing environmental conditions, and thereby failed to include any meaningful assessment of construction impacts such as noise, dust, and air pollution, was erroneous—but that the public had a common sense understanding of construction impacts, so meaningful public engagement could occur even in the absence of an EIR analysis of these impacts.<sup>367</sup>

Finally, the Legislature enacted section 21083.1 of CEQA, which reads in full:

It is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, shall not

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<sup>362</sup> See *Ctr. for Biological Diversity v. Cal. Dep’t of Fish & Wildlife*, 226 Cal. Rptr. 3d 432, 436–38 (Ct. App. 2017); *San Bernardino Valley Audubon Soc’y v. Metro. Water Dist. of S. Cal.*, 109 Cal. Rptr. 2d 108, 113–14 (Ct. App. 2001); *POET, LLC v. Cal. Air Res. Bd.*, 160 Cal. Rptr. 3d 69, 122–24 (Ct. App. 2013); *King & Gardiner Farms, LLC v. County of Kern*, 259 Cal. Rptr. 3d 109, 174–76 (Ct. App. 2020).

<sup>363</sup> CAL. PUB. RES. CODE § 21005(b).

<sup>364</sup> See *City of Maywood v. L.A. Unified Sch. Dist.*, 145 Cal. Rptr. 3d 567, 587 (Ct. App. 2012).

<sup>365</sup> See *N. Coast Rivers All. v. Kawamura*, 196 Cal. Rptr. 559, 576–77 (Ct. App. 2015).

<sup>366</sup> *State Water Res. Control Bd. Cases*, 39 Cal. Rptr. 3d, 189, 228 (Ct. App. 2006).

<sup>367</sup> See *Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.*, 304 P.3d 499, 516–18 (Cal. 2013).

interpret this division or the state guidelines adopted pursuant to Section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines.<sup>368</sup>

This statute was cited in two Third District Court of Appeal decisions, including one that noted courts are “constrained to reject” interpretations of CEQA that are “beyond the explicit terms of the act”—even if accepting the interpretation would “arguably afford greater protection to the environment.”<sup>369</sup>

As noted above, in my experience, the 1993 Session was the last time that the Legislature attempted to reform CEQA using traditional statutory amendment tools: new and amended statements of legislative intent, legislative directives regarding the absence of prejudicial error, legislative directives to allow portions of the project not affected by an analytic deficiency to proceed with a severance remedy, and—more importantly—a clear direction that courts no longer construe CEQA “broadly to protect the environment” but instead avoid construing CEQA “in a manner which imposes procedural or substantive requirements beyond those explicitly stated” in the CEQA statute or guidelines.

None of these statutes resulted in any meaningful change to CEQA jurisprudence. CEQA lawsuits are filed in a form of litigation proceeding called a “writ of mandamus”—an old common law term that differs from ordinary civil disputes initiated by a “complaint.”<sup>370</sup> Writs seek to compel agencies to undertake, or refrain from undertaking, an action.<sup>371</sup> Although a writ of mandamus is entirely ordinary in CEQA, in U.S. law it is considered an “extraordinary writ” that “is not [issued as] a matter of right, nor governed entirely by fixed rules, but is within the ‘sound’ or ‘wise’ discretion of the court[s].”<sup>372</sup>

In contrast to ordinary administrative law jurisprudence, California courts have demonstrated no appetite to have their

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<sup>368</sup> CAL. PUB. RES. CODE § 21083.1 (West 2023).

<sup>369</sup> *Picayune Rancheria of Chukchansi Indians v. Brown*, 178 Cal. Rptr. 3d 563, 573 (Ct. App. 2014); *see also* *W. Placer Citizens for an Agric. & Rural Env’t v. County of Placer*, 50 Cal. Rptr. 3d 799, 806 (Ct. App. 2006).

<sup>370</sup> *See* STEPHEN L. KOSTKA & MICHAEL H. ZISCHKE, PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT § 23.2 (2d ed. 2008).

<sup>371</sup> *See Writ*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining a “writ” as “[a] court’s written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing some specified act”).

<sup>372</sup> John Till, *Extraordinary Writs – Discretion or Matter of Right?*, 15 HASTINGS L.J. 218, 218 (1963).



discretion boxed in by statutes or rules in CEQA jurisprudence, as shown in Table 3:

TABLE 3: POST-1993 CEQA JURISPRUDENCE: THE LEGISLATIVE CEQA REFORM WAVE CRASHES INTO CEQA JURISPRUDENCE INCLUDING THE JUDICIAL DISCRETION INHERENT IN EXTRAORDINARY WRIT LAWSUITS

1997	<p><b><i>Mountain Lion Foundation v. Fish &amp; Game Commission</i>, 939 P.2d 1280 (Cal. 1997)</b></p> <p>Courts rejected newly-enacted statutory constraints on CEQA, again affirming that CEQA prohibits agencies from approving a project causing a significant adverse impact if there are “feasible alternatives or mitigation measures” available to substantially lessen that effect.<sup>373</sup></p>
2001	<p><b><i>Berkeley Keep Jets Over the Bay Committee v. Port of Oakland</i>, 111 Cal. Rptr. 2d 598 (Ct. App. 2001)</b></p> <p>EIRs, formerly largely defensible in court, become newly vulnerable with an expansive new application of the “prejudicial abuse of discretion” standard (previously used to review an agency’s compliance with CEQA’s procedure) to evaluate the substantive adequacy of an agency’s analysis of impacts.<sup>374</sup> The court found that the Port did use a protocol approved by an expert agency to evaluate toxic air emissions from an airport expansion project.<sup>375</sup> The court further found that the Port knew about and was advised that more recent draft protocols had been developed but not yet adopted, but were, in the opinion of a staff member of the expert agency, the “best available data” and should be used.<sup>376</sup> The Port continued to use the approved protocol, while responding on the record to arguments that the newer draft protocol should be used and while adopting nine mitigation measures to reduce toxic air emission exposures at the airport project.<sup>377</sup> The appellate court concluded that the Port erred in not using the new draft protocol endorsed by staff of the expert agency and invalidated the EIR.<sup>378</sup> This decision reverses prior court precedent of deferring to agency conclusions on factual issues when supported by substantial evidence in the record even in an EIR context, as well as longstanding case law that disagreements among experts are resolved in favor of the CEQA lead agency. This decision launches a new era of challenges to the analytical</p>

<sup>373</sup> *Mountain Lion Found. v. Fish & Game Comm’n*, 939 P.2d 1280, 1298 (Cal. 1997).

<sup>374</sup> *Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm’rs*, 111 Cal. Rptr. 2d 598, 606 (Ct. App. 2001).

<sup>375</sup> *See id.* at 613–15.

<sup>376</sup> *Id.* at 613–15.

<sup>377</sup> *See id.* at 613–14.

<sup>378</sup> *See id.* at 615.

	<p>sufficiency of EIRs: courts began to substitute their own judgment for the agency's factual determinations by an expansive application of the "abuse of discretion" standard formerly applied to procedural violations of CEQA.</p>
2002	<p style="text-align: center;"><b><i>Communities for a Better Environment v. California Resources Agency</i>, 126 Cal. Rptr. 2d 441 (Ct. App. 2002)</b></p> <p>Amendments to CEQA's implementing regulations, the CEQA Guidelines that attempted to integrate more than fifty major environmental protection laws (clean air and water, protected species and resources, etc.) enacted since 1970 were rejected by the Third District as inconsistent with the "fair argument" standard of review and other CEQA precedents.<sup>379</sup> When, where, and what CEQA requires in "additional" evaluation and/or mitigation beyond compliance with applicable environmental and public health statutes and regulations remains entirely unpredictable in CEQA litigation. These regulatory amendments to CEQA, which are subject to the APA, followed from several court decisions confirming that compliance with an applicable environmental and/or health protection standard did satisfy the "substantial evidence" standard of review in CEQA for showing that an impact was reduced to a less than significant level.<sup>380</sup> Both <i>Sundstrom</i> and <i>Leonoff</i> were decided under the far less deferential negative declaration "fair argument" standard.<sup>381</sup> However, the Third District rejected amendments to the Guidelines codifying these earlier published judicial decisions, largely based on an expansive reading of the "fair argument" standard of review applicable only to negative declarations (and not environmental impact reports or exemption determinations).<sup>382</sup> It is also noteworthy that the Third District decision completely ignores the "non-duplication" criteria of the APA, which requires that regulations not duplicate other laws or regulations and is itself an ordinary canon of administrative law jurisprudence that warrants the full integration of the CEQA Guidelines with the now thousands of environmental, safety, and health protection laws and regulations that have become effective since 1970.</p>

<sup>379</sup> See *Cmtys. for a Better Env't v. Cal. Res. Agency*, 126 Cal. Rptr. 2d 441, 446 (Ct. App. 2002), *overruled in part by* *Berkeley Hillside Pres. v. City of Berkeley*, 343 P.3d 834 (Cal. 2015).

<sup>380</sup> See *Leonoff v. Monterey Cnty. Bd. of Supervisors*, 272 Cal. Rptr. 372, 382 (Ct. App. 1990) (holding that compliance with hazardous materials management laws was sufficient to conclude that hazardous materials impacts are less than significant); *Sundstrom v. County of Mendocino*, 248 Cal. Rptr. 352, 360 (Ct. App. 1988).

<sup>381</sup> See *Leonoff*, 272 Cal. Rptr. at 382; *Sundstrom*, 248 Cal. Rptr. at 360.

<sup>382</sup> See *Cmtys. for a Better Env't v. Cal. Res. Agency*, 126 Cal. Rptr. 2d 441, 446 (Ct. App. 2002), *overruled in part by* *Berkeley Hillside Pres. v. City of Berkeley*, 343 P.3d 834 (Cal. 2015).

