Challenges to Environmental Impact Reports Under the California Environmental Quality Act: To Partially Decertify or Not, That Is the Question

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* © 2023 Andrew Dallas Kent. J.D. 2023, University of San Diego School of Law; B.A. 2017, University of California, Santa Barbara. I dedicate this Comment to my family, who have always supported me in my endeavors. I would like to also extend my sincerest appreciation to Professor Mary Jo Wiggins and the entire *San Diego Law Review* team for their guidance throughout the process.

I. INTRODUCTION

The city council chambers are abuzz with community members as they provide public comment on the benefits of a proposed housing project in their city, which would provide desperately needed housing, community improvements, and job creation. After listening to community feedback and publicly discussing the housing project, the city council votes unanimously to approve the project. The project developer breathes a sigh of relief as the journey to this point has been immense based on the time and money spent on the land, development plan, and experts to comply with California's stringent regulations. Before ground can be broken, however, a disgruntled community member challenges the Environmental Impact Report (EIR) that the city council relied on in its determination to approve the project. Now the entire project's future is in jeopardy because the construction schedule and related costs are once again uncertain due to the time, costs, and unpredictability associated with litigation.

Unfortunately, anti-housing lawsuits under the California Environmental Quality Act (CEQA) have reached epidemic proportions.[1] A challenge to

1. JENNIFER HERNANDEZ, CTR. FOR JOBS & THE ECON., ANTI-HOUSING CEQA LAWSUITS FILED IN 2020 CHALLENGE NEARLY 50% OF CALIFORNIA'S ANNUAL HOUSING PRODUCTION 1, 10 (2022) [hereinafter ANTI-HOUSING CEQA LAWSUITS], https://www.hklaw.com/-/media/files/insights/publications/2022/08/082222fullceqaguestreport.pdf?la=en [https://perma.cc/B582-5J66] (finding in its interim report that CEQA litigation in 2020 targeted

a development project under CEQA, which can be made by a single individual, can stall or even prevent the entire project.[2] Even the mere threat of CEQA litigation can halt a project.[3] California's development future has become complicated and the state's housing crisis[4] is at risk of being further exacerbated through abuse by individuals who use CEQA to prevent projects, classically known as not-in-my-backyard project opponents or NIMBYs.[5] While challenges under CEQA are theoretically limited to disputes over the environmental impact a proposed project may have, history demonstrates that CEQA has been used for a host of other protectionist[6] or anti-development ideals.[7]

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nearly 50,000 housing units which is approximately half of California's total annual housing production); JENNIFER HERNANDEZ, CTR. FOR DEMOGRAPHICS & POL'Y, CALIFORNIA GETTING IN ITS OWN WAY: IN 2018, HOUSING WAS TARGETED IN 60% OF ANTI-DEVELOPMENT LAWSUITS 6 (Joel Kotkin ed., 2019) [hereinafter CALIFORNIA GETTING IN ITS OWN WAY], https://www.chapman.edu/communication/files/ca-getting-in-its-own-way.pdf [https://perma.cc/2EB3-XYBG] ("[A]nti-housing CEQA lawsuits [in 2018] comprise 60% of all statewide CEQA lawsuits targeting private sector development projects.").

2. M. Nolan Gray, *How Californians Are Weaponizing Environmental Law*, ATLANTIC (Mar. 12, 2021), https://www.theatlantic.com/ideas/archive/2021/03/signature-environmental-law-hurts-housing/618264/ [https://perma.cc/Z6CL-5DKH].

3. *Id.*

4. The California housing crisis can be seen as three distinct crises that stem from the same underlying problems. Matt Levin, *Commentary: Five Things I've Learned Covering California's Housing Crisis That You Should Know*, CAL MATTERS (Jan. 12, 2021), https://calmatters.org/housing/2021/01/california-housing-crisis-lessons/ [https://perma.cc/75SH-MVYY]. First, there are approximately 150,000 homeless individuals in California sleeping in shelters or on the streets. *Id.* Second, housing prices in California are high, which requires Californians to pay more than half of their paycheck to rising rents, leaving 7.1 million Californians living in poverty after housing costs are taken into account. *Id.* Third, high rent costs in California have made it difficult for individuals to save enough to pay the down payment required for home ownership. *Id.*

5. Gray, *supra* note 2. NIMBYs are often homeowners and longtime residents that prefer the status quo, but there has been an increase in younger and more liberal individuals opposing new housing and density. *The Changing Faces of NIMBYism*, COURBANIZE (Sept. 7, 2021), https://www.courbanize.com/blog/the-changing-faces-of-nimbyism/ [https://perma.cc/8TEC-GWDT]. New NIMBYs are even better at organizing due to technology and community apps that provide the ability to engage online. *Id.*

6. Protectionists in the development context would be individuals who want to protect the status quo and believe any changes to their community might impact the community character or home prices. *See The Changing Faces of NIMBYism*, *supra* note 5. For example, a common complaint of any new development is the increased traffic associated with future residents that will live within the development. *See id.*

7. *See* Respect Life South San Francisco v. City of South San Francisco, 223 Cal. Rptr. 3d 202, 206, 211 (Ct. App. 2017) (finding that a plaintiff's challenge of an EIR to

The Southern California Association of Governments (SCAG)[8] voted on March 4, 2021, to adopt a new housing plan to build 1.34 million new homes by 2029 in Southern California.[9] The sheer amount of new housing required under the ambitious plan could lead to numerous challenges to projects throughout Southern California under CEQA.[10] The development community will not only have to procure the land, materials, and labor to build these homes, but also will have to ensure the environmental impact analysis is extremely thorough to prevent or at least defend against litigation.[11] Even in instances where CEQA may not require an EIR, developers may decide to protect their interests in a project by spending the resources to have one completed.[12]

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prevent an office building to be converted into a medical clinic to be used by Planned Parenthood "failed to identify any substantial evidence of a potential significant environmental effect"); Jensen v. City of Santa Rosa, 233 Cal. Rptr. 3d 278, 280–81 (Ct. App. 2018) (rejecting a plaintiff's challenge to prevent a youth center due to noise impacts that "were not significant under CEQA and did not require preparation of an EIR"); Liam Dillon & Benjamin Oreskes, *Homeless Shelter Opponents Are Using This Environmental Law in Bid to Block New Housing*, L.A. TIMES (May 15, 2019, 5:00 AM), https://www.latimes.com/politics/la-pol-ca-ceqa-homeless-shelter-20190515-story.html [https://perma.cc/4QAN-YM4F].

8. SCAG is a Joint Powers Authority comprised of local governments and agencies that address regional issues. SCAG, https://scag.ca.gov/about-us [https://perma.cc/U43V-4QW5]. The SCAG region includes six counties and 191 cities and is responsible for developing "long-range regional transportation plans including sustainable communities strategy and growth forecast components, regional transportation improvement programs, regional housing needs allocations and a portion of the South Coast Air Quality management plans." *Id.*

9. Jeff Collins, *Southern California Adopts Plan to Build 1.3 Million New Homes by* 2029, ORANGE CNTY. REG. (Mar. 5, 2021, 6:58 AM), https://www.ocregister.com/2021/03/04/southern-california-adopts-plan-to-build-1-3-million-new-homes-by-2029/ [https://perma.cc/Y7GJ-JN7F].

10. CALIFORNIA GETTING IN ITS OWN WAY, *supra* note 1, at 9 ("[E]ven if every one of the region's 1.34 million housing units are built in 200-unit apartment towers, the region will need to comply with CEQA Round 4 [when a city or county approves housing] more than 6,500 times to build 1.34 million housing units.").

11. *See* Kelsi Maree Borland, *CEQA Remains the Biggest Development Challenge for CA Builders*, GLOBEST (July 28, 2020), https://www.globest.com/2020/07/28/ceqa-remains-the-biggest-development-challenge-for-ca-builders/?slreturn=20210816213021 [https://perma.cc/LM3S-BNGK].

12. While EIRs are more expensive and time-consuming to prepare compared to Negative Declarations (ND) and Mitigated Negative Declarations (MND), the standard of review is dramatically different. GOVERNOR'S OFF. OF PLAN. & RSCH., MITIGATED NEGATIVE DECLARATIONS: CEQA TECHNICAL ADVICE SERIES 5 (2004). EIRs are subject to a substantial evidence standard of review that examines the whole record before the lead agency, and the lead agency gets the benefit of the doubt on disputed factual issues where its conclusion is supported by any substantial evidence in the record. *Id.* On the other hand, NDs and MNDs are subject to a fair argument standard of review that is a much lower threshold and does not defer to the agency in a close case. *Id.*

The problem is CEQA lawsuits in the SCAG region from 2013–2015 were almost entirely—98%—against housing units located within existing communities and not greenfield developments.[13] With land availability for large projects already scarce, CEQA litigation has become the anti-housing tool of choice.[14] The California Legislative Analyst's Office's[15] "review of CEQA documents submitted to the state by California's ten largest cities between 2004 and 2013 indicates that local agencies took, on average, around two and a half years to approve housing projects that required an EIR."[16] Further, the report found that developers occasionally reduced the size and scope of the proposed project based on concerns brought forward during the review process or expected challenges to the project.[17] In addition, the significant time and costs associated with complying with CEQA and the EIR requirement has made many smaller developments infeasible.[18]

CEQA provides an important analysis of the potential damage to the surrounding environment due to development while offering various measures to mitigate against the impacts associated with constructing a project.[19] Yet, potential reform is necessary to ensure that CEQA correctly allows

13. CALIFORNIA GETTING IN ITS OWN WAY, *supra* note 1, at 9–10. A greenfield development is a "real estate development in previously undeveloped areas" such as agricultural fields, forest land or unused land parcels. *What is Greenfield Development?*, PLANETIZEN, https://www.planetizen.com/definition/greenfield-development [https://perma.cc/5N63-89FU].

14. *See* Borland, *supra* note 11.

15. The California Legislative Analyst's Office (LAO) provides fiscal and policy advice to the California Legislature. *About Our Office*, LEGIS. ANALYST'S OFF., https://lao.ca.gov/About [https://perma.cc/SU9J-UKA8]. The LAO analyzes the annual Governor's budget and also prepares special reports on topics of interest to the legislature. *Id.*

16. MAC TAYLOR, LEGIS. ANALYST'S OFF., THE 2016–17 BUDGET: CONSIDERING CHANGES TO STREAMLINE LOCAL HOUSING APPROVALS 8 (2016), https://lao.ca.gov/reports/2016/3470/Streamline-Local-Housing-Approvals.pdf [https://perma.cc/K82U-LBEK].

17. *Id.* By reducing the size and scope of a proposed project, the developer hopes that any environmental impacts would be minor, resulting in the need to obtain a Negative Declaration rather than going through the EIR process. *See id.*

18. *See* Daniel Kolkey, *CEQA: How to Mend It Since You Can't End It*, ORANGE CNTY. REG. (Feb. 13, 2019, 7:00 AM), https://www.ocregister.com/2019/02/13/ceqa-how-to-mend-it-since-you-cant-end-it/ [https://perma.cc/FV3J-WWR6] ("The costs for an EIR can range from $200,000 to millions of dollars.").

19. *See generally* CAL. CODE REGS. tit. 14, §§ 15000–15387 (2005); *see also California Environmental Quality Act (CEQA)*, OFF. OF HISTORIC PRES., https://ohp.parks.ca.gov/?page_id=21721 [https://perma.cc/8XGX-T26Y].

decision makers to balance the need for development[20] with the need to protect the environment.[21]

This Comment will provide (1) a background of CEQA and the importance of the EIR for decision-making; (2) a framework of the current split in the California Courts of Appeal as to whether an EIR can be partially decertified; (3) a breakdown on the current split; (4) an analysis of the potential impacts the split has on development projects; and (5) solutions that clarify a court's remedies explicitly allowing partial decertification of an EIR under CEQA.

II. THE CALIFORNIA ENVIRONMENTAL QUALITY ACT AND THE ENVIRONMENTAL IMPACT REPORT

The CEQA was signed in 1970 by then-Governor Ronald Reagan[22] and was modeled after the federal National Environmental Policy Act of 1969.[23] In general, CEQA "requires state and local government agencies to inform decision makers and the public about the potential environmental impacts of proposed projects, and to reduce those environmental impacts to the extent feasible."[24] Through transparency and analysis, decision makers[25] and the public can make informed decisions with the proper knowledge of the consequences of a development project and mitigation measures.[26] CEQA is implemented by the California Governor's Office of Planning and Research which prepares and develops guidelines with which agencies[27] must comply.[28]

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20. While much of this Comment refers to housing development and large projects, challenges to project EIRs also occur for large solar and wind projects. *See* ANTI-HOUSING CEQA LAWSUITS, *supra* note 1, at 1, 4–11. Such challenges can make the transition to renewable energy more challenging if the projects face the time delays and increased costs associated with litigation of the project's EIR. *See id.*

21. *See* Kolkey, *supra* note 18.

22. *Frequently Asked Questions About CEQA*, CAL. NAT. RES. AGENCY, https://files.resources.ca.gov/ceqa/more/faq.html [https://perma.cc/6N4X-VU7L].

23. *Id.*

24. *Getting Started with CEQA*, GOVERNOR'S OFF. OF PLAN. & RSCH., https://opr.ca.gov/ceqa/getting-started/ [https://perma.cc/TK8H-NK57].

25. For purposes of this Comment, decision makers are those individuals in charge of the agencies that certify an EIR and approve a development project.

26. *See* CAL. PUB. RES. CODE §§ 21000–21001 (West 1979).

27. For purposes of CEQA, agencies include local municipalities such as counties and cities. PUB. RES. § 21063 ("'Public Agency' includes any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision."). A local agency is defined as "any public agency other than a state agency, board, or commission." *Id.* § 21062.

28. *Id.* § 21083.

A. Requirements Under CEQA

A project for purposes of CEQA is an action taken or supported by a public agency that either directly changes or is reasonably foreseeable to indirectly change the environment.[29] Additionally, CEQA applies to discretionary projects—projects that require an agency to exercise judgment—and does not apply to ministerial projects—projects not requiring an agency's exercise of discretion.[30] Public agencies follow a three-tiered process under CEQA.[31] First, the agency must review whether the action is a "project" and determine if the proposed project is statutorily or categorically exempt.[32] Second, an initial study must be prepared to determine if the project may have significant environmental effects.[33] If there is no evidence of potential significant environmental effects, then the agency prepares a negative declaration.[34] Third, if the initial study uncovers substantial evidence that the project may cause a significant effect on the environment, then the agency must prepare a full EIR.[35]

Statutory exemptions are described in the CEQA guidelines Sections 15260–15285 and include such activities as ministerial projects, emergency projects, and specified mass transit projects.[36] Additionally, there are

29. CAL. CODE REGS. tit. 14, § 15378 (2005).

30. *See* PUB. RES. § 21080; Union of Med. Marijuana Patients, Inc. v. City of San Diego, 446 P.3d 317, 329 (Cal. 2019). For example, discretionary projects include "placing conditions on the issuance of a permit, delaying demolition to explore alternatives, or reviewing the design of a proposed project." *When Does CEQA Apply?*, OFF. OF HISTORIC PRES, https://ohp.parks.ca.gov/?page_id=21723 [https://perma.cc/4DYQ-DEHS]. Examples of ministerial permits include "roof replacements, interior alterations to residences, and landscaping changes." *Id.*

31. PUB. RES. § 21080(a).

32. *See* tit. 14, §§ 15260–15285.

33. An initial study assesses a range of quantitative and qualitative environmental effects that could occur. *Id.* § 15371. Typically, an affirmative response to any one threshold would be evidence that a significant effect may occur, and an EIR will need to be prepared. *See id.* A negative declaration is "a written statement by the lead agency briefly describing the reasons that a proposed project, not exempt from CEQA, will not have a significant effect on the environment and therefore does not require the preparation of an EIR." *Id.*

34. *Id.*

35. *See* Farmland Prot. All. v. Cnty. of Yolo, 238 Cal. Rptr. 3d 227, 233 (2021) (quoting Save Our Big Trees v. City of Santa Cruz, 194 Cal. Rptr. 3d 169, 176–77 (2015)).

36. CAL. CODE REGS. tit. 14, §§ 15260–15285 (2005). There is a significant distinction between statutory exemptions and categorical exemptions. Statutory exemptions are enacted based on policy decisions made by the legislature regardless of environmental impacts and are not subject to exceptions unless stated in the statute. *Id.* Categorical exemptions are

thirty-three classes of categorical exemptions based on a finding by the California Secretary of Resources that these categories of projects do not have a significant effect on the environment.[37] The categorical exemptions are described in Sections 15300–15333 and include projects such as replacement or reconstruction, accessory structures, and in-fill development projects.[38]

During the initial study,[39] if the agency determines that there is substantial evidence that the project may cause a significant effect on the environment, the preparation of an EIR is necessary.[40] The preparation of an EIR is required under CEQA "whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact."[41] The three-stage approach in determining which reviews a project will have to comply with sets the stage for ultimately meeting CEQA's purpose which has been described as:

> (1) inform the government and public about a proposed activity's potential environmental impacts; (2) identify ways to reduce, or avoid environmental damage; (3) prevent environmental damage by requiring project changes via alternatives or mitigation measures when feasible; and (4) disclose to the public the rationale for governmental approval of a project that may significantly impact the environment.[42]

In order to provide decision makers and the public with information about potential environmental impacts of a proposed project, agencies are required to certify an EIR.[43] A variety of environmental factors are analyzed in an EIR including aesthetics, air quality, biological resources, cultural resources, geology, greenhouse gas emissions, hydrology and water quality,

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all subject to exceptions including where the individual project may have potentially significant effects due to unusual circumstances. *Id.* §§ 15300–15332.

37. *See id.* § 15354.

38. *Id.* §§ 15300–15333. Replacement or reconstruction is categorically exempt if the "new structure will be located at the same site as the structure replaced and will have the same purpose and capacity as the structure replaced." *Id.* § 15302 (2005). An accessory structure is categorically exempt if it consists of construction or placement of minor structures accessory to an existing structure. *Id.* § 15311. In-fill development projects are categorically exempt if the project meets certain conditions specified by the statute. *Id.* § 15332.

39. An initial study is meant to provide the lead agency with information and is often comprised of expert opinion supported by facts, technical studies, or other substantial evidence to document the findings within the study. *Id.* § 15063.

40. *Id.* § 15064(a)(1).

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

42. Cal. Bldg. Indus. Ass'n v. Bay Area Air Quality Mgmt. Dist., 362 P.3d 792, 797 (Cal. 2015) (citing Tomlinson v. County of Alameda, 278 P.3d 803, 805 (Cal. 2012)).

43. CAL. PUB. RES. CODE § 21151 (West 2003).

mineral resources, noise, transportation, tribal cultural resources, and utilities.[44] However, there is no formulaic standard for an EIR to analyze the environment, but rather general guidelines issued by the Office of Public Resources.[45]

B. Certification of an EIR

The EIR is considered the "heart of CEQA."[46] The EIR contains a project description that includes the location, objectives sought by the proposed project, description of the area, and a brief statement of the intended use of the EIR.[47] The EIR itself must set forth the significant effects on the environment due to the proposed project, potential mitigation measures to minimize effects on the environment, and alternatives to the project.[48] Preparing an EIR is an extensive process.[49] A draft EIR (DEIR) must be created, analyzed, and then circulated for public review and comment for at least thirty days.[50] After circulation,[51] a final EIR is produced that includes the responses to the comments from the DEIR made by the public and other agencies as well as any information added to the document.[52]

EIRs have evolved over time and now run thousands of pages, becoming "bloated, unwieldy documents."[53] An individual can challenge

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44. *CEQA Appendix G: Environmental Checklist Form*, CAL. NAT. RES. AGENCY, https://resources.ca.gov/CNRALegacyFiles/ceqa/docs/ab52/final-approved-appendix-G.pdf [https://perma.cc/XX6B-XCKU].

45. *See* CAL. CODE REGS. tit. 14, § 15000–15007 (2005).

46. *See* Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal., 864 P.2d 502, 506 (Cal. 1993) (quoting Citizens of Goleta Valley v. Bd. of Supervisors, 801 P.2d 1161, 1167 (Cal. 1990)).

47. CAL. CODE REGS. tit. 14, § 15124 (2018).

48. PUB. RES. § 21100.

49. The minimum timeline for the preparation of an EIR is eighteen months, but the timeline can quickly be extended due to factors like "changes in the proposed project, MEA [(Major Environmental Analysis)] caseload, supplemental data requirements, quality of work submitted to the Department, and whether the FEIR is appealed." S.F. PLAN. DEP'T, ENVIRONMENTAL REVIEW PROCESS SUMMARY 5–6 (2008), https://sfpl.org/pdf/about/commission/eirprocess.pdf [https://perma.cc/5ZCX-D4W7].

50. PUB. RES. § 21091(a); tit. 14, § 15105(a).

51. If significant new information is added to an EIR, the agency must re-notice the EIR. PUB. RES. § 21092.1.

52. CAL. CODE REGS. tit. 14, § 15088(c) (2018).

53. Kenneth R. Weiss, *Reports Have an Impact on Environment: Development: Studies Mandated by the State Are Poised to Play a Key Role in the Biggest Decisions Facing Local Officials.*, L.A. TIMES (Sept. 15, 1991, 12:00 AM), https://www.latimes.com/archives/la-xpm-1991-09-15-me-3409-story.html [https://perma.cc/WD2M-AMZD].

the adequacy of an EIR for a proposed project by filing a petition for a writ of mandate.[54] If the court finds that any determination, finding, or decision of a public agency has been made without complying with CEQA, the court must issue a peremptory writ of mandate.[55] An agency's failure to comply with CEQA leaves the court with the option to order a peremptory writ of mandate with one or more of three specified mandates.[56] The mandates include voiding the decision in whole or in part,[57] suspending specific project activities that could affect the environment, and requiring the agency to take the necessary action to comply with CEQA.[58]

CEQA's design creates a litigation enforcement mechanism as a check on local decision-making because environmental documents are presumed adequate until they are challenged.[59] The legislature has attempted to limit CEQA litigation by implementing extremely short statutes of limitation and expedited litigation procedures.[60]

III. WHETHER AN EIR CAN BE PARTIALLY DECERTIFIED: A SPLIT BETWEEN THE FIFTH APPELLATE DISTRICT AND THE SECOND AND FOURTH APPELLATE DISTRICTS

Currently, there is a split among the California Courts of Appeal as to whether a court can partially decertify a project EIR when it is being challenged under CEQA.[61] Functionally, a partial decertification allows a court to sever from the project approvals any noncompliant portions of

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54. *See* STEPHEN L. KOSTKA & MICHAEL H. ZISCHKE, PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT § 23.61 (Ann H. Davis & Robia S. Crisp eds., 2d ed. 2015). A writ of mandate is a court order to compel the performance or non-performance of an act. CAL. CIV. PROC. CODE § 1085(a) (West 2011).

55. PUB. RES. § 21168.9.

56. Pres. Wild Santee v. City of Santee, 148 Cal. Rptr. 3d 310, 329 (Ct. App. 2012) (citing PUB. RES. § 21168.9).

57. However, as this Comment makes clear, there is a split as to whether the remedy of voiding in part, or partial decertification, is allowed under CEQA.

58. PUB. RES. § 21168.9(a)(1)–(3).

59. *See* Gray, *supra* note 2.

60. *See* PUB. RES. § 21167.

61. *See* LandValue 77, LLC v. Bd. of Trs. of Cal. State Univ., 122 Cal. Rptr. 3d 37 (Ct. App. 2011); *Pres. Wild Santee*, 148 Cal. Rptr. 3d 310; Ctr. for Biological Diversity v. Dep't of Fish & Wildlife (*Ctr. for Biological Diversity II*), 226 Cal. Rptr. 3d 432 (Ct. App. 2017); Sierra Club v. Cnty. of Fresno, 271 Cal. Rptr. 3d 887 (Ct. App. 2020); *see also* Arthur F. Coon, *Remedial Legal Logic: Fifth District Doubles Down on Split with Other Districts in Holding CEQA Doesn't Allow Limited Writ Remedy of Partial EIR Decertification —But Does It Really Matter?*, MILLER STARR REGALIA (Nov. 29, 2020), https://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/ [https://perma.cc/K8TJ-G8DT].

the EIR.[62] Once a court orders partial decertification, the severed portions of the EIR must be appropriately completed to comply with CEQA, and the partial decertification is accompanied by a court order to suspend work on the project until the EIR is fully compliant with CEQA.[63]

A. Fifth Appellate District Strikes First: Finds Partial Decertification of an EIR Prohibited Under CEQA

In 2011, the fifth appellate district decided *LandValue 77, LLC v. Board of Trustees of California State University*, involving challenges to the EIR of an approved mixed-use development on the Fresno campus of the California State University.[64] The mixed-use development plan included "apartments for students, faculty, employees and seniors, offices and retail stores, a hotel, and a 14-screen movie theater."[65] The trial court found the final EIR certified by the Board of Trustees inadequately analyzed environmental impacts involving "(1) the water supply, (2) traffic and parking, and (3) air quality."[66] Yet, the trial court only voided a theater sub-sublease of the project, leaving the compliant aspects of the project in place and ordering the agency to revise the findings and recirculate for comment the EIR in respect to the three deficient areas.[67] However, the appellants[68] contended

62. *See* Arthur F. Coon, *Common Sense Reading of CEQA Remedies Statute Authorizes "Limited Writ" for Violations, Fourth District Holds, Rejecting Contrary Fifth District Decision*, MILLER STARR REGALIA (Nov. 28, 2012), https://www.ceqadevelopments.com/2012/11/28/common-sense-reading-of-ceqa-remedies-statuteauthorizes-limited-writ-for-violationsfourth-district-holds-rejecting-contrary-fifth-district-decision/ [https://perma.cc/8D99-68XN].

63. *Ctr. for Biological Diversity II*, 226 Cal. Rptr. 3d at 440 ("Severance of the noncompliant Project approvals from the other Project approvals will not prejudice complete and full compliance with CEQA or Fish and Game Code section 5515 because, as required above, no Project activity (including construction) that could result in an adverse change or alteration to the physical environment is allowed under this Writ unless and until the Department takes corrective action to address the two EIR deficiencies identified above and the Department has complied with CEQA . . . ." (citation omitted)).

64. *LandValue 77, LLC*, 122 Cal. Rptr. 3d at 38.

65. *Id.*

66. *Id.*

67. *Id.* at 38–39.

68. The appellants in this case owned and managed the Sierra Vista Mall approximately two miles from the project. LandValue 77, LLC v. Bd. of Trs. of Cal. State Univ., No. F063653, 2014 WL 118231, at *1 (Cal. Ct. App. Jan. 14, 2014).

that the entire project approval should be voided because the final EIR was found inadequate, making partial decertification an inappropriate remedy.[69]

The fifth appellate district, in reviewing the case, analyzed what remedies a court has under CEQA if an EIR is inadequate.[70] Reading CEQA's remedies statute, Public Resources Code section 21168.9,[71] the court interpreted the text of the statute to determine whether a court must overturn the entire project approvals as the appellants contended or if the trial court's limited remedy was appropriate.[72]

First, the court found that the trial court did not sever a specific project activity from the overall project, but such a finding did not foreclose the application of section 21168.9(b).[73] Then, the court relied on a treatise describing the appropriate remedy under section 21168.9(b) when the project has not been severed, and the treatise states:

> In contrast to a case where severance is proper, a situation may arise where an EIR is inadequate in some respects, but not others. This requires the local agency to set aside all project approvals and the certification of the EIR, but the writ of mandate need only require the preparation, circulation and consideration under CEQA of a legally adequate EIR on limited issues.[74]

The court found the treatise's statement about setting aside all project approvals and the certification of the EIR to be compatible with the text of CEQA.[75] Further, the court found the wording of the regulation and statutes addressing certification of a final EIR to be compatible with the treatise interpretation.[76] Throughout the Public Resources Code and CEQA Guidelines, the use of the terms "final" and "completion" must be understood to mean "a final EIR should [or could] not be certified if it is not complete or in compliance with CEQA."[77]

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69. *LandValue 77, LLC*, 122 Cal. Rptr. 3d at 39.

70. *See id.* at 40–42.

71. Further statutory references are also to the California Public Resources Code unless otherwise stated.

72. *LandValue 77, LLC*, 122 Cal. Rptr. 3d at 41–42.

73. *Id.*; *see also* CAL. PUB. RES. CODE § 21168.9(b) (West 1993).

74. *LandValue 77, LLC*, 122 Cal. Rptr. 3d at 41 (quoting 2 RONALD B. ROBIE, DIANE R. SMITH & SUMMER L. NASTICH, CALIFORNIA CIVIL PRACTICE: ENVIRONMENTAL LITIGATION § 8:33 (2d ed. 2002)).

75. *Id.*

76. *See LandValue 77, LLC*, 122 Cal. Rptr. 3d at 42 ("In short, an EIR is either complete or it is not."); CAL. CODE REGS. tit. 14, § 15090(a)(1) (2005) ("Prior to approving a project the lead agency shall certify that: (1) The final EIR has been completed in compliance with CEQA."); PUB. RES. § 21100(a) ("All lead agencies shall prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project which they propose to carry out or approve that may have a significant effect on the environment.").

77. *LandValue 77, LLC*, 122 Cal. Rptr. 3d at 41.

In *LandValue 77*, the project's EIR could not be deemed complete based on the court's interpretation of the CEQA requirements, thus, requiring the court to completely decertify the EIR and vacate all the project's approvals until the EIR was adequately corrected.[78] Therefore, the entire project could not be approved until the EIR was compliant with CEQA.[79] Also, the court attempted to bolster its position by citing to a string of cases that had set aside approvals of a project because the EIR was found inadequate in part.[80] However, setting aside approvals based on precedent that fails to interpret the CEQA remedies statute is not determinative that partial decertification is an inappropriate remedy. These cases simply demonstrate that reviewing courts have previously set aside approvals until the EIR was compliant with CEQA.[81]

Importantly, the court did not read the CEQA remedies statute in its entirety and failed to interpret the "in part" language of section 21198.9(a)(1) as to whether it allows for partial decertification.[82] Instead, the court merely mentioned section 21168.9(a)(1) and, with no analysis of the statute, opines "[w]e . . . reject the idea of partial decertification."[83] Ultimately, "[the court] concluded that a lead agency must certify a legally adequate EIR prior to deciding whether to approve a contested project."[84] Because the approvals were based on a non-legally adequate EIR, all the approvals had to be set aside until the EIR was completed.[85]

78. *Id.* at 41–43.
79. *See id.* at 41–42.
80. *Id.* at 42.
81. *See* Protect the Historic Amador Waterways v. Amador Water Agency, 11 Cal. Rptr. 3d 104, 113 (Ct. App. 2004) ("[W]e must reverse the superior court's denial of plaintiff's petition for a writ of mandate and remand the case for issuance of a writ directing the Agency to set aside its certification of the final EIR and to take the action necessary to bring the water resources section of the EIR into compliance with CEQA."); Save Our Peninsula Comm. v. Monterey Cty. Bd. of Supervisors, 104 Cal. Rptr. 2d 326, 358 (Ct. App. 2001) (vacating the EIR and ordering the Board "not to take any further action to approve the project without the preparation, circulation and consideration under CEQA of a legally adequate EIR with regard to the water issues discussed in this opinion").
82. *See LandValue 77, LLC*, 122 Cal. Rptr. 3d at 42.
83. *Id.*
84. *Id.*
85. *See id.*

B. Fourth and Second Appellate Districts Split with Fifth District: Find Partial Decertification Appropriate

1. Fourth Appellate District

In 2012, the fourth appellate district decided *Preserve Wild Santee v. City of Santee*, which involved Preserve Wild Santee challenging a final EIR of a development project and claiming that the City of Santee failed to comply with CEQA.[86] The proposed project plan encompassed 2,600 acres of undeveloped land and would include the development of 1,380 single-family dwelling units on 970 acres, a pedestrian-oriented village center on 230 acres, and 1,400 acres of land dedicated to "become an open space preserve."[87] The trial court issued a limited writ of mandate—effectively a partial decertification of the EIR—finding the EIR's conclusion regarding the project's fire safety impacts inadequate and directing the City of Santee to bring this portion of the EIR into compliance with CEQA.[88] On appeal, the fourth appellate district reviewed "whether the trial court properly interpreted section 21168.9 as authorizing the limited writ remedy."[89]

To begin, the court analyzed the CEQA remedy statute, section 21168.9, to determine the remedies available if a project failed to comply with any aspect of CEQA.[90] In order to properly interpret the text, the court determined that the legislative intent of section 21168.9 was "to give the trial court some flexibility in tailoring a remedy to fit a specific CEQA violation."[91] First, the court read the entire statute within its statutory construction to determine the available remedies.[92] Specifically, the court focused its attention on section 21168.9, subdivision (a)(1), which provided that the court's remedy may include "[a] mandate that the determination, finding, or decision be voided by the public agency, in whole or in part."[93] The court interpreted the "whole or in part" language of the statute to allow a court to issue a limited writ and in practice allow for the partial decertification of an EIR.[94] The court concluded that reading the statute to require complete decertification

86. Pres. Wild Santee v. City of Santee, 148 Cal. Rptr. 3d 310, 315 (Ct. App. 2012).
87. *Id.* at 316.
88. *Id.* at 315.
89. *Id.* at 330.
90. *Id.* at 329–30.
91. *Id.* at 331 (citing San Bernardino Valley Audubon Soc'y v. Metro. Water Dist., 109 Cal. Rptr. 2d 108, 113 (Ct. App. 2001)).
92. *Id.*
93. CAL. PUB. RES. CODE § 21168.9 (West 1993); *Pres. Wild Santee*, 148 Cal. Rptr. 3d at 331.
94. *Pres. Wild Santee*, 148 Cal. Rptr. 3d at 331.

and void all project approvals is a rigid requirement in direct conflict of the "in part" language of section 21168.9(a)(1).[95]

Second, the court relied on section 21168.9(b) that limits the court's mandates to "only those necessary to achieve CEQA compliance and, if the court makes specified findings, to only 'that portion of a determination, finding, or decision' violating CEQA."[96] Thus, a court is statutorily allowed under section 21168.9(b) to direct its mandates to parts of an EIR.[97]

Therefore, if the court found the inadequate sections of an EIR to be severable from other project approvals, then a partial decertification would not prejudice compliance with CEQA.[98] The court announced that the commonsense reading of both sections 21168.9(a)(1) and 21168.9(b) does not require a mandate to decertify the EIR and void all project approvals when an EIR is found to violate CEQA.[99] Thus, the court took an expansive view as to what a trial court's remedies are under CEQA.[100]

The environmental groups[101] that challenged the EIR relied on *LandValue 77*, arguing that partial decertification was not an appropriate remedy.[102]

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95. *Id.*

96. *Id.* (emphasis removed). The entire section 21168.9(b) states in full:

> Any order pursuant to subdivision (a) shall include only those mandates which are necessary to achieve compliance with this division and only those specific project activities in noncompliance with this division. The order shall be made by the issuance of a peremptory writ of mandate specifying what action by the public agency is necessary to comply with this division. However, the order shall be limited to that portion of a determination, finding, or decision or the specific project activity or activities found to be in noncompliance only if a court finds that (1) the portion or specific project activity or activities are severable, (2) severance will not prejudice complete and full compliance with this division, and (3) the court has not found the remainder of the project to be in noncompliance with this division. The trial court shall retain jurisdiction over the public agency's proceedings by way of a return to the peremptory writ until the court has determined that the public agency has complied with this division.

PUB. RES. § 21168.9(b).

97. *Pres. Wild Santee*, 148 Cal. Rptr. 3d at 331 ("[W]e conclude the trial court correctly determined it had authority under section 21168.9 to issue a limited writ.").

98. PUB. RES. § 21168.9.

99. *Pres. Wild Santee*, 148 Cal. Rptr. 3d at 331.

100. *See id.*

101. Three environmental groups took part in the litigation—Preserve Wild Santee, Center for Biological Diversity, and Endangered Habitats League, Inc. *Id.* at 315.

102. *Id.* at 329 ("Plaintiffs contend the trial court's use of a limited writ to remedy the City's CEQA violations was improper."); *see* LandValue 77, LLC v. Bd. of Trs. of

However, the fourth appellate district rejected *LandValue 77* because the fifth appellate district failed to read and apply the "in part" language of section 21168.9(a)(1) in the context of the EIR certification decision.[103] Further, the treatise for which the fifth appellate district relied omitted the "in part" language in the treatise's analysis of the statute, "making it unclear whether the treatise's authors were even aware of the language."[104]

Thus, the court found partial decertification an appropriate remedy; however, the project's approvals were not left in place for a different reason.[105] Still, the court concluded that section 21168.9 authorized the issue of a limited writ in appropriate cases.[106]

In addition, the court recognized that these less rigid requirements do not allow environmental harm in the interim and render CEQA compliance meaningless because section 21168.9 "expressly allows a court to mandate the suspension of any project activities that might adversely affect the environment and prejudice the consideration or implementation of mitigation measures or project alternatives until the public agency complies with CEQA."[107]

2. Second Appellate District

In 2017, the second appellate district decided *Center for Biological Diversity v. Department of Fish and Wildlife II*,[108] where the plaintiff environmental groups[109] challenged the EIR, claiming the trial court's partial decertification of the EIR was prohibited under section 21168.9.[110] The proposed project included two natural resource plans that would be developed over a twenty year period.[111] The plans would "consist of up to 20,885 dwelling units housing nearly 58,000 residents as well as [incorporate]

Cal. State Univ., 122 Cal. Rptr. 3d 37, 42 (Ct. App. 2011) (rejecting the idea of partial certification).

103. *Pres. Wild Santee*, 148 Cal. Rptr. 3d at 331–32.

104. *Id.* (citing 2 ROBIE, SMITH & NASTICH, *supra* note 74).

105. *Id.* at 332.

106. *Id.*

107. *Id*. at 331 (citing CAL. PUB. RES. CODE § 21168.9(a)(2) (West 1993)).

108. *Ctr. for Biological Diversity II*, 226 Cal. Rptr. 3d 432 (2017). The same case was appealed on two different occasions. In 2015, *Center for Biological Diversity* was appealed all the way to the California Supreme Court. Ctr. for Biological Diversity v. Dep't of Fish & Wildlife (*Ctr. for Biological Diversity I*), 361 P.3d 342 (Cal. 2015).

109. The environmental groups that originally challenged the EIR include the Center for Biological Diversity, Friends of the Santa Clara River, Santa Clarita Organization for Planning the Environment, California Native Plant Society, and Wishtoyo Foundation/ Ventura Coastkeeper. *Ctr. for Biological Diversity I*, 361 P.3d at 346 n.2.

110. *Ctr. for Biological Diversity II*, 226 Cal. Rptr. 3d at 433.

111. *Ctr. for Biological Diversity I*, 361 P.3d at 346.

commercial business uses, schools, golf courses, parks and other community facilities."[112] The trial court found two aspects of the EIR to be inadequate: (1) the greenhouse gas emissions analysis and (2) the capture and relocation measures planned to be used to protect the unarmored threespine stickleback,[113] a protected fish species.[114] Therefore, the trial court directed the agency to decertify the portions of the EIR that addressed the significance of the project's greenhouse gas emissions and the stickleback mitigation measures, but left in place four approvals that did not rely on those aspects of the EIR.[115]

The second appellate district acknowledged that "an agency initially must certify an entire EIR,"[116] however, section 21168.9 provides a court "additional options once it has found an agency's EIR certification noncompliant."[117] Following *Preserve Wild Santee*, the court found that because an EIR certification is an agency determination, a court may void in part an agency determination if the voided parts are severable.[118] The court affirmed the fourth appellate district's statutory reading in *Preserve Wild Santee* that the "in part" language of section 21168.9(a)(1) allows voiding aspects of an EIR that are found severable under section 21168.9(b).[119] Additionally, the court supported the proposition of partial decertification on the grounds that the California Supreme Court on an earlier appeal "did not order the EIR decertified in its entirety even though it found portions of it noncompliant; instead, it ordered: 'The Court of Appeal shall further decide, or remand for the superior court to decide, the parameters of the

112. *Id.*

113. *See id.* An unarmored threespine stickleback is a small fish that is native to the North American west coast that has three spines on its dorsal fin. *Unarmored Threespine Stickleback,* AQUARIUM OF THE PACIFIC, https://www.aquariumofpacific.org/onlinelearningcenter/species/unarmored_threespine_stickleback [https://perma.cc/2WN7-5HFP].

114. *Ctr. for Biological Diversity I*, 361 P.3d at 345–46.

115. *Ctr. for Biological Diversity II*, 226 Cal. Rptr. 3d at 435.

116. *Id.* (citing CAL. CODE REGS. tit. 14, § 15004 (2018) ("Before granting any approval of a project subject to CEQA, every lead agency or responsible agency shall consider a final EIR.")).

117. *See Ctr. for Biological Diversity II*, 226 Cal. Rptr. 3d at 435 (citing CAL. PUB. RES. CODE § 21168.9(a) (West 1993)).

118. *Id.* at 436.

119. *Id.* at 436–37.

writ of mandate to be issued.'"[120] Therefore, a court has authority to partially decertify an EIR if the severability criteria are satisfied.[121]

The court distinguished *LandValue 77* as a case that "expressly addressed a situation where the trial court did not properly make severance findings under section 21168.9, subdivision (b)."[122] Here, based on the facts of the case, the trial court could properly sever the greenhouse gas analysis and stickleback mitigation measures from certain aspects of the project, allowing partial decertification to be an appropriate remedy.[123]

Thus, both the second and fourth appellate districts have found partial decertification to be a proper remedy when the other aspects of an EIR is CEQA compliant.[124]

C. Fifth District Doubles Down: Partial Decertification Not Allowed Under CEQA

Most recently, in 2020, the fifth appellate district decided *Sierra Club v. County of Fresno* involving a challenge[125] of the final EIR of a master planned community, Friant Ranch, consisting of "2,500 residential units, 250,000 square feet of commercial space, and 460 acres dedicated to open space."[126] The trial court found the EIR's discussion of air quality inadequate.[127] After its finding, the trial court filed a writ of mandate ordering the County of Fresno to "vacate or set aside its approval of the Friant Ranch project and not approve the project before preparing a revised EIR that provides an adequate discussion of health and safety problems that will be caused by the rise in the various pollutants resulting from the Project's development."[128]

The developer contended that the court should have partially decertified the EIR and kept certain project approvals in place.[129] Relying heavily on

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120. *Id.* at 437 (quoting *Ctr. for Biological Diversity I*, 361 P.3d 342, 364 (Cal. 2015)).

121. *Id.* at 437–38.

122. *Id.* at 436–37 (citing LandValue 77, LLC v. Bd. of Trs. of Cal. State Univ., 122 Cal. Rptr. 3d 37, 41 (Ct. App. 2011)).

123. *Id.* at 439–40.

124. *See* Pres. Wild Santee v. City of Santee, 148 Cal. Rptr. 3d 310, 331 (Ct. App. 2012); *Ctr. for Biological Diversity II*, 226 Cal. Rptr. 3d at 439.

125. Three nonprofit organizations challenged the project, including the Sierra Club, League of Women Voters of Fresno, and Revive the San Joaquin. Sierra Club v. Cnty. of Fresno, 271 Cal. Rptr. 3d 887, 889 (Ct. App. 2020).

126. *Id.*

127. *Id.* at 890.

128. *Id.* at 892 (citation omitted).

129. *Id.*

LandValue 77, the court found that CEQA's requirement for completeness of an EIR is not compatible with partial certification.[130] Importantly, the court relied on its precedent in *LandValue 77* and the statutory interpretations of the California Public Resources Code finding it an "oxymoron to conclude an agency can partially 'certify the completion of' an EIR."[131]

The court acknowledged that the second and fourth appellate districts have concluded that partial decertification is permissible but declined to follow those courts' judgments because neither case analyzed sections 21100, 21151 or Guidelines section 15090, which all deal with the completion of an EIR.[132]

Further, the court recognized that the second appellate district in *Center for Biological Diversity II* distinguished that case from *LandValue 77* by allowing partial decertification when severance findings could be made.[133] Because the court found the Friant Ranch EIR's inadequate discussion on air quality to be inseverable, the fifth appellate district concluded that "partial decertification is inappropriate in this case [and] does not contradict the holding in *Center of Biological Diversity* [*II*] because the circumstances of this case are distinguishable."[134] However, the fifth appellate district clearly dismisses the finding in *Preserve Wild Santee*, because that case did not limit the partial decertification analysis to the requirement of finding aspects of the EIR severable.[135] Further, even though the fifth appellate district does not slam the door shut on the possibility for partial decertification of an EIR, it is difficult to imagine the court allowing partial decertification even when portions are severable because of the court's insistence that the EIR is either complete or not complete.[136] Allowing a severance of part of the EIR would seem to conflict with the statutory interpretation the fifth district relies on when refusing to grant partial decertification.

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130. *Id.* at 889, 893–95.
131. *Id.* at 894.
132. *Id.* at 894–95; *see also* CAL. PUB. RES. CODE § 21100 (West 1994); *id.* § 21151; CAL. CODE REGS. tit. 14, § 15090 (2005).
133. *Sierra Club*, 271 Cal. Rptr. 3d at 894–95.
134. *Id.* at 895.
135. *See id.*
136. *See id.* at 889 ("We again reject the statutory interpretation that allows for partial certification because an EIR is either completed in compliance with CEQA or it is not so completed." (citing LandValue 77, LLC v. Bd. of Trs. of Cal. State Univ., 122 Cal. Rptr. 3d 37, 41–42 (Ct. App. 2011))).

Therefore, the fifth appellate district held that the trial court was correct not to partially decertify the EIR either on the "conclusion that (1) partial decertification of the completion of the EIR is not authorized by CEQA or (2) partial decertification of the completion of the EIR is authorized by CEQA only if severance findings allowed a portion of the project approvals to remain in place."[137]

IV. INTERPLAY BETWEEN THE DECISIONS

While there is a clear split between the courts of appeal regarding the issue of whether a court can partially decertify an EIR, the rationales behind each conclusion differ significantly. The fifth appellate district in both cases, *LandValue 77* and *Sierra Club*, relies on the interpretation of statutes and CEQA Guidelines to require a complete, final EIR.[138] Therefore, any inadequacy must be completely redressed in the new, final EIR. Thus, only a complete decertification is available to the court as a remedy.[139] On the other hand, the second and fourth appellate districts have interpreted the Public Resources Code section 21168.9 "in part" language to allow a court to partially decertify an EIR.[140] While the fifth appellate district reads *Preserve Wild Santee* to not require a finding of severability, such an interpretation is misguided as the fourth appellate district read section 21168.9 in its entirety, which includes a requirement of severability.[141] The second appellate district stated explicitly in its opinion that certain severable project approvals could be left in place until the EIR was deemed adequate.[142]

The interplay between the various cases demonstrates that both positions have defensible points relying on differing interpretations of the statutes dealing with EIRs under CEQA.[143] However, the different interpretations

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137. *Id.* at 895.

138. *LandValue 77, LLC*, 122 Cal. Rptr. 3d at 41 ("The wording of the [CEQA] guideline and statutes indicates that a final EIR should not be certified if it is not complete or in compliance with CEQA."); *Sierra Club*, 271 Cal. Rptr. 3d at 893 ("[W]hat public agencies are required to 'certify' to satisfy the statutes is 'the completion of' the EIR. The Guidelines explain this requirement by stating the agency must certify '[t]he final EIR has been *completed* in compliance with CEQA.'" (citation omitted)).

139. *See LandValue 77, LLC*, 122 Cal. Rptr. 3d at 42.

140. *See* Pres. Wild Santee v. City of Santee, 148 Cal. Rptr. 3d 310, 331 (Ct. App. 2012); *Ctr. for Biological Diversity II*, 226 Cal. Rptr. 3d 432, 437–38 (Ct. App. 2017).

141. *See Pres. Wild Santee*, 148 Cal. Rptr. 3d at 331.

142. *See Ctr. for Biological Diversity II*, 226 Cal. Rptr. 3d at 437–38.

143. Sixteen states and the District of Columbia have laws similar to either NEPA or CEQA. Kavan Peterson, *Few States Self-Police with Environmental Impact Laws*, PEW (Dec. 3, 2003), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2003/

and precedents in each district have created varied remedies available as challenges to a proposed project's EIR based on the location of the project.

The fifth appellate district's interpretation is likely incorrect and does not provide for a limited remedy for which the legislature intended.[144] The court's interpretation of CEQA's statutes and guidelines requiring the certification of a completed EIR is an all or nothing approach.[145] The court fails to textually read section 21168.9 as it ignores the "in part" language of the statute.[146] Further, the court consistently defends its position on other statutes that govern the agency, not remedies available to the courts.[147] Yet, the interpretation creates an additional issue in regard to who decides when an EIR is complete and whether a challenge to an EIR that leads to any correction deems the prior EIR as incomplete when the agency makes its determination.

First, the fifth appellate district has taken a black and white approach to determining if an EIR is "complete."[148] When the lead agency makes decisions on a proposed project, they evaluate what they deem as a complete, final EIR.[149] Although the court may later determine that there was an error in the analysis, at the time of approval the EIR was deemed final and complete by the agency.[150] Under CEQA, when examining the environmental consequences, absolute perfection is not required, but rather agencies need to "make an objective, good-faith effort to comply."[151] The fifth appellate district's holding

12/03/few-states-selfpolice-with-environmental-impact-laws [https://perma.cc/5JCC-DRGW]. As of October 2022, no other state has dealt with this exact issue of partial decertification.

144. *See* San Bernardino Valley Audubon Soc'y v. Metro. Water Dist., 109 Cal. Rptr. 2d 108, 113–14 (Ct. App. 2001) (finding legislative intent of amendments to section 21168.9 "expanded the trial court's authority" and "permits some part of the project to go forward while an agency seeks to remedy its CEQA violation").

145. *See* LandValue 77, LLC v. Bd. of Trs. of Cal. State Univ., 122 Cal. Rptr. 3d 37, 41–42 (Ct. App. 2011); Sierra Club v. Cnty. of Fresno, 271 Cal. Rptr. 3d 887, 889 (Ct. App. 2020).

146. *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167–69 (2012) (discussing how statutory interpretation should begin and end with the full text of the statute); Clint Bolick, *The Case for Legal Textualism*, HOOVER INST. (Feb. 27, 2018), https://www.hoover.org/research/case-legal-textualism [https://perma.cc/7LRD-AE8E].

147. *See Sierra Club*, 271 Cal. Rptr. 3d at 893–94.

148. *Id.* at 889, 893.

149. *See* CAL. CODE REGS. tit. 14, § 15090(a) (2005).

150. *See id.* (stating lead agency shall certