

Stopping the Runaway Train of CEQA Litigation: Proposals for Non-Judicial Substantive Review

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I. INTRODUCTION

Since the early 1970s, U.S. federal and state laws have sought to guide government actions to balance new developments against the expected environmental impacts, while emphasizing goals of public participation and information. Increasingly, however, such impacts are measured and predicted using complex technical methods, making it difficult for the lay public to understand the scope or adequacy of environmental assessments. Furthermore, modern environmental issues are less likely to be characterized as black and white tradeoffs between urbanization and preserving the environment, but rather as contests between divergent “green” interests. Recent environmental battles have arisen over proposed clean energy and transportation infrastructure developments that necessarily impact the environment, such as wind farms or solar power plants.¹ Similarly, high-speed rail development in the U.S. has gained new prominence recently as a potential means to reduce national greenhouse gas emissions from vehicle travel; yet, as with the expansion of the Federal highway system in the 1950s, the infrastructure development required to build new high-speed rail projects will require extensive environmental harm and potentially significant community disruption well before the long-term environmental impacts may be realized.² As a result, residents in dense urban areas may support the concept of additional travel options, but want assurance that the government has carefully considered the best implementation plans. Yet, U.S. laws mandating environmental review currently lack any method for verifying the accuracy of scientific analyses that inform decisionmakers. Rather, agencies are free to make “reasonable” decisions based on any available information or data as long as their reasoning is made available to the public. Citizens seeking additional review or assurances therefore turn to litigation, which can cause expensive delays in projects and often fails to resolve the underlying concerns due to limits on judicial review.³

This paper argues that it is time to provide options for meaningful substantive

¹ See, e.g., *Ctr. for Biological Diversity v. FPL Grp., Inc.*, 83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008) (appealing dismissal of action alleging that defendant operator of wind farm in Altamont Pass violated public trust because wind turbines killed and injured raptors and other birds); Todd Woody, *Solar Projects in California Challenged in Court*, N.Y. TIMES, Feb. 23, 2011, at B1 available at <http://www.nytimes.com/2011/02/24/business/energy-environment/24solar.html> (discussing recent challenges to five solar projects, noting areas at issue are “fragile landscapes and are home to desert tortoises, bighorn sheep and other protected flora and fauna.”).

² See TOM LEWIS, *DIVIDED HIGHWAYS: BUILDING THE INTERSTATE HIGHWAYS, TRANSFORMING AMERICAN LIFE* 162 (1997) (noting that policy decision to build long highway route sections through rural areas “reversed the long-standing practice at the bureau, and at state highway departments as well, of building roads where the congestion was greatest . . . federal and local officials decided to proceed slowly with construction of urban sections because of the mounting criticism they were encountering.”).

³ See *infra* Part III.B (discussing judicial review limitations as played out in high-speed rail litigation).

review of environmental analyses, not merely procedural assurances. Using California's high-speed rail project as an illustrative example, I contend that the current absence of any regular process for obtaining independent scientific or technical verification of agencies' substantive assumptions is an important factor contributing to citizen litigations challenging large infrastructure projects. Part II provides a background of the National Environmental Policy Act ("NEPA") and the California Environmental Quality Act ("CEQA") as the statutes mandating environmental analysis of government actions. Part III provides a brief overview of high-speed rail development in California, and discusses a recent city-led lawsuit challenging one of the high-speed rail agency's environmental impact reports. Part IV proposes ways to build substantive review into the environmental impact assessment process itself, prior to a legal challenge. Providing meaningful substantive review within the environmental assessment process would enhance the consistency and credibility of agency decisions, and thus potentially avoid costly lawsuits.

II. ENVIRONMENTAL IMPACT REVIEW BACKGROUND

The 1970s marked an important period of environmental regulatory developments in the United States. Congress passed NEPA in 1970, requiring federal agencies to consider the environmental consequences of their actions.⁴ NEPA embodied the congressional goal that federal agencies account for environmental costs and benefits when making decisions that might significantly affect the environment, by requiring environmental impact analysis at the planning stage.⁵ Later the same year, California's legislature passed CEQA, similarly requiring that both agency actions and private actions subject to governmental regulation give major consideration to preventing environmental damage.⁶ Other states have since adopted environmental policy acts, commonly referred to as "state NEPAs" due to extensive overlap with the federal statute

⁴ See 42 U.S.C. § 4332(2)(C) (2006) (requiring EIS to accompany any major federal action significantly affecting environmental quality); see generally National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370.

⁵ See *Greene County Planning Bd. v. Fed. Power Comm'n*, 455 F.2d 412, 419 (2d Cir. 1972) (describing NEPA as response to urgent need for federal agencies to give adequate consideration to public interest when making changes affecting environment); *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (recognizing that in passing NEPA, Congress desired to reorder federal priorities so that agencies would consider environmental costs and benefits in their decisionmaking). See generally 42 U.S.C. §§ 4321-4370(f) (2006) (articulating statement of national policy, and procedural requirements for federal agency actions significantly impacting environment).

⁶ CAL. PUB. RES. CODE §§ 21000-21189 (2010); see *Friends of Mammoth v. Bd. of Supervisors of Mono County*, 502 P.2d 1049 (Cal. 1972) (holding CEQA applies not only to public works projects, but also to private projects requiring discretionary government action such as permitting, regulating, or funding).

and regulations.⁷ Agencies contemplating large infrastructure projects involving both federal and state input or approval will often perform a detailed environmental analysis to satisfy the requirements of NEPA and the state NEPA simultaneously.⁸ This section will discuss the procedural requirements common to both NEPA and CEQA, and will describe CEQA's additional substantive requirements and judicial review process.

A. *Procedural Requirements Under NEPA*

NEPA and state NEPA statutes require an agency to complete an environmental impact statement and make it available for public comment prior to undertaking major actions affecting the environment.⁹ Specifically, NEPA requires the statement to detail both short-term and long-term impacts expected from a proposed action, as well as feasible alternatives to the specific project.¹⁰ NEPA also requires consultation with agencies having jurisdiction or expertise relating to an identified impact, and that these agencies' comments be made available to the public.¹¹

The public information purpose of environmental impact statements is further emphasized in NEPA's implementing regulations, which provide that the statements "shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment."¹² Specific NEPA regulations prohibit agencies from committing resources that would prejudice selection of alternatives prior to making a decision, and require that the environmental impact statements be used to actually assess the alternatives, not to justify

⁷ See generally FRANK P. GRAD, 4-9 TREATISE ON ENVIRONMENTAL LAW § 9.08 (Matthew Bender & Co., Inc. 2011) (citing twenty-six states with NEPA-like requirements for environmental impact statements).

⁸ See, e.g., CAL. PUB. RES. § 21083.7 (directing that lead agency for project requiring analysis under both CEQA and NEPA, shall "whenever possible, use the [NEPA] environmental impact statement as such environmental impact report").

⁹ See 42 U.S.C. § 4332(2)(C) (2006) (detailing requirements of EIS, including environmental impact of proposed action, unavoidable adverse environmental effects, and alternatives to proposed action, among other considerations); see also CAL. CODE REGS. tit. 14 § 15126 (2012) (setting forth CEQA requirements for consideration and discussion of environmental impacts, similar to NEPA's but including consideration of growth-inducing impacts and mitigation measures proposed to minimize the significant effects).

¹⁰ 42 U.S.C. § 4332(C) (iii)-(iv) (2006).

¹¹ 42 U.S.C. § 4332(C)(v) (2006) ("Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments . . . shall accompany the proposal through the existing agency review processes.").

¹² 40 C.F.R. § 1502.1 (2012).

decisions already made.¹³ Congress' intention has proven difficult to enforce, however.

B. Additional Substantive Requirements Under CEQA

CEQA provides a critical expansion from NEPA's procedural requirements by giving the statute substantive effect; CEQA reports must also discuss mitigation measures that could minimize significant effects on the environment.¹⁴ CEQA's purpose, to regulate activities "found to affect the quality of the environment" such that "major consideration is given to preventing environmental damage," is carried out through the Environmental Impact Report ("EIR") process.¹⁵ A full EIR is mandatory for projects expected to have significant environmental impacts,¹⁶ in order to "identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided."¹⁷ Notably, CEQA forbids public agencies from approving proposed projects if there are feasible alternatives or mitigation measures available to reduce or prevent such projects from resulting in significant environmental impacts.¹⁸

Yet, CEQA also provides for approval of some projects despite the associated impacts, where economic or social conditions make alternatives or mitigation measures infeasible.¹⁹ A detailed provision allows for a statement of overriding consideration, presenting the agency's finding that a project's benefits outweigh the unavoidable significant effects on the environment.²⁰ Such findings,

¹³ 40 C.F.R. § 1502.2(f)-(g) (2012).

¹⁴ CAL. PUB. RES. CODE § 21100(b)(3) (2010). CEQA also replaces NEPA's language about short term and long term analysis with a specific charge to set forth "[t]he growth-inducing impact of the proposed project." § 21100(b)(5).

¹⁵ *Id.* § 21000(g) ("It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian."); § 21100.

¹⁶ *See* PUB. RES. CODE § 21080(d) ("If there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment, an environmental impact report shall be prepared.").

¹⁷ CAL. PUB. RES. CODE § 21002.1(a) (discussing purpose, use, and application of EIRs).

¹⁸ *Id.* § 21002 ("[I]t is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects."); *but see id.* § 21081 (setting forth conditions under which projects can be approved despite unavoidable impacts).

¹⁹ PUB. RES. CODE § 21002.

²⁰ *Id.* § 21081 ("[N]o public agency shall approve or carry out a project for which an

frequently accompanying large infrastructure development plans,²¹ are subject to the substantial evidence standard, defined as “fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.”²²

The critical decision regarding when public benefits might outweigh environmental impacts is left almost entirely to the discretion of the lead agency, provided its decision is supported by enough facts that the conclusion is reasonable “even though other conclusions might also be reached.”²³ CEQA offers no further guidance for the policy decision of how to weigh anticipated environmental costs against public benefits, leading to criticisms of inconsistent CEQA application across different jurisdictions.²⁴ On the other hand, the lack of

environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless both of the following occur:

(a) The public agency makes one or more of the following findings with respect to each significant effect:

- (1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.
- (2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.
- (3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.

(b) With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment.”).

²¹ See, e.g., CALIFORNIA HIGH-SPEED RAIL AUTHORITY (“CHSRA”), BAY AREA TO CENTRAL VALLEY HIGH-SPEED TRAIN: CEQA FINDINGS OF FACT AND STATEMENT OF OVERRIDING CONSIDERATION 96-101 (June 2008), available at <http://www.cahighspeedrail.ca.gov/WorkArea/DownloadAsset.aspx?id=8083> (adopting findings of overriding consideration detailing both the specific unavoidable impacts and the anticipated benefits of the selected Bay Area to Central Valley route.).

²² PUB. RES. CODE § 21080(e)(1). The definition also includes a negative description: “Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment.” PUB. RES. CODE § 21080(e)(2). See also *id.* § 21081.5. CEQA guidelines [implementing regulations] repeat the statutory definitions, but also provide a more permissive interpretation of substantial evidence as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.” CAL. CODE REGS. tit. 14, § 15384 (2012).

²³ CAL. CODE REGS. tit. 14, § 15384.

²⁴ See ELISA BARBOUR & MICHAEL TEITZ, CEQA REFORM: ISSUES AND OPTIONS iii, (Pub. Policy Inst. of Cal. 2005), available at http://www.ppic.org/content/pubs/op/OP_405EBOP.pdf

rigid standards allows for maximum flexibility in decisionmaking throughout a large and diverse state.²⁵ When projects have environmental impacts limited to a single jurisdiction, CEQA entrusts policy decisions to local governing bodies that are politically accountable to their constituents. However, the political accountability rationale for CEQA's structure breaks down when projects subject to CEQA apply across regions that may have divergent environmental values.²⁶ In particular, regional- or state-level projects give appointed officials the discretion to determine that a project's benefits override its environmental impacts, making political accountability even more attenuated.²⁷ Public input is thereby limited to the public comment process or a legal challenge of the agency's actions.

C. *Judicial Review Under CEQA*

Courts reviewing citizen suits against public agencies, particularly in the environmental context, face a unique challenge in balancing deference to agency procedure while maintaining substantive participation rights for the public. Unlike NEPA, which must be challenged under the federal Administrative Procedure Act, CEQA contains its own specific judicial review requirements. Under CEQA, courts may only find a prejudicial abuse of discretion by a lead agency for two reasons: either a procedural flaw, "if the agency has not proceeded in a manner required by law" or a substantive flaw, "if the determination or decision is not supported by substantial evidence."²⁸ Courts must otherwise defer to the agency's findings and decisions as described in CEQA's regulations:

An EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences[.] The

[hereinafter *PPIC CEQA Report*]. Scholars have identified similar issues in the NEPA context. *See, e.g.,* Bradley Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 921-23 (2002) [hereinafter *Karkkainen*] (noting lack of standards governing nature or quality of evidence provided in EIS hinders "meaningful comparisons," aggregation, or synthesis of environmental data over time).

²⁵ *See* PPIC CEQA Report, *supra* note 24, at iii (recognizing CEQA's flexibility in different settings and deference to local policy choices).

²⁶ *See id.* ("For example, localities may approve projects in spite of adverse effects, and because localities weigh cost and benefits of environmental mitigation differently, project applicants may face inconsistent requirements across jurisdictions . . . [there is a] lack of coordinated state and regional growth and environmental policies.").

²⁷ For instance, CHSRA "has a nine-member policy board (five appointed by the governor, two appointed by the Senate Rules Committee, and two by the speaker of the Assembly) and a core staff." *See Board*, CHSRA, http://www.cahighspeedrail.ca.gov/monthly_brdmtg.aspx (last visited Mar. 12, 2012).

²⁸ CAL. PUB. RES. CODE § 21168.5 (2012).

courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.²⁹

Importantly, the regulations do not provide any concrete substantive measures that might indicate adequacy, but instead look for vague standards such as “sufficient” analysis and “good faith effort.” This creates a high burden on plaintiffs seeking to invalidate an EIR, so that project opponents cannot readily turn to the judicial review process as a mere delay tactic.³⁰

CEQA also provides a range of available remedies, allowing judges case-by-case flexibility. An order finding agency non-compliance must include one or more of three available remedies: 1) voiding a decision, finding, or determination either in whole or part, 2) suspending activity on the specific project that could result in an adverse change to the environment until the agency has come into compliance, or 3) mandating that the agency take specific actions to come into compliance.³¹ However, courts may not direct the “agency to exercise its discretion in any particular way.”³² Thus, while courts may require an agency to perform additional analysis of a problem or to provide more evidence to support its conclusion, they cannot direct the agency to reach a particular outcome or decision. Further provisions limit the application of mandates to only those parts of the agency’s action or decisions that are out of compliance, as long as they can be severed without undermining the project’s overall CEQA compliance.³³ Therefore, although the CEQA standard of review seems straightforward as laid out in the statute, its implementation in a particular case is highly uncertain.³⁴

The following section explores the potential conflict between local environmental values and state-wide infrastructure planning, using the recent example of local opposition to the California High-Speed Rail Authority’s (“CHSRA”) environmental analysis that the agency relied on to select a preferred Bay Area to Central Valley route alignment in that segment’s EIR.

²⁹ CAL. CODE REGS. tit. 14, § 15151 (2012).

³⁰ See, e.g., CAL. PUB. RES. CODE § 21003(f) (It is the policy of the state that “[a]ll persons and public agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner in order to conserve the available financial, governmental, physical, and social resources with the objective that those resources may be better applied toward the mitigation of actual significant effects on the environment.”); see also PPIC CEQA Report, *supra* note 24, at 11-15 (discussing public perceptions of litigation delay in CEQA process).

³¹ CAL. PUB. RES. CODE § 21168.9(a) (2012).

³² *Id.* § 21168.9(c).

³³ *Id.* § 21168.9(b).

³⁴ Although there is CEQA provision directing courts to ensure that certain judges have particular expertise in CEQA or land use issues, the motivation was arguably for expedient review rather than to promote consistency in judicial review. PUB. RES. § 21167.1(b).

III. CEQA AND THE CALIFORNIA HIGH-SPEED RAIL PROJECT

California has been investigating the feasibility of a high-speed rail project to connect major northern and southern cities for over a decade. The legislature established CHSRA in 1996 to “direct the development and implementation of intercity high-speed rail service” connecting California’s major metropolitan areas.³⁵ As concerns about vehicle emissions and global warming have grown in recent years, the project has attracted increasing public attention for its potential environmental benefits in providing an alternative to driving or flying.³⁶ However, planning a new high-speed rail line requires balancing the immediate environmental damage that is necessary to construct the rail system, and the environmental impacts of continued operation against the anticipated long-term benefits of emission reduction and traffic decongestion.³⁷ The policy decision to pursue high-speed rail also includes economic assessment of the project’s commercial viability, which depends on modeling forecasts of ridership demand and construction costs beyond simply the environmental impact costs.³⁸ CEQA leaves full discretion over these technical analyses and policy choices solely in

³⁵ PUB. UTIL. CODE § 185030 (2012); *see also* S.B. 1420 (Cal. 1996), *available at* http://www.leginfo.ca.gov/pub/95-96/bill/sen/sb_1401-1450/sb_1420_bill_960924_chaptered.html (last visited Mar. 12, 2012).

³⁶ *See, e.g.*, CHSRA, THE BIG PICTURE, (Apr. 2010), *available at* <http://www.cahighspeedrail.ca.gov/assets/0/152/159/ea5aa92d-ce37-4255-9bad-30fd66026f3f.pdf> (describing high-speed trains as “a cleaner, safer and a more environmentally sound approach than building thousands of freeway miles or a series of new airports”); *cf.* CONG. BUDGET OFFICE, THE PAST AND FUTURE OF U.S. PASSENGER RAIL SERVICE 27 (Sept. 2003) [hereinafter *CBO PASSENGER RAIL STUDY*], *available at* <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/45xx/doc4571/09-26-PassengerRail.pdf> (pointing out “two major weaknesses” of the argument that government-subsidized rail “could reduce congestion at airports and on highways.”).

³⁷ For instance, a 1991 study of high-speed rail feasibility sponsored by the U.S. Department of Transportation noted that “[p]ublic subsidies might be justified in some corridors because rail could divert enough passengers from crowded airports and highways, resulting in less adverse environmental impact and lower energy consumption per passenger mile. High-speed rail is relatively noisy, however, and requires long, straight alignments to achieve its high speeds; such corridors could traverse residential areas and sensitive wetlands and lead to fragmented habitats. Moreover, whether high-speed rail corridors would be any easier to build than other major transportation infrastructure is an open question.” *In Pursuit of Speed: New Options for Intercity Passenger Transport*, TRANSPORTATION RESEARCH BD. OF THE NAT’L ACADEMIES, http://www.trb.org/Main/Blurbs/In_Pursuit_of_Speed_New_Options_for_Intercity_Pass_153319.aspx (last visited Mar. 12, 2012); *see* CBO PASSENGER RAIL STUDY, *supra* note 36, at 23 (discussing 1991 study).

³⁸ *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-317, HIGH SPEED PASSENGER RAIL: FUTURE DEVELOPMENT WILL DEPEND ON ADDRESSING FINANCIAL AND OTHER CHALLENGES AND ESTABLISHING A CLEAR FEDERAL ROLE 25 (2009) [hereinafter *GAO HIGH SPEED PASSENGER RAIL*], *available at* <http://www.gao.gov/new.items/d09317.pdf> (“[D]etermining whether any specific proposed line will be viable has proven to be difficult for decision makers. This difficulty is due to uncertainties with the forecasts of riders and cost estimates that project sponsors produce, the lack of agreement and standards regarding how a project’s public benefits should be valued and quantified, and the lack of comparison with alternative investments in highway or air infrastructure.”).

the hands of an agency charged with designing the project,³⁹ which may be contrary to the overall goals of the process.⁴⁰ In particular, CEQA's overarching goal of preventing or mitigating environmental damage provides no direction to agency decisions proceeding on findings of overriding consideration.⁴¹

Public projects in particular often lack a meaningful opportunity for considering policy goals aside from those held by the lead agency. Presently, the only inputs CEQA requires in the agency's environmental assessment process are consultation with other affected public agencies and a public notice and comment process.⁴² Neither of these methods necessarily will affect the agency's policy decisions to pursue a project.⁴³

CEQA provides for citizen lawsuits, but the available judicial review does not provide a method for revisiting the policy assumptions driving an agency's decision.⁴⁴ As illustrated by the 2009 lawsuit, *Town of Atherton v. CHSRA*,⁴⁵

³⁹ CAL. PUB. RES. CODE § 21082.1 ("Any draft environmental impact report, negative declaration, or mitigated negative declaration prepared pursuant to the requirements of this division shall be prepared directly by, or under contract to, a public agency."); see CHSRA, *Board*, http://www.cahighspeedrail.ca.gov/monthly_brdmtg.aspx (last visited Mar. 12, 2012) ("The majority of the environmental, planning and engineering work is performed by private firms under contract with the Authority.").

⁴⁰ See, e.g., GAO HIGH SPEED PASSENGER RAIL, *supra* note 38, at 41 (discussing experiences of Texas' failed attempt to construct high-speed rail, noting that "rail authorities can sometimes be conflicted between advocating for a high speed rail project and objectively determining whether a system is in the 'public convenience and necessity.'").

⁴¹ See, e.g., *id.* at 28 ("Quantifying public benefits can be difficult, however, and the level at which to value some benefits can be subject to disagreement. Furthermore, there are currently multiple federal guidelines in the United States for valuing public benefits, yet none have been designated for use in analyzing proposed high speed rail projects.").

⁴² See CAL. PUB. RES. CODE § 21104(a) ("Prior to completing an [EIR], the state lead agency shall consult with, and obtain comments from, each responsible agency, trustee agency, any public agency that has jurisdiction by law with respect to the project, and any city or county that borders on a city or county within which the project is located . . . and *may consult with* any person who has special expertise with respect to any environmental impact involved" (emphasis added); § 21153. Other sections of CEQA set out similar provisions specific to classes of projects. For instance, projects of regional significance require at least one public "scoping meeting" (§ 21083.9), and transportation projects require consultation with "transportation planning agencies and public agencies which have transportation facilities within their jurisdiction which could be affected by the project" (§ 21092.4).

⁴³ See Karkkainen, *supra* note 24, at 923-24 & n.92 (discussing conclusions from Council on Environmental Quality's 1997 study of NEPA effectiveness, that environmental analysis through EIS process likely occurs "too late" to influence agency and private sector planning and after "alternatives and strategic choices are foreclosed"). Although consultation with other public agencies is required, substantive comments are limited to "those activities involved in a project that are within an area of expertise of the agency or that are required to be carried out or approved by the agency." See, e.g., PUB. RES. CODE § 21104(c).

⁴⁴ See PUB. RES. CODE § 21168.9(c) ("Nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way").

⁴⁵ *Town of Atherton v. Cal. High-Speed Rail Auth.*, No. 34-2008-80000022 (Sacr. Super. Ct. 2009). Subsequent citations to case materials refer to items by docket title, *available at* <https://services.saccourt.com/publicdms2/DefaultDMS.aspx> (last visited Mar. 12, 2012) (follow

even when litigants succeed in demonstrating an agency's failure of procedure or substantial evidence in the CEQA process, the court will direct the agency to narrowly address particular flaws in the agency's analysis or presentation, rather than to reconsider its substantive decision.

A. High-Speed Rail Final Program EIR and Route Selection Challenge

CHSRA released the draft EIR for the high-speed rail project in January 2004, which included a preliminary decision on the proposed route from the Bay Area to the Central Valley, proceeding through the Pacheco Pass. Based on comments received, including "[s]upport for the investigation of the Altamont Pass as [a high-speed train] alignment option between the Central Valley and the Bay Area,"⁴⁶ the final EIR delayed the decision concerning the specific route between the Bay Area and the Central Valley for further study, even as the rest of the High-Speed Rail Program EIR was approved in December 2005.⁴⁷ CHSRA then issued a separate draft programmatic EIR for the Bay Area route in 2007, which studied numerous variations of two main alternatives, proceeding through either Pacheco Pass or Altamont Pass.⁴⁸ The agency approved the Final Program EIR ("FPEIR") for the Bay Area route in July 2008, selecting the Pacheco Pass route due to finding that any route through Altamont Pass would have greater "constructability issues and logistical constraints."⁴⁹

However, several local governments felt their comments had not been adequately addressed in the EIR process, and suspected that the route alignment presented in the final EIR was the product of a predetermined political decision.⁵⁰ Because CEQA only permits challenging a final EIR through the

"Proceed to Document Search" hyperlink; then enter appropriate "Case Number" and "Event Date" and search).

⁴⁶ CHSRA, CALIFORNIA HIGH-SPEED TRAIN: FINAL PROGRAM EIR/EIS 8-11 (Aug. 2005) [hereinafter *STATEWIDE FINAL PROGRAM EIR/EIS*], available at <http://www.cahighspeedrail.ca.gov/assets/0/152/198/91183651-fa20-4231-8f46-6065b7e80e48.pdf> (summarizing comments received from public agencies and at public hearings).

⁴⁷ See, e.g., Letter from U.S. Env'tl Prot. Agency Region IX to Mark Yachmetz, Assoc. Adm'r of R.R. Dev., Fed. R.R. Admin., (Aug. 31, 2004), available at <http://www.epa.gov/region9/nepa/letters/CalifHiSpeedTrainSysDPEIS-DEIR.pdf> (noting "specific objections to impacts that would result from the two Bay Area to Merced alignments" and concluding document overall provided "Insufficient Information"). See also *STATEWIDE FINAL PROGRAM EIR/EIS*, *supra* note 45, at S-19 (noting that statewide EIR identified only "broad preferred corridor between the Bay Area and the Central Valley containing a number of feasible route options within which further study will permit the identification of a single preferred alignment option.").

⁴⁸ See CHSRA, BAY AREA TO CENTRAL VALLEY HST FINAL PROGRAM EIR/EIS P-1 (published May 2008; certified July 2008) [hereinafter, BAY AREA 2008 FPEIR] available at <http://www.cahighspeedrail.ca.gov/assets/0/152/03c3cf10-5856-486b-8293-ad46f527a5e0.pdf> (describing circulation of draft EIR).

⁴⁹ *Id.* at 8-12-8-14 (comparing different aspects of Pacheco and Altamont routes in discussion of preferred alignments).

⁵⁰ See Complaint at 2-3, *Town of Atherton*, No. 34-2008-80000022 (Sac. Super. Ct., Aug. 8,

courts, plaintiff cities and environmental watchdog organizations filed suit, alleging overall that the FPEIR was inadequate under CEQA and was therefore wrongly approved by CHSRA.⁵¹ Plaintiffs highlighted concerns that the agency did not give adequate attention to their comments, leading them to allege that the FPEIR was biased in favor of approving the Pacheco Pass route.⁵² Additionally, plaintiffs raised the concern that the level of analysis addressing significant impacts and proposed mitigation measures did not satisfy CEQA's requirements.

In *Town of Atherton*, the complaint first alleged that the agency violated CEQA by certifying an EIR with four specific flaws: inadequate project description, failure to fully disclose and adequately analyze the project's significant environmental impacts, failure to adequately mitigate the project's significant impacts, and failure to include an adequate analysis of project alternatives.⁵³ Second, plaintiffs argued that the agency violated CEQA by failing to recirculate a draft program EIR in response to new information or changed circumstances. After the comment period on the draft program EIR closed, Union Pacific Railroad objected to the agency's plans to use Union Pacific's right-of-way as the project right-of-way, casting doubt on the route selection criteria without affording the public opportunity to comment on that aspect of the plan.⁵⁴ Third, plaintiffs alleged that the agency's CEQA findings accompanying the approval of the project EIR were not supported by substantial evidence, as required by CEQA.⁵⁵ Plaintiffs sought both declaratory and injunctive relief, to vacate and set aside the certification of the FPEIR and the project approval, and to require agency reconsideration of the specific inadequacies.⁵⁶

The court issued a ruling on the merits in August 2009, and issued a writ of mandate in November rescinding approval of the FPEIR for the project and

2008) (alleging that CHSRA Board was improperly predisposed towards selecting the Pacheco Pass alignment alternative.).

⁵¹ Plaintiffs included the Town of Atherton, the City of Menlo Park, Transportation Solutions Defense and Education Fund ("TRANSDEF"), California Rail Foundation, and Bayrail Alliance. *Id.* at 1-2.

⁵² *Id.* at 9 ("Even though the time period for public review and comment on the DPEIR/S had already closed and even though responses to comments on the DEPEIR/S had not yet been completed or provided to the CHSRA Board, the staff recommendations designated the Pacheco Alignment Alternative as the preferred alternative" in November 2007). *Cf.* NEPA Guidelines, 40 C.F.R. § 1502.2(g) (2012) ("Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.").

⁵³ Complaint at 10-17, *Town of Atherton*, No. 34-2008-80000022 (Aug. 8, 2008).

⁵⁴ *Id.* at 17.

⁵⁵ *Id.* at 17-18.

⁵⁶ To accompany the writ, petitioners sought a temporary restraining order and preliminary injunction on any activities that might harm the environment until the agency took actions to bring the FEIR into compliance with CEQA, but the court denied a stay of project-level environmental studies. *See* Order, *Town of Atherton*, No. 34-2008-80000022 (Oct. 29, 2009).

remanding the FPEIR to the agency for revision and recirculation.⁵⁷ To support its holding, the court relied heavily on the issue of Union Pacific's refusal to share its right-of-way with the high-speed rail project. The court found fully in favor of plaintiffs on the second count of the complaint, holding that CHSRA failed to revise and recirculate the FPEIR after learning of this new information,⁵⁸ and noting that without access to the existing right-of-way, the EIR would need to discuss the costs and local impacts from taking additional land needed for an alternate right-of-way.⁵⁹ The court rejected the agency's claims that it did not plan to rely on the right-of-way based on the maps and photographs included in the record,⁶⁰ and found the project description of the planned track placement between San Jose and Gilroy "was inadequate even for a programmatic EIR."⁶¹ The lack of specificity in the FPEIR obscured necessary analysis of impacts, such as the displacement of local homes and businesses and the effects of Union Pacific's continued use of its existing right-of-way for its freight operations.⁶²

However, the outcome was not a clear victory for plaintiffs since the court also upheld many aspects of the FPEIR analysis that plaintiffs challenged. Though the final judgment declared the project description inadequate overall, the court upheld the FPEIR analysis concerning most of the significant environmental impacts identified in the complaint. The court found that only land use impacts and vibration impacts lacked substantial evidence in the record, while analysis of mitigation for certain other impacts, such as noise impacts and impacts on heritage trees, were properly deferred to project-level environmental review.⁶³ Additionally, the court upheld respondent's analysis of project alternatives as meeting the procedural and evidentiary requirements of CEQA. Counter to plaintiffs' goal of reconsidering the Altamont pass alternative, the court stated that "the FPEIR studied a reasonable range of alternatives and presented a fair and unbiased analysis."⁶⁴ Moreover, the court held that CHSRA met the substantial evidence standard to support its conclusion "that putting the [high-speed train] system over the existing, out-of-service Dumbarton Rail Bridge is not reasonable."⁶⁵

⁵⁷ See Ruling on Submitted Matter, *Town of Atherton*, No. 34-2008-80000022 (Aug. 26, 2009); Peremptory Writ of Mandate at 1-4, *Town of Atherton*, No. 34-2008-80000022 (Nov. 3, 2009).

⁵⁸ Ruling on Submitted Matter at 21, *Town of Atherton*, No. 34-2008-80000022 (Aug. 26, 2009).

⁵⁹ *Id.* at 15-16.

⁶⁰ *Id.* at 19.

⁶¹ *Id.* at 6.

⁶² *Id.*

⁶³ *Id.* at 13, 16.

⁶⁴ *Id.* at 17.

⁶⁵ *Id.*

B. Limits of Judicial Review

CEQA's presumption that an EIR is adequate until proven otherwise⁶⁶ essentially restricts plaintiffs to procedural challenges, despite the substantial evidence standard that an EIR must meet. Although plaintiffs can raise challenges addressing substantive aspects of an EIR, such as scope of analysis, methodology, or reliability of data, courts will reject those challenges unless an EIR is "clearly inadequate or unsupported" or the agency "applied an erroneous legal standard."⁶⁷ Furthermore, because courts are prohibited from directing an agency's exercise of discretion, even when a court finds an EIR inadequate the court may only remand the project approval and EIR analysis back to the agency to supply an explanation in enough detail to satisfy the substantial evidence standard. Thus, in *Town of Atherton*, although the court permissibly indicated that the agency's assessments of rights-of-way use and ownership were inadequate under CEQA, it did not direct the agency to reconsider any particular route.⁶⁸ The court's holding that the maps and drawings in the record "strongly indicate[d]" that the agency wrongly claimed its route would be independent of Union Pacific's right-of-way⁶⁹ was based on the apparent inconsistency between the agency's statement and the evidence in the record, but did not require the reconsideration of specific alternatives. The final judgment requiring CHSRA to rescind its approval and recirculate a revised draft EIR was more firmly grounded on the procedural requirement that an agency recirculate an EIR if significant new information is added to the EIR. The guidelines list examples of significant information requiring recirculation, for instance, if a new significant impact would result, or if the draft was fundamentally inadequate or conclusory in a way that precluded meaningful public participation.⁷⁰ Because the court found that the EIR failed to provide detailed analysis of the potential impacts of obtaining an independent right-of-way, it ordered the agency to rescind approval of its EIR until the agency brought the identified problems into compliance.⁷¹

Judicial review is even more limited when reviewing CEQA projects that proceed on findings of overriding consideration. For projects without such findings, for instance, courts might rely on evidence showing that mitigation measures adopted would be insufficient to mitigate the environmental impacts of a project, and remand for further mitigation. Findings of overriding

⁶⁶ See CAL. PUB. RES. CODE § 21167.3 (2012).

⁶⁷ See *Fed'n of Hillside and Canyon Ass'ns v. City of L.A.*, 100 Cal. Rptr. 2d 301, 307 (Cal. Ct. App. 2000).

⁶⁸ Ruling on Submitted Matter at 21, *Town of Atherton*, No. 34-2008-80000022 (Aug. 26, 2009).

⁶⁹ *Id.* at 19.

⁷⁰ See CAL. CODE REGS. tit. 14, § 15088.5 (2012).

⁷¹ Ruling on Submitted Matter at 6, 21, *Town of Atherton*, No. 34-2008-80000022 (Aug. 26, 2009).

consideration, however, are not subject to CEQA's primary policy mandate to avoid or significantly reduce environmental damage, but only to the substantial evidence standard.⁷² Therefore, a reviewing court must defer to the agency's decision if it is a reasonable option under all the facts.⁷³ Notably, court decisions finding EIR inadequacies often recommend that agencies adopt a statement of overriding considerations to overcome flaws in the feasibility or enforceability of mitigation options.⁷⁴ Courts will only overturn findings of overriding consideration for inadequate description of the agency's reasoning,⁷⁵ or if "its conclusions are based on misrepresentations of the contents of the EIR or it misleads the reader about the relative magnitude of the impacts and benefits the agency has considered."⁷⁶ Courts have repeatedly rejected CEQA claims that could be characterized primarily as policy disputes.⁷⁷

In the Bay Area route FPEIR, the agency's discussion of preferred alignments

⁷² Compare CAL. PUB. RES. CODE § 21000(g) (2012) (citing legislature's overall intent in CEQA to "regulate such activities [affecting the quality of the environment] so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.") with CAL. CODE REGS. tit 14, § 15093(b) ("When the lead agency approves a project which will result in the occurrence of significant effects which are identified in the final EIR but are not avoided or substantially lessened, the agency shall state in writing the specific reasons to support its action based on the final EIR and/or other information in the record. The statement of overriding considerations shall be supported by substantial evidence in the record.").

⁷³ See *Citizens of Goleta Valley v. Bd. of Supervisors*, 197 Cal. App. 3d 1167, 1177 (1988) ("[T]he reviewing court must resolve reasonable doubts in favor of the administrative findings and decision.") (citing *Topanga Ass'n for a Scenic Cmty. v. County of L.A.*, 11 Cal.3d 506, 514 (Cal. 1974)).

⁷⁴ See, e.g., *Fed'n of Hillside and Canyon Ass'ns v. City of L.A.*, 100 Cal. Rptr. 2d 301, 312-13 (Cal. Ct. App. 2000) ("The city may comply with CEQA by amending the [City General Plan Framework ("GPF")] so that effective mitigation measures are required as a condition of the development allowed under the GPF or by . . . making a finding of overriding considerations as to the significant effects on transportation."); *Gray v. County of Madera*, 85 Cal. Rptr. 3d 50, 68 (Cal. Ct. App. 2008) ("Thus, the County is improperly deferring the study of whether building such a system is feasible until the significant environmental impact occurs. The County could have approved the Project even if the Project would cause significant and unavoidable impacts on water despite proposed mitigation measures if the County had adopted a Statement of Overriding Considerations that made such findings.").

⁷⁵ See, e.g., *Uphold Our Heritage v. Town of Woodside*, 54 Cal. Rptr. 3d 366, 374-76 (Cal. Ct. App. 2007) (upholding trial court determination that EIR failed to provide sufficient evidence to support agency's claim that mitigation measures were economically infeasible).

⁷⁶ *Woodward Park Homeowners Ass'n, Inc. v. City of Fresno*, 58 Cal. Rptr. 3d 102, 128 (Cal. Ct. App. 2007).

⁷⁷ See, e.g., *Cal. Native Plant Soc'y v. City of Santa Cruz*, 99 Cal. Rptr. 3d 572, 604 (Cal. Ct. App. 2009) ("Appellants nevertheless attack the infeasibility determination in this case, asserting that the City 'rejected the alternatives simply because they did not like them, not because they were truly infeasible.' As we see it, however, appellants' assertion represents nothing more than a 'policy disagreement with the City.'" (internal citations omitted); *No Slo Transit, Inc. v. City of Long Beach*, 242 Cal. Rptr. 760, 767 (Cal. Ct. App. 1987) ("CEQA does not provide a forum for attacking the policy decision to proceed. Nor do disagreements among experts require the invalidation of an EIR.") (citing CAL. CODE REGS. tit. 14, § 15151).

directly acknowledges the controversy over alignment choice, noting that input from federal, state, regional, and local agencies as well as the general public raised a range of concerns for all the proposed routes through the Bay Area.⁷⁸ Yet, by adopting findings of overriding consideration, the agency could proceed with any policy choice provided that the discussion was sufficiently detailed to constitute substantial evidence of the agency's reasoning process.⁷⁹ In short, based on its assessment of different alignments in its EIR, CHSRA could have chosen any of the routes, highlighted its benefits over the others, and a court would have to find that its decision was reasonable. The *Town of Atherton* Plaintiffs' frustrations with this apparent lack of standards or substantive review, necessarily expressed as procedural challenges to the EIR, unsurprisingly yielded procedural remedies.⁸⁰ Courts' deference to agency findings of overriding consideration essentially permits agencies' overly broad and unreviewable discretion to approve projects for which mitigation measures are infeasible, no matter the consequences for the affected populations.

C. Continued Controversy

Challenges to the high-speed rail project continued to arise from a variety of sources. In November 2008, while the challenge to the Bay Area to Central Valley route was still underway, state voters passed Proposition 1A, which approved bonds of \$9.95 billion to help finance high-speed rail development in California.⁸¹ One effect of the bond measure was to impose additional voter requirements on the project; the newly approved legislation introduced conditions for overall route times, financial feasibility measures, and created an independent "peer review" panel to review the agency's implementation plans.⁸² The successful ballot measure also brought increased public attention to the review process, particularly the substantive analysis addressing ridership estimates and the overall financial feasibility of the project.

⁷⁸ BAY AREA 2008 FPEIR, *supra* note 48, at 8-3-8-13.

⁷⁹ See CODE REGS. tit. 14, § 15093(b) (2012).

⁸⁰ See also PPIC CEQA Report, *supra* note 24, at 14 ("Some observers have argued that CEQA may actually facilitate development by channeling citizen opposition into a predictable process.").

⁸¹ *What is Proposition 1A?*, CHSRA, <http://www.cahighspeedrail.ca.gov/prop1A.aspx> (last visited Mar. 12, 2012); see also CHSRA, *Relevant Legislation*, http://www.cahighspeedrail.ca.gov/relevant_legislation.aspx (last visited Mar. 12, 2012) (summarizing AB 3034, High-Speed Trains Bond Act of 2008). The bill relied on the 2005 certified EIR for the state project, but did not address the ongoing controversy with the Bay Area to Central Valley Program EIR. *Id.*

⁸² CAL. PUB. UTIL. CODE § 185035(a) (2012) ("The authority shall establish an independent peer review group for the purpose of reviewing the planning, engineering, financing, and other elements of the authority's plans and issuing an analysis of appropriateness and accuracy of the authority's assumptions and an analysis of the viability of the authority's financing plan, including the funding plan for each corridor required pursuant to subdivision (b) of Section 2704.08 of the Streets and Highways Code.").

Public concern about ridership assumptions prompted CHSRA to publish a memorandum in March 2010 clarifying the agency's use of ridership models, noting that "[w]hile a peer review process may also review and comment upon the reasonableness of model results, peer review generally does not approve or accept specific model details."⁸³ Plaintiffs in *Town of Atherton* learned of discrepancies between the ridership analysis relied on by CHSRA and the analysis that appeared in the EIR, and hired independent experts to evaluate the model.⁸⁴ They presented their conflicting findings as comments to the revised draft EIR issued by CHSRA, and simultaneously attempted to challenge the agency by extending the original lawsuit, in May 2010.⁸⁵ Researchers at the University of California at Berkeley ("UC Berkeley") also analyzed the high-speed rail ridership studies at the request of the California Senate Transportation and Housing Committee, and issued a final report in June 2010 finding "significant problems that render the key demand forecasting models unreliable for policy analysis."⁸⁶ Nevertheless, CHSRA certified the revised final EIR in September 2010 and adopted new findings of overriding consideration approving the Pacheco Pass route,⁸⁷ claiming that the route selection was not influenced by ridership because both the Pacheco and Altamont Pass alignments predicted high ridership.⁸⁸

Plaintiffs brought a new lawsuit in October 2010, challenging the sufficiency of the revised EIR documents under CEQA. Plaintiffs alleged that, contrary to CHSRA's claims that ridership was not material to the route selection, the agency required accurate ridership forecasts to assess feasible alternatives,

⁸³ Memorandum from Mehdi Morshed, Exec. Dir., CHSRA Bd., to Chairman Pringle and Members of the CHSRA Bd. (Mar. 3, 2010) at 1, 4-5, *available at* <http://www.cahighspeedrail.ca.gov/assets/0/152/198/4a85c722-26c2-4ffd-beee-6aafb701e90.pdf>.

⁸⁴ See *Ridership Challenge*, TRANSDEF, <http://www.transdef.org/HSR/Ridership.html> (last visited Mar. 12, 2012) (summarizing timeline and outcome of additional litigation addressing ridership models).

⁸⁵ *Id.*

⁸⁶ DAVID BROWNSTONE, MARK HANSEN, AND SAMER MADANAT, REVIEW OF "BAY AREA/CALIFORNIA HIGH-SPEED RAIL RIDERSHIP AND REVENUE FORECASTING STUDY" 2 (Univ. of Cal., final report, June 2010), *available at* <http://www.its.berkeley.edu/publications/UCB/2010/RR/UCB-ITS-RR-2010-1.pdf>.

⁸⁷ See *Bay Area to Central Valley Revised Final Program EIR*, CHSRA http://www.cahighspeedrail.ca.gov/ba_cv_program_eir_old.aspx (last visited Mar. 12, 2011) (providing chronology and links to revised EIR documents); see also HSR Resolution 11-11 (Cal. 2010), *available at* <http://www.cahighspeedrail.ca.gov/assets/0/152/281/a8f44c5a-26a5-4456-ba01-1bd5d76cd933.pdf> (adopting new findings of overriding consideration).

⁸⁸ CHSRA, BAY AREA TO CENTRAL VALLEY HIGH-SPEED TRAIN REVISED FINAL PROGRAM ENVIRONMENTAL IMPACT REPORT 7-19 (vol. 1, Aug. 2010), *available at* <http://www.cahighspeedrail.ca.gov/assets/0/152/198/b0593616-e103-4685-95df-8f3cec116583.pdf> (concluding "that both the Pacheco Pass and Altamont Pass alternatives have high ridership potential and that ridership and revenue do not differentiate between these alternatives").

mitigation measures, and the revenue requirements set by Proposition 1A.⁸⁹ Meanwhile, the six members of the Proposition 1A peer review group convened for the first time in June 2010, and issued a report to the legislature on November 18, 2010, concluding overall that “[m]eeting the challenge” of creating a viable high-speed train system in California “will require a thorough re-assessment of a number of critical engineering, financial, economic, and managerial issues.”⁹⁰ The group’s findings concerning ridership demand modeling suggested a greater need for reliability and clarity, and recommended that CHSRA work together with its previous consultant and U.C. Berkeley to “develop estimates that are generally agreed to be the best that can be obtained.”⁹¹

The continued scope of controversy over the technical aspects of high-speed rail, from the specific environmental impact concerns of the *Town of Atherton* plaintiffs to the broader feasibility concerns of the legislature, the peer review panel, and the general public, all suggest that the current planning process for state-wide infrastructure projects is badly flawed. That process, primarily driven in the early stages by CEQA analysis of a project’s expected environmental impacts, could benefit from additions providing appropriate substantive review at an earlier stage, rather than limited judicial review after the agency has made a final decision. The following section outlines two proposals for addressing the types of concerns raised by multi-jurisdictional projects currently proceeding under nearly unrestrained agency discretion.

IV. PROPOSALS FOR ADDITIONAL INDEPENDENT REVIEW

Projects that proceed under CEQA findings of overriding consideration presently lack any substantive standards to govern the resulting environmental analysis. Moreover, when these projects take place outside a single locality, decisionmakers are no longer politically accountable to the members of the public likely to be impacted by a project. Taken together, multi-jurisdictional infrastructure projects, such as the high-speed rail example, lack meaningful standards to guide decisionmakers, yet leave the public without recourse to challenge an agency’s substantive decisions. Thus, there is widespread public distrust of such projects, and the sole option of litigation to contest a final decision is minimally effective in the face of CEQA’s default agency deference.

⁸⁹ *Town of Atherton v. CHSRA*, Case No. 34-2010-80000679, (Sac. Super. Ct. filed Oct. 4, 2010) [hereinafter *Town of Atherton II*], Complaint at 14-15.

⁹⁰ Letter from Will Kempton, Chairman, CHSRA Peer Review Grp., to The Honorable John Perez, Speaker of the Assembly, and The Honorable Darrell Steinberg, Senate President Pro Tem (Nov. 18, 2010) [hereinafter *CHSRA Peer Review Grp. Letter*], available at <http://www.cahighspeedrail.ca.gov/assets/0/152/233/6845899c-0e96-4871-a71f-baf3a3a7a699.pdf>.

⁹¹ *Id.* at Attachment B at 12.

Citizens and groups that challenge the adequacy of agency analysis for any given project are often disparaged as “NIMBYs,”⁹² leaving unaddressed the underlying concerns about accurately accounting for project impacts.

Existing scholarship discusses possibilities for including more substantive standards within CEQA.⁹³ Other scholars and politicians suggest that the level of foresight expected from agencies is unattainable, making environmental analysis an inefficient use of limited agency resources.⁹⁴ However, the current EIR process could be minimally altered to enhance public trust in an agency’s decisionmaking and to allay fears of outcome-oriented analysis. This could be achieved through provisions requiring independent substantive reviews of the information, assumptions, models, and other technical judgments made by agencies or their contractors at the earliest stages of environmental impact assessment.⁹⁵ Two variations that could meet this purpose are suggested below: either an ad-hoc review panel, modeled off provisions of the Canadian Environmental Assessment Act (“CEAA”), or a state-level dedicated environmental assessment agency, which would function independently from a project’s CEQA lead agency.

A. *Ad-hoc Environmental Review Panel*

Adopted in 1992, CEAA sets forth a multi-step review process of environmental assessment similar to that found in NEPA-type statutes.⁹⁶ CEAA provides for review of projects requiring assessment through either an initial screening process or comprehensive study of listed factors, which are similar to those required for an Environmental Assessment (“EA”) or EIR.⁹⁷ For both types of assessment, unlike NEPA or CEQA, the CEAA requires independent

⁹² See, e.g., PPIC CEQA Report, *supra* note 24, at 11-14 (discussing influence of “Not in My Backyard” (NIMBY) litigation threats in CEQA process).

⁹³ See PPIC CEQA Report, *supra* note 24, at 38 (analyzing major proposed changes to CEQA over the years, and specifically discussing proposals for “[s]tandardizing threshold and mitigation requirements”).

⁹⁴ See, e.g., Karkkainen, *supra* note 24, at 906-07, 926-27 (discussing critiques of NEPA, which are applicable to CEQA as well); see also Shane Goldmacher and Evan Halper, *GOP Lawmakers Threaten to Withhold Votes Unless Environmental Rules are Rewritten*, L.A. TIMES, Mar. 16, 2011, at AA1, available at <http://articles.latimes.com/2011/mar/16/local/la-me-budget-environment-20110316> (discussing recent proposals for CEQA reforms as part of state budget compromise, noting among several suggested changes that “[t]he GOP proposal also would broaden the kinds of projects allowed to skip certain steps in the environmental review process.”).

⁹⁵ Cf. CHSRA Peer Review Grp. Letter, *supra* note 90 and accompanying text (convening after environmental review presumed to be complete).

⁹⁶ Canadian Environmental Assessment Act (“CEAA”), S.C. 1992, c. 37 (Can.), available at <http://laws-lois.justice.gc.ca/PDF/C-15.2.pdf>.

⁹⁷ See CEAA § 5 (defining projects requiring environmental assessment). Canada requires comprehensive studies for certain listed projects, rather than leaving discretion to choose between performing an initial study or a comprehensive study.

review of the responsible authority's assessment for all projects, except those that are clearly not likely to cause significant adverse environmental effects.

An initial screening (equivalent to an agency's determination to carry out a full EIS or EIR) has three possible outcomes that the responsible authority may adopt: that the project can proceed (equivalent to a negative impact declaration or a mitigated negative impact), that it cannot proceed, or that it requires independent assessment.⁹⁸ The third option mandates additional review by a mediator or review panel under circumstances where there is remaining uncertainty of environmental consequences even after mitigation measures, where a project that will certainly have significant adverse environmental effects may be justified for other public policy reasons, or where "public concerns warrant."⁹⁹ Responsible authorities may also request referral to an independent review panel on their own initiative, at any point in the screening or comprehensive study process that significant impacts or public concerns are at issue.¹⁰⁰

For projects requiring comprehensive study, however, the EA performed by the responsible authority is provided to the Canadian Environmental Assessment Agency ("Agency"), and the Minister of the Environment ("Minister") makes the final decision.¹⁰¹ The Minister is authorized either to approve the project, to set out mitigation measures and follow-up programs, or to require additional information or actions to address public concerns.¹⁰² The Minister also has discretion to refer projects for independent review at any point in the process.¹⁰³ However, the Minister's decision to invoke the referral to a mediator or review panel under the CEAA can be challenged in Canadian courts.¹⁰⁴

If additional review by a review panel is either required by statute or requested by the responsible authority or the Minister, CEAA provisions assure

⁹⁸ See CEAA §§ 18-20 (Screening); § 16 (Factors to be considered); § 20 (Decision of responsible authority following a screening).

⁹⁹ § 20(1)(c).

¹⁰⁰ § 25 ("[W]here at any time a responsible authority is of the opinion that (a) a project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, may cause significant adverse environmental effects, or (b) public concerns warrant a reference to a mediator or a review panel, the responsible authority may request the Minister to refer the project to a mediator or a review panel in accordance with section 29.").

¹⁰¹ §§ 61-63 (creating agency, defining purpose and duties); § 23 (Comprehensive study: Decision of Minister). High-speed rail would fall under the statutory definition of a transportation project requiring a comprehensive study. Comprehensive Study List Regulations, SOR/94-638, Part IX § 29 (Can.), available at <http://laws-lois.justice.gc.ca/PDF/SOR-94-638.pdf> (last visited Mar. 12, 2012).

¹⁰² CEAA §§ 21-23 (setting forth comprehensive study requirements and determinations).

¹⁰³ § 28 (Referral by Minister).

¹⁰⁴ See, e.g., *Canada (Minister of the Env't) v. Bennett Env't'l Inc.* (2005), [2006] 3 F.C.R. D-65 (Can.) at ¶¶ 95-104, available at <http://www.canlii.org/en/ca/fca/doc/2005/2005fca261/2005fca261.html> (discussing, in dicta, reasonableness and method of Minister's referral of Bennet High-Temperature Thermal Oxidizer project to review panel).

the expertise and independence of the review panel members. Appointed members of the review panel must be “unbiased and free from any conflict of interest relative to the project,” and must have “knowledge or experience relevant to the anticipated environmental effects of the project.”¹⁰⁵ The specific reviewing duties of the review panel closely track the original requirements of a responsible authority, but are carried out by an independent body in a public trial-like setting. The review panel holds public hearings, at which it may order witnesses to give oral or written testimony, and the panel ultimately produces a report setting out “the rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project, including any mitigation measures and follow-up program.”¹⁰⁶ The panel must submit the report to both the Minister and the responsible authority, and the latter makes the determination based on the report whether the project may proceed.¹⁰⁷

The Canadian model for a review panel successfully addresses several key gaps in CEQA. First, it provides a variety of methods for obtaining additional environmental review, beyond a responsible authority’s assessment. For project screenings that would fall within an agency’s discretion to adopt findings of overriding consideration under CEQA, the CEAA instead automatically triggers further substantive review. This offers a clear improvement over CEQA in that an independent expert panel reviews an agency’s substantive claims and performs its own assessment. CEQA’s judicial review, on the other hand, requires giving deference to agency decisions, which leaves the public no meaningful opportunity to obtain further review of uncertain or controversial agency decisions. In particular, the CEAA review provision would have required additional review of the CHSRA’s initial choice of which route alignments to consider in the program EIR. The EIR’s discussion of alternatives would meet each of the three triggering conditions: first, the uncertainty of environmental consequences even after mitigation; second, the significant effects that may be justified for other policy reasons; and third, the general public concern, notably demonstrated by the subsequent lawsuit. Alternatively, under a comprehensive study of the route options, CHSRA’s decision would be subject to review by a comparable Environmental Assessment Agency, in which the Agency and Minister would provide independent review of the assessments.¹⁰⁸ In contrast to a deferential court, the Minister would have authority to request additional substantive information from CHSRA to address his own or the public’s concerns, and could still choose to refer the project to

¹⁰⁵ CEAA § 33 (Appointment of review panel).

¹⁰⁶ §§ 34-35 (setting forth powers and duties of review panel).

¹⁰⁷ § 37 (Decision of the responsible authority).

¹⁰⁸ *See infra* Part IV.B for discussion of state-level environmental agency review.

mediation or a review panel at any point.¹⁰⁹ Currently, CEQA provides for substantive review only through notice and comment or public hearings during the EIR process, or through judicial review of whether an agency's discretionary decisions were reasonable or based on substantial evidence. Notably, the CEAA recommends additional review for projects involving "transboundary effects," or impacts likely to occur in a different province than the project is located in.¹¹⁰ This emphasizes the important difference between local and regional impacts. Adopting this approach, CEQA could provide for, but not require, the option of additional review for all multi-jurisdictional projects. In the event that the review panel reaches similar conclusions as the lead agency, the public would benefit from the additional assurances of reliability from an independent source, and the panel's assessment may satisfy would-be plaintiffs that project decisions were not primarily political.¹¹¹

Second, the review panel provides an independent forum of knowledgeable persons to review the information in a public setting. This would provide opportunities to address any public concerns that responsible agency officials may have vested interests in approving projects, such as tax benefits to a community or federal subsidies to the state, as a reason to approve a project regardless of impacts.¹¹² Third, a review panel would provide additional substantive public participation, as members of the public could offer comments suggesting experts from whom to obtain testimony, even when those members of the public lacked the specific expertise. In contrast, the public comment process of CEQA requires that substantive comments appear as part of the initial comment process, and issues not raised in public comment are presumed to be unchallenged. The brief time periods for comment also limit the ability of members of the public or non-consulted experts to carry out substantive analyses to confirm or challenge the agency's draft EIR presentations.¹¹³ Even when

¹⁰⁹ CEAA § 23 (Decision of Minister).

¹¹⁰ CEAA § 46 (Transboundary and related environmental effects).

¹¹¹ This is primarily a concern when the same agency is charged with carrying out and approving a project under CEQA, that information in an EIR will merely support a decision the agency has already made, rather than providing the public with a full understanding of how the agency arrived at its decision. *See* Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 764 P.2d 278, 291 (Cal. 1988) ("The Regents apparently believe that, because they and UCSF were already fully informed as to the alleged infeasibility of alternatives, there was no need to discuss them in the EIR."). *See also* STATEWIDE FINAL PROGRAM EIR/EIS, *supra* note 65 & accompanying text.

¹¹² *See, e.g.*, Woodward Park Homeowners Ass'n, Inc. v. City of Fresno, 58 Cal. Rptr. 3d 102, 106 (Cal. Ct. App. 2007) (noting city's long-standing policy, illegal under CEQA, of approving projects with unmitigated freeway impacts).

¹¹³ *See, e.g.*, Gray v. County of Madera, 85 Cal. Rptr. 3d 50, 59 (Cal. Ct. App. 2008) (discussing plaintiffs' reliance on untimely expert letter and noise study prepared by independent consultants); *see also supra*, Part III.C (discussing post-EIR disclosures of ridership study details, and conflicts with independent ridership studies completed after EIR).

substantive differences in expert opinions appear, CEQA allows an agency to merely explain why it adopts one view over the other, and courts will not review an agency's explanation unless it falls below the reasonableness standard.¹¹⁴ Each of these provisions from CEAA, if implemented as part of CEQA, would likely have addressed the primary concerns of the *Town of Atherton* plaintiffs. By removing the technical debates to a neutral forum of unaffiliated experts, concerns that project decisions were driven primarily by political motivations would likewise be neutralized.

On the other hand, any provision for additional regulation or analysis is likely to introduce new costs to the CEQA process. Use of a public review panel, for instance, is likely to significantly extend the duration of environmental analysis, and may slow important projects. Particularly for private projects as opposed to state actions, the proponents are likely to pursue legal challenges of any referral to a panel.¹¹⁵ Thus, there may not be any savings in court time or state litigation expenses over the current situation in which dissatisfied persons or interest groups are almost certain to challenge the adequacy of EIRs. Furthermore, because there is no direct equivalent in California to Canada's Minister for the Environment, adopting a similar approach might require delegating the task of assembling such panels of persons without conflicts of interest to an existing government official, or creating a new position. Moreover, providing the review after the agency's EIR process means that the information, methods, and conclusions likely will remain framed by the project proponents, rather than considered independently as they might be if the review process occurred earlier in the environmental analysis.

Nevertheless, the benefits to providing options for substantive review of controversial projects remain compelling. Additionally, CEAA has demonstrated political feasibility, which suggests that it would be relatively easy to either obtain further information about the system's efficiency, or to implement without causing additional uncertainty. Furthermore, Canadian case law interpreting CEAA would provide useful illustrations to courts, should any parallel additions to CEQA be challenged.

B. State-Level Environmental Impact Review Committee

In this proposal, a state-level CEQA committee would serve to review a lead

¹¹⁴ See CAL. CODE REGS. tit. 14, § 15151 (2012) ("Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts. The courts have not looked for perfection but for adequacy, completeness, and a good faith effort at full disclosure.").

¹¹⁵ Cf. *Canada (Minister of the Env't) v. Bennett Env't'l Inc.* (2005), [2006] 3 F.C.R. D-65 (Can.) at par. 2, available at <http://www.canlii.org/en/ca/fca/doc/2005/2005fca261/2005fca261.html> (noting project proponent's expedited review seeking to overturn Minister's referral of project to a review panel).

agency's environmental analysis prior to distributing a draft EIR for public comment. The importance of verifying technical data and forecasting models early in the environmental review process, to overcome the demonstrated likelihood of optimistic politics-based inaccuracies reaching the public,¹¹⁶ supports adding a step to the CEQA review process that precedes the publication of EIRs. If the CEQA committee did not have the expertise required for a particular project, it would direct and coordinate an independent peer review to accomplish the same function.

The threshold question for whether a project warranted such review could be established either by statutory definition, as with listed projects like CEAA's comprehensive study requirement, or by statutory mechanisms leaving discretion with agencies or the public to request additional review. Arguably, any CEQA approval relying on findings of overriding consideration should be subject to additional independent review. This is because the justification finding depends on the agency's balancing of the project's benefits against the environmental and social harms, a determination that necessarily relies on forecasting and modeling for the uncertainties involved.¹¹⁷ Based on the levels of uncertainty involved and the high likelihood of goal-driven analysis, such forecasts should require corroboration.¹¹⁸ For local private projects, the role of the lead agency in approving the EIR may operate as this check on the project proponent's goals. For multi-jurisdictional projects, however, the issue is complicated by potentially competing policy views in the different jurisdictions affected, and potential controversy over what entity will be the lead agency.¹¹⁹ Yet, the clearest case for needing additional oversight is public works projects, in which the lead agency is directly charged with both creating and approving the EIR. Regardless of the method used to invoke further review, it should at least cover public multi-jurisdictional projects with unavoidable significant impacts, such as state infrastructure developments.

¹¹⁶ See Bent Flyvbjerg, Mette K. Skamris Holm, and Søren L. Buhl, *How (In)accurate are Demand Forecasts in Public Works Projects?: The Case of Transportation*, 71 J. OF THE AM. PLANNING ASS'N. 131 (2005).

¹¹⁷ Cf. *Woodward Park Homeowners Ass'n, Inc. v. City of Fresno*, 58 Cal. Rptr. 3d 102, 117 (Cal. Ct. App. 2007) ("CEQA requires that an agency 'weigh and balance the economic and other benefits of the project against its environmental risks,' but demands 'no cost-benefit analysis' and does not compel an agency 'to quantify the adverse environmental effects of a project, in terms of cost.'") (internal citations omitted).

¹¹⁸ See Bent Flyvbjerg, Mette Skamris Holm, and Søren L. Buhl, *Underestimating Costs in Public Works Projects: Error or Lie?*, 68 J. OF THE AM. PLANNING ASS'N. 279, 290 (2002) (discussing prior research findings that "[i]n case after case, planners, engineers, and economists told Wachs that they had had to 'cook' forecasts in order to produce numbers that would satisfy their superiors and get projects started, whether or not the numbers could be justified on technical grounds.").

¹¹⁹ See CAL. PUB. RES. CODE § 21165 (2012) (discussing how to choose one agency when several might have jurisdiction).

The form of the committee would also be an important decision, along with other administrative considerations inherent to regulatory bodies such as whether it would meet full-time or only for project-based meetings, or whether the members would be appointed or elected and what qualifications they must meet. More critical to this discussion, however, is the committee's role in reviewing environmental analyses. The committee would be able to review both the scope and methods of analysis, and request that an agency's assessment fill gaps or clarify for assumptions, as in the Canadian comprehensive study, but at the draft EIR level. Otherwise, the environmental review process would remain shaped by project proponents, where planning researchers have noted a high incidence of hired analysts producing data that comports with project proponents' interests.¹²⁰ The problem, as demonstrated by the California high-speed rail situation, is that if conflicting information appears in later independent review, non-expert courts or members of the public have limited means for making a judgment about the accuracy of either source.¹²¹ Providing for the early involvement of a CEQA committee, either to perform or direct peer-review, would ensure that disinterested parties verify such information independently. A peer-review requirement would also need measures to verify the true independence of the additional review. This might include using a pre-approved committee selection process or a process for routing review tasks to pre-specified expert university departments, both subject to conflict checks.

Another alternative would be to authorize the dedicated CEQA committee to take on the lead agency role for statewide or multi-jurisdictional projects. The agency that would otherwise be charged with lead agency authority¹²² would act as the project proponent, much like a private project subject to local agency approval. In this arrangement, the CEQA committee would still be charged with directing its environmental assessment work to an appropriate source for independent review to avoid the possibility of special interest capture.¹²³ Furthermore, through the experience of acting as lead agency on numerous complex projects, the review committee could develop guidelines for mandatory methodologies or discussions to provide consistency across such projects throughout the state.¹²⁴ Promoting more statewide consistency in environmental planning would seem to be an evident benefit, though concentrating experience

¹²⁰ See Flyvbjerg et al., *Underestimating Costs in Public Works Projects: Error or Lie?*, *supra* note 118, at 290.

¹²¹ See, e.g., *supra*, Part III.C (discussing conflicts between ridership studies, prompting advice from independent oversight group that parties work together to clarify best model).

¹²² See CAL. PUB. RES. CODE § 21165 (2012) (discussing current process of how to choose one agency when several might have jurisdiction).

¹²³ Cf. *Woodward Park Homeowners Ass'n, Inc. v. City of Fresno*, 58 Cal. Rptr. 3d 102, 117-18 (Cal. Ct. App. 2007) (noting culture of CEQA non-compliance within that local government).

¹²⁴ Cf. Karkkainen, *supra* note 24, at 946-47 (promoting idea of centralizing NEPA environmental assessment data from post-project mitigation monitoring).

in one body might be said to obstruct the project-specific analysis CEQA requires. Countering that claim, however, planning research demonstrates that an “outside” view of a project, analyzing it in terms of classes of similar projects, yields more accurate planning forecasts concerning timelines and costs.¹²⁵

By providing ways to obtain substantive review of environmental decision-making, a CEQA committee would offer improvements to CEQA’s present judicial review options either as expert peer-review or as a lead agency on multi-jurisdictional projects. Mandatory peer review preceding publication of an EIR would ideally avoid many of the planning pitfalls or information gaps presently exposed by plaintiffs through litigation. If plaintiffs still wished to challenge a project approval, the additional review within the EIR would provide courts a substantive basis to find whether lead agency decisions were supported by substantial evidence, for cases in which agency and independent analyses conflicted.

To illustrate how a CEQA committee might function for the high-speed rail project, the committee would initially be involved at the environmental planning stages because of the multi-jurisdictional aspect of the project. Then, under the first version of the proposal, the CEQA committee would provide substantive peer review for CHSRA’s environmental analysis itself, or by referral to independent expert sources prior to EIR publication. In the second version, the CEQA committee would function as the lead agency with CHSRA as the project proponent, while providing for alternative independent review of the project—for instance, through the U.C. Berkeley transportation research department. Both options have their strengths: the first, because it allows earlier independent review to shape the EIR; the second, because it allows groups who remain dissatisfied with an EIR or its conclusions to obtain further substantive review outside of courts. In both cases, CHSRA or the CEQA committee could ultimately adopt findings of overriding consideration, but the underlying analysis would be more thorough than presently required and such findings would be more likely adopted under consistent policy choices throughout the state.

V. CONCLUSION

Though CEQA provides some methods for obtaining independent analyses of the environmental impacts from affected agencies, presently, consultation with disinterested experts remains optional. This is a problem when the only available recourse for disputing facts or analyses in an EIR is non-substantive

¹²⁵ See Flyvbjerg et al., *How (In)accurate are Demand Forecasts in Public Works Projects?: The Case of Transportation*, *supra* note 116, at 141-42.

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judicial review. Citizens and interests groups dissatisfied with the adequacy of a project's environmental analysis must channel their objections through courtroom procedures, expending private and public resources in the slim hope of obtaining substantive results. Instead, independent substantive review should be mandatory when the project is multi-jurisdictional and relies on findings of overriding consideration for approval. Amending CEQA to provide additional substantive review of controversial projects, either during or after the EIR process as outlined above, would likely address frustrations with the current system experienced by all parties. This would better serve the goals of public citizens turned litigants limited by CEQA's restrictive judicial review, and it would also satisfy CEQA's goals of providing more reliability and uniformity in the environmental review process.