2005	<p><b><i>Californians for Alternatives to Toxics v. Department of Food &amp; Agriculture</i>, 38 Cal. Rptr. 3d 638 (Ct. App. 2005); <i>Protect the Historic Amador Waterways v. Amador Water Agency</i>, 11 Cal. Rptr. 3d 104 (Ct. App. 2004)</b></p> <p>Express judicial rejection of the 1993 statutory standard (Section 2005(b)) that errors and omissions in CEQA documents is presumed to be non-prejudicial. First the Fourth District, and then most others, held that the “omission” of “important environmental information” is “presumed to be prejudicial error.”<sup>383</sup> Courts differ as to what constitutes “important environmental information” and why. Some courts (including the California Supreme Court) for some projects continue to conclude that the omission of information is not necessarily prejudicial.<sup>384</sup> These inconsistent court conclusions about whether “missing” information or analysis is prejudicial have introduced greater uncertainty to judicial outcomes than existed pre-1993 under the former “substantial evidence” and “fair argument” standards of review. For challenged EIRs, CEQA lawsuits always allege insufficiently-detailed disclosure, analysis, and/or mitigation. The judicial outcome is, as acknowledged by learned University of California environmental law professors, unknowable.<sup>385</sup></p>
2006; 2011; 2015; 2023	<p>While CEQA political rhetoric often pits “environmentalists” against “developers,” the victims of CEQA jurisprudence are far more likely to be those not served by unbuilt facilities and “the environment” not located immediately adjacent to those forced to live farther away from campus.</p> <p>California college campus systems, especially the University of California and Cal State University systems, lost a string of CEQA lawsuits based on CEQA mandates newly identified in court decisions decided after the 1993 CEQA reform wave.<sup>386</sup> UC Berkeley CEQA lawsuits are in the news, but anti-campus CEQA lawsuits resulting in blocked campus enrollment growth and development have long been a staple in CEQA jurisprudence, as noted in the following three examples:</p>

<sup>383</sup> See *Protect the Historic Amador Waterways v. Amador Water Agency*, 11 Cal. Rptr. 3d 104, 108 (Ct. App. 2004); see, e.g., *Save Cuyama Valley v. County of Santa Barbara*, 153 Cal. Rptr. 3d 534, 545 (Ct. App. 2013); *State Water Res. Control Bd. Cases*, 39 Cal. Rptr. 3d 189, 233 (Ct. App. 2006); *Sierra Club v. County of Napa*, 19 Cal. Rptr. 3d 1, 5 (Ct. App. 2004).

<sup>384</sup> See, e.g., *Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.*, 304 P.3d 499, 504–05 (Cal. 2013).

<sup>385</sup> See generally KOSTKA & ZISCHKE, *supra* note 371, §§ 13.13–13.53.

<sup>386</sup> See, e.g., *City of Marina v. Bd. of Trs. of California State Univ.*, 138 P.3d 692, 707 (Cal. 2006); *City of San Diego v. Bd. of Trs. of California State Univ.*, 135 Cal. Rptr. 3d 495, 522 (Ct. App. 2011); *City of Hayward v. Bd. of Trs. of California State Univ.*, 195 Cal. Rptr. 3d 614, 637 (Ct. App. 2015); see generally *City of San Diego v. Bd. of Trs. of California State Univ.*, 352 P.3d 883 (Cal. 2015).

	<p>Monterey Bay State University must mitigate impacts to local infrastructure and public services due to campus expansion, even if it has no funding to do so.<sup>387</sup> Cost-sharing of infrastructure improvements in mitigation is not rendered infeasible by uncertainty in the local agency's ability to obtain its matching share of necessary funding.<sup>388</sup></p> <p>San Diego State must contribute funds for off-site mitigation of environmental effects of campus expansion, even if the Legislature has declined to appropriate funds to do so. San Diego State must tap other resources, such as alumni, for funding or consider redirecting student enrollment to other campuses.<sup>389</sup></p> <p>East Bay (Hayward) State University must analyze and mitigate impacts from increased student use of regional park trails.<sup>390</sup></p> <p>"Social Noise" from future undergraduate residents of unbuilt dorms was added to CEQA as an environmental impact.<sup>391</sup></p>
2016	<p style="text-align: center;"><b><i>Center for Biological Diversity v. Department of Fish &amp; Wildlife</i>, 361 P.3d 342 (Cal. 2015)</b></p> <p>Housing projects must consider greenhouse gas emission impacts from new residents in relation to state and global climate science, even though future residents could have a greater impact on greenhouse gas emissions if the challenged housing project is denied and they live somewhere else.<sup>392</sup></p> <p>The dissenting Justice opines that CEQA is not a population control statute; his colleagues in this and other opinions agree that CEQA is not a population control statute.<sup>393</sup></p> <p>In its recently approved (December 2022) "Scoping Plan" to achieve California's greenhouse gas reduction targets, CARB reported on an academic study commissioned by CARB and the California EPA to evaluate how CEQA affects housing production.<sup>394</sup> Although the study looked at fewer than twenty</p>

<sup>387</sup> *City of Marina*, 138 P.3d at 706.

<sup>388</sup> *Id.*

<sup>389</sup> *City of San Diego v. Bd. of Trs. of California State Univ.*, 352 P.3d 883, 885 (Cal. 2015); *City of San Diego v. Bd. of Trs. of California State Univ.*, 135 Cal. Rptr. 3d 495, 522 (Ct. App. 2011).

<sup>390</sup> *City of Hayward*, 195 Cal. Rptr. 3d at 637.

<sup>391</sup> *See Make UC A Good Neighbor v. Regents of Univ. of Cal.*, 304 Cal. Rptr. 3d 834 (Ct. App. 2023).

<sup>392</sup> *Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 361 P.3d 342, 350 (Cal. 2016).

<sup>393</sup> *See id.* at 367 (Chin, J., dissenting).

<sup>394</sup> *See CAL. AIR RES. BD., 2022 SCOPING PLAN APPENDIX D – LOCAL ACTIONS 19–20 (2022)*, <http://ww2.arb.ca.gov/sites/default/files/2022-11/2022-sp-appendix-d-local-actions.pdf> [<http://perma.cc/WK2Q-XWGM>]; *see also* MOIRA O'NEILL ET AL., CAL. AIR RES. BD., EXAMINING ENTITLEMENT IN CALIFORNIA TO INFORM POLICY AND PROCESS: ADVANCING SOCIAL EQUITY IN HOUSING DEVELOPMENT PATTERNS, CALIFORNIA AIR RESOURCES BOARD 83 (2022), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3956250](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3956250) [<http://perma.cc/FFE9-JX7A>]

	<p>jurisdictions, in contrast to the comprehensive statewide analysis included in this study, the authors reported that two-thirds of anti-housing CEQA lawsuits claimed an alleged inadequacy of the project’s compliance with GHG provisions of CEQA, and the even newer “Vehicle Miles Traveled” climate metric impact—consisting of estimated future use post-construction of residential automobile/pickup truck use, even by a carpool or electric car.<sup>395</sup> CARB has not created clear, feasible, or lawful standards for how new housing is supposed to mitigate GHG and VMT impacts—an APA violation.<sup>396</sup> For example, a competitor’s 2020 CEQA lawsuit against a veterans outpatient health clinic in Bakersfield alleged that the CEQA documentation prepared by the city insufficiently considered state GHG requirements.<sup>397</sup></p>
<p>2015; 2017; 2018</p>	<p>The greatest source of legal uncertainty in more recent judicial opinions derives from increasingly common rejection of the “substantial evidence” standard of review for the analytical environmental content of EIRs. Under the substantial evidence standards, courts defer to lead agency factual determinations as to the appropriate impact assessment methodology, impact significance criteria, and mitigation measure effectiveness when these are supported by substantial evidence in the record. The far less deferential “prejudicial abuse of discretion” standard of review – formerly used mostly to enforce CEQA’s procedural requirements – is now far more commonly applied to judicially reject an agency’s analytical and mitigation determinations. In practice, this means that courts are asked to conclude that an EIR is fatally flawed because the agency did not do an analysis of a particular sub-topic (or sub-topic of a sub-topic) in the Draft EIR itself not simply in response to comments in a Final EIR, and not staff report or hearing responses to “late hit” comments submitted well after CEQA’s public comment periods.</p>

(providing that of the small percentage of projects studied that were litigated, approximately two-thirds were challenges based on claimed deficiencies in their GHG or VMT analysis).

<sup>395</sup> See CAL. AIR RES. BD., 2022 SCOPING PLAN APPENDIX D – LOCAL ACTIONS 19–20 (2022), <http://ww2.arb.ca.gov/sites/default/files/2022-11/2022-sp-appendix-d-local-actions.pdf> [<http://perma.cc/WK2Q-XWGM>].

<sup>396</sup> See JENNIFER HERNANDEZ, CAL. CTR. FOR JOBS & THE ECON., ANTI-HOUSING CEQA LAWSUITS FILED IN 2020 CHALLENGE NEARLY 50% OF CALIFORNIA’S ANNUAL HOUSING PRODUCTION 4 (2022), <http://www.hklaw.com/-/media/files/insights/publications/2022/08/082222fullceqaguestreport.pdf?la=en&rev=9f9b36899f9546fbad1bbac3ca792281> [<http://perma.cc/L5V2-2YB5>].

<sup>397</sup> See Jennifer Hernandez, *California’s Environmental State Agencies Are Converting CEQA’s Anti-Project Howitzer into a Neutron Bomb*, DAILY J. (Aug. 25, 2022), <http://www.hklaw.com/-/media/files/insights/publications/2022/08/californiaenvironmentalstateagenciesconvertingceqaantiprojecthorwitzer.pdf?la=en&rev=c2c1dc6bb6fd4163b9bf98c70ad419e5> [<http://perma.cc/JP5Q-8VTC>].

	<p>Examples of this CEQA jurisprudential trend are decisions that an EIR is flawed because it did not include what a court later decides is the best practically available scientific information. For example, the San Diego Association of Governments failed to comply with CEQA by using a methodology containing “data gaps” to estimate the amount of existing farmland (and therefore the project’s impacts to existing farmland), even though the agency explained why its methodology was sufficient and appropriate.<sup>398</sup></p> <p>Similarly, the California Supreme Court concluded that Fresno County committed prejudicial error by not considering in the EIR for a mixed use housing project that the localized toxicity of ambient air pollutants produced primarily from project traffic. Fresno County, as well as two expert state air quality agencies, informed the Court that the impacts of these ambient pollutants that caused regional smog could not be accurately assessed on a localized level. The Court concluded that even if the lead and expert agencies were correct, the EIR was flawed for not explaining the an analysis that was not and could not have been done.<sup>399</sup></p> <p>In 2015, the California Supreme Court concluded that even though impacts to an endangered fish were analyzed and mitigated in an EIR for another mixed use residential project, the EIR was nonetheless flawed because it omitted an analysis of impacts to the juvenile stage this fish. The same Court concluded that the project’s compliance with a statewide target for reducing greenhouse gas emissions was an insufficient CEQA impact significance standard, and identified—but did not endorse—four potential “paths” for completing a legally-sufficient CEQA analysis of greenhouse gas impacts.<sup>400</sup></p>
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These Table 3 examples are of judicially-created, presumptively mandatory CEQA compliance requirements for which there are no “express” requirements in the CEQA statute or Guidelines requiring analysis or mitigation, and which, accordingly, should not have been found to be prejudicial error gaps under the plain language of Section 21083.1 of CEQA. Absent judicial enforcement of Section 21083.1, CEQA practitioners and agencies working on CEQA documents—particularly those involving well-funded and entrenched project opponents—are routinely slammed with scores of “studies” purporting to show some CEQA impact or another, each hoping

<sup>398</sup> See *Cleveland Nat’l Forest Found. v. San Diego Ass’n of Gov’ts*, 225 Cal. Rptr. 3d 591, 619 (Ct. App. 2017).

<sup>399</sup> See *Sierra Club v. County of Fresno*, 431 P.3d 1151, 1169 (Cal. 2018).

<sup>400</sup> See *Ctr. for Biological Diversity v. Dept. of Fish & Wildlife*, 361 P.3d 342, 356–57 (Cal. 2015).

that a judge (or group of appellate justices) will conclude that even the most elaborate and costly EIR has a fatal substantive analytical flaw.

These “best scientific data” open-ended judicial precedents impose a vastly uncertain CEQA compliance obligation on agencies, without Legislative or APA-compliant regulatory authority. For example, a recent study of greenhouse gas emissions and climate change reported its review of “88125 climate-related papers published since 2012.”<sup>401</sup> The study searched “the Web of Science [online database] for English language ‘articles’ added between the dates of 2012 and November 2020 with the keywords ‘climate change’, ‘global climate change’ and ‘global warming.’”<sup>402</sup> The study’s authors found that, over an eight year period, ten thousand scientific articles per year were published on GHG and climate change in English alone.<sup>403</sup> No city planner reviewing an apartment project application can sort through and identify the “best available scientific data” in this study tsunami, to accurately guess at what must be included in an EIR.

Greenhouse gas impacts—and global climate change—are CEQA topics especially vulnerable to CEQA lawsuits. For example, in another 2015 case, *Friends of Highland Park v. the City of Los Angeles* (an unpublished appellate court decision reviewing a twenty-condo, fifty-affordable housing unit project in the Highland Park Transit Village of Los Angeles), the court concluded the project’s greenhouse gas emissions analysis was insufficient and ordered rescission of this small housing project.<sup>404</sup>

CEQA litigation frequently involves disputes over whether the lead agency used best available scientific data, with courts offering some legal refuge (if an EIR is completed) for studies prepared by a qualified expert, even if other experts disagree. Experts that do not specifically address and rebut the sometimes hundreds of studies lobbed into the lead agency as “comments” on an EIR risk the wrath of a court, however, if opposition studies are not also rebutted by the agency’s expert in the EIR record. This war of experts, on multiple topics, can consume many months and any hundreds of thousands of dollars—all to answer this question:

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<sup>401</sup> See Mark Lynas et al., *Greater Than 99% Consensus on Human Caused Climate Change in the Peer-Reviewed Scientific Literature*, 16 ENV’T RSCH. LETTERS 1, 1 (2021).

<sup>402</sup> *Id.* at 2.

<sup>403</sup> See *id.*

<sup>404</sup> See *Friends of Highland Park v. City of Los Angeles*, No. B261866, 2015 WL 6736840, at \*9, \*10, \*11 (Ct. App. Nov. 4, 2015).

does building new homes for Californians, in compliance with the most stringent environmental standards in the world, cause significant adverse climate change impacts? In its recent Scoping Plan, the state's leading climate agency—the California Air Resources Board—citing to a study prepared by UC Berkeley scholars—acknowledged that greenhouse gas emissions, and the new regulatory climate-based “vehicle “miles traveled” impact, are in dispute in two-thirds of the anti-housing CEQA lawsuits considered in that study.<sup>405</sup>

### 3. The Legislature Turns “Transactional” – Favored or Priority Projects Granted Statutory Exemptions from CEQA, Less Politically Powerful Projects Left to Flounder in Uncertainty

The Legislature did not show any further appetite for directing the courts on how CEQA should be interpreted, and instead responded to an ongoing but increasingly notorious practice of enacting more than one hundred statutory exemptions from CEQA, either for specific projects (prisons,<sup>406</sup> the 1982 LA Olympics<sup>407</sup> in their entirety), or for categories of projects (pipelines in public streets less than one mile long<sup>408</sup>), the adoption of Groundwater Sustainability Plans,<sup>409</sup> and the allocation of new housing planning and approval mandates to cities and counties under the Regional Housing Needs Assessment laws.<sup>410</sup> The reach and effectiveness of these exemptions was “transactional” politically: a strong political stakeholder, with support or non-opposition from other political stakeholders, got an unambiguous exemption. Exemptions for the poor (affordable and farmworker housing), the less politically powerful (bike path users), and the destitute (homeless shelters) got political bragging rights but highly restrictive, and time-limited, exemptions.<sup>411</sup>

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<sup>405</sup> See CAL. AIR RES. BD., *supra* note 394, at 19–20; see also MOIRA O'NEILL-HUTSON ET AL., *supra* note 394, at 5, 83.

<sup>406</sup> See CAL. PUB. RES. CODE § 21080.03 (West 2023).

<sup>407</sup> See *id.* § 21080(b)(7).

<sup>408</sup> See *id.* § 21080.21.

<sup>409</sup> See Ellen M. Moskal & Kelley M. Taber, *SGMA Implementation and CEQA: Is Now the Time to Reconsider a Statutory Exemption?*, SOMACH SIMMONS & DUNN (Jan. 10, 2023), <http://somachlaw.com/policy-alert/sgma-implementation-and-ceqa-is-now-the-time-to-reconsider-a-statutory-exemption/> [<http://perma.cc/3GGK-Y7D5>].

<sup>410</sup> See CAL. GOV'T CODE § 65584(g) (providing a partial list of statutory exemptions, which can also be found in CAL. CODE REGS. tit. 14 § 15260 *et seq.*).

<sup>411</sup> See CAL. PUB. RES. CODE § 21080.25(b)(1) (exemption for pedestrian bike paths); *id.* § 21080.27(b)(1) (exemption for City of Los Angeles emergency shelters or supportive housing).



The Legislature also directed the Governor's OPR to promulgate CEQA Guidelines, adopted as regulations, which are required to identify categories of projects that are exempt from CEQA if they meet all categorical exemption regulatory criteria, and there are no "unusual circumstances" that cause an otherwise environmentally benign project to nevertheless cause a significant adverse environmental impact.<sup>412</sup> Construction of a code-compliant single family home on a single family lot is a Class 3 exemption, and in the longest known judicial dispute involving a categorical exemption, one Berkeley home was caught in multiple court proceedings for eleven years.<sup>413</sup> There are thirty-three classes of categorical exemptions.<sup>414</sup> There is also a "common sense" regulatory exemption for agency actions which could not conceivably result in any change to the physical environment that could be environmentally significant,<sup>415</sup> which was originally explained to the author as the need to avoid CEQA for a state agency deciding whether to stock Coke or Pepsi in its vending machines.

The Legislature also enacts non-codified, one-time CEQA exemptions in annual budget trailer bills.<sup>416</sup> These are typically enacted in a hurried process to meet budget deadlines when failure to do so means legislators aren't paid, and they typically involve no CEQA policy committee hearings or other meaningful public disclosure or debate. CEQA compliance can also be avoided if the Governor declares an emergency, albeit with less legal certainty for projects that are approved or funded, but not fully constructed, during an emergency.<sup>417</sup>

The challenge posed by "transactional" exemptions is that the housing and infrastructure needed by ordinary people does not have the well-funded and well-organized special interest stakeholder sponsors skilled at "making a deal" to avoid CEQA for their particular project or category of projects. Vigorous defense of the CEQA status quo by two of Sacramento's most powerful constituencies—Building Trades and

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<sup>412</sup> See *id.* § 21080(b)(9); see also *id.* § 21084.

<sup>413</sup> See *Berkeley Hills Watershed Coal. v. City of Berkeley*, 243 Cal. Rptr. 3d 236, 239–41 (Ct. App. 2019).

<sup>414</sup> See CAL. CODE REGS. tit. 14, §§ 15300–333 (2023).

<sup>415</sup> *Id.* § 15061.

<sup>416</sup> See, e.g., ASS'N OF ENV'T PROS., 2022 CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) STATUTE AND GUIDELINES 1 (2022), [http://www.califaep.org/docs/2022\\_CEQA\\_Statute\\_and\\_Guidelines.pdf](http://www.califaep.org/docs/2022_CEQA_Statute_and_Guidelines.pdf) [<http://perma.cc/V87B-WFJ6>].

<sup>417</sup> See CAL. CODE REGS. tit. 14, § 15268; CAL. PUB. RES. CODE §§ 21080(b)(2)–(4), 21080.33, 21083.

environmentalists—also made Legislators wary of touching “third rail” CEQA reforms. Even a once-ardent supporter of CEQA reforms—who led the Senate chamber before becoming the Mayor of Sacramento—settled for a “Kings Arena” buddy bill exemption; the bill was inclusive of remedy restrictions forbidding the court from stopping the project and was introduced and approved in the last two days of the legislative session.<sup>418</sup> Other parts of that Legislation, crafted exclusively by environmentalists and Building Trades that were heralded as meaningful pro-housing CEQA reforms, were too narrow or otherwise burdensome to have much practical effect in the real world, consistent with the policy objective of these CEQA status quo defenders.

Courts generally uphold CEQA exemptions, especially statutory exemptions. Courts do not, in this context, interpret CEQA expansively to defeat an exemption for a project that would cause environmental harm: the sole legal question is whether the challenged project meets the exemption criteria.<sup>419</sup> Categorical exemptions are subject to a less deferential review process and must be “narrowly construed” to effectuate the judiciary’s broad interpretation of CEQA.<sup>420</sup>

#### 4. Legislature v. CEQA Jurisprudence

CEQA amendments by the Legislature evolved from enacting “transactional” full statutory exemptions from CEQA for specific, politically favored projects that have satisfied environmental, labor and local government stakeholders, to enacting a statutory program for “Environmental Leadership Projects” (“ELP”) that meet eligibility and political stakeholder acceptance criteria as approved by the Governor.<sup>421</sup> ELP projects are entitled to “streamlined” judicial review, completing trial and appellate court proceedings in a total of 270 days.<sup>422</sup> Few ELP projects are approved, fewer are challenged, and none meet the 270 day

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<sup>418</sup> See Justin Ewers, *CEQA Roundup: A Win for the Kings and Steinberg. But for CEQA Reform?*, CAFWD (Sept. 13, 2013), <http://cafwd.org/news/ceqa-roundup-a-win-for-the-kings-and-steinberg-but-for-ceqa-reform/> [<http://perma.cc/8F3P-UMLR>].

<sup>419</sup> See *Napa Valley Wine Train, Inc. v. Pub. Utils. Comm’n*, 787 P.2d 976, 982–84 (Cal. 1990), *abrogated by statute*, CAL. PUB. RES. CODE § 21080.04 (2020).

<sup>420</sup> See *Dehne v. County of Santa Clara*, 171 Cal. Rptr. 753, 761–62 (Ct. App. 1981).

<sup>421</sup> See CAL. PUB. RES. CODE §§ 21178–21189.3.

<sup>422</sup> See *id.* § 21185.

deadline, but they do come close based on new Judicial Rules of Court for ELP projects.<sup>423</sup>

Several of these transactional legislative dispensations expressly limit judicial discretion, forbidding judges from imposing any remedy to stop project construction, or require rescission of project approvals, except under prescribed circumstances.<sup>424</sup>

The Third Appellate District rejected an express legislative prohibition on CEQA judicial remedy of halting or rescinding a Capitol office building project, unless the project presents an immediate threat to public health and safety, or if the project contains “unforeseen” important cultural or historical artifacts that would be adversely affected by the project’s continuance.<sup>425</sup> The Court found that the challenged office project on the state capital had adverse and under-disclosed aesthetic and historic resource impacts and ultimately could not commence construction pending a new and legally compliant EIR process.<sup>426</sup>

#### V. RECOMMENDATIONS AND NEXT STEPS

When CEQA was adopted in 1970, there was no Endangered Species Act, Clean Water Act, Clean Air Act, Coastal Protection Act, or any of the myriad new environmental protection statutes initially adopted later in the 1970s, many of which have been strengthened thereafter.

In the void of any meaningful environmental protection mandates except CEQA, the Supreme Court’s 1972 exhortation that CEQA be broadly construed to protect the environment<sup>427</sup>

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<sup>423</sup> See, e.g., Arthur F. Coon, *Slam Dunked! First District Rejects All CEQA and Land Use Challenges to Golden State Warriors Event Center Project and EIR in Expedited Litigation*, MILLER STARR REGALIA (Dec. 5, 2016), <http://www.ceqadevelopments.com/2016/12/05/slam-dunked-first-district-rejects-all-ceqa-and-land-use-challenges-to-golden-state-warriors-event-center-project-and-eir-in-expedited-litigation/> [http://perma.cc/9KED-3JU6].

The Court of Appeal observed that the 270-day target for resolution of judicial proceedings established pursuant to Public Resource Code § 21185 carries no penalty for noncompliance, is implicitly qualified by feasibility considerations, and was not met here (largely due to delay associated with transferring one of two consolidated CEQA actions that was improperly filed in Sacramento); however, it noted the parties and courts met most applicable deadlines and resolved the CEQA petitions at the appellate level “considerably sooner than would have been the case had the project not been certified under Section 21184 as an environmental leadership development project”

*Id.*

<sup>424</sup> See, e.g., CAL. PUB. RES. CODE § 21168.6.6(h) (repealed as of inoperative date); see also *Save Our Capitol! v. Dep’t of Gen. Servs.*, 303 Cal. Rptr. 3d 761, 771–72 (Ct. App. 2023).

<sup>425</sup> *Save Our Capitol!*, 303 Cal. Rptr. 3d at 771–72.

<sup>426</sup> See *id.* at 805–06.

<sup>427</sup> *Friends of Mammoth v. Bd. of Supervisors*, 502 P.2d 1049, 1056 (Cal. 1972).

was all that stood between an agency determined to authorize old growth timber clear cuts.<sup>428</sup> All those projects were stopped, in part through CEQA, but more meaningfully and permanently through the dozens of other environmental laws enacted subsequent to CEQA.

The 1972 directive, though, needs to be revisited to reflect the reality of CEQA practice today. In Berkeley, repairing our small kitchen deck was “categorically exempt” from CEQA as a “repair” of an existing structure. A cranky neighbor could have sued us and claimed we didn’t qualify for a categorical exemption based on an “unusual circumstance”—such as the non-compliant side setback distance to the next-door house (when both houses, and the broken deck, were built prior to the adoption of side setback requirements). If we were unwilling to pay the City to defend us from that lawsuit, and if we were unwilling to indemnify the City in case our neighbors won and the City was ordered to pay the neighbor’s attorneys’ fees, then we could not get approval from the City to repair the deck. Fortunately, we did not have cranky neighbors. Cranky neighbors love CEQA. Only wealthy neighbors can pay for CEQA compliance costs, litigation costs, and fund city indemnity demands. If we had a cranky neighbor, we would have had to demolish the deck. Bummer, as it was also our backyard access and fire exit.

This is not CEQA as enacted by the Legislature, nor is it CEQA as reviewed by the courts. It is CEQA in practice, and the Legislature (through CEQA statutes), Governor (through the CEQA Guidelines), and the courts (through CEQA jurisprudence) should be aware of what CEQA is actually doing, for whom it is acting on behalf of, and what it is blocking—like housing and climate resiliency.

CEQA today is about protecting the status quo by stopping housing, and “those people,” and all the infrastructure “they” need. CEQA today is about protecting the current “natural” environment, inclusive of catastrophically mismanaged forests, crumbling levees, reverse-flow rivers, and water supply shortfalls that have left one million residents in urban and rural communities (mostly disadvantaged communities of color) without water they can safely drink from their taps. CEQA today favors blocking two-story homes to preserve a parking lot micro-environment ocean view of four-foot tall children and adults in

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<sup>428</sup> *Ebbetts Pass Forest Watch v. Cal. Dep’t of Forestry & Fire Prot.*, 43 Cal. Rptr. 3d 363 (Ct. App. 2006).

wheelchairs, even as climate change policies demand vast and fast action to generate renewable energy from land-intensive solar and wind projects and new transmission lines across states and tribal lands. Creating well-paid jobs for Californians without fancy college degrees in alignment with the national priority of re-shoring manufacturing of critical technologies and supplies to respond to global supply chain and national defense uncertainties is another priority doomed to CEQA pre-litigation and post-litigation bickering, costly multi-year studies, and uncertain judicial outcomes decided in decades, not months or years.

Legislative amendments to CEQA face significant political hurdles, and even if those hurdles are overcome, the amendments will not be effective unless judicial enforcement of CEQA is reshaped into traditional administrative law jurisprudence based on the Rule of Law.

A core principle of the United States, and other democratic governments globally, is that all people and all institutions are required to comply with the Rule of Law. As defined in Oxford Languages, the Rule of Law is “the restriction of the arbitrary exercise of power by subordinating it to well-defined and established laws.”<sup>429</sup> As amplified by the World Justice Project, the rule of law requires the law to be “clear, publicized, and stable and [to be] applied evenly.”<sup>430</sup> It also “ensures human rights as well as property, contract, and procedural rights.”<sup>431</sup>

Courts can restore administrative law jurisprudence to CEQA jurisprudence by embracing the 1993 statutes and ignoring any substance or process not expressly required by the CEQA statutes of Guidelines. The Governor can revise the Guidelines to align with today’s civil rights, housing, environmental and economic justice, and climate priorities. The Legislature, and all the CEQA status quo defenders who lobby in the Legislature, need to recognize that the harms inflicted on California by weaponizing CEQA can far more effectively, equitably, and economically be achieved by statutes resolving policy disputes directly—not via CEQA.

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<sup>429</sup> Oxford Languages, *Rule of Law*, GOOGLE, [http://www.google.com/search?q=rule+of+law+definition&rlz=1C5CHFA\\_enUS921US921&oq=rule+of+law+definition&aqs=chrome..69i57j0i512l9.2855j0j4&sourceid=chrome&ie=UTF-8](http://www.google.com/search?q=rule+of+law+definition&rlz=1C5CHFA_enUS921US921&oq=rule+of+law+definition&aqs=chrome..69i57j0i512l9.2855j0j4&sourceid=chrome&ie=UTF-8) [http://perma.cc/SR8G-2458] (last visited Apr. 9, 2023).

<sup>430</sup> *What is the Rule of Law?*, WORLD JUST. PROJECT, <http://worldjusticeproject.org/about-us/overview/what-rule-law> [http://perma.cc/5JWJ-HBB8] (last visited Mar. 25, 2023).

<sup>431</sup> *Id.*

Californians created our CEQA (and housing) mess, especially the Californians from my generation (Baby Boomers). We need to own this failure while also owning our environmental successes, like stripping tailpipe emissions of ninety-nine percent of smog pollution as confirmed by the EPA.<sup>432</sup> We can do this, but not by talking past each other or refusing to talk with each other at all, or even by continuing to pretend that what we are doing with CEQA is to “protect the environment” instead of “protect *my* environment.”

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<sup>432</sup> *History of Reducing Air Pollution from Transportation in the United States*, EPA, <http://www.epa.gov/transportation-air-pollution-and-climate-change/history-reducing-air-pollution-transportation> [<http://perma.cc/3RHX-BM79>] (last updated Jan. 31, 2023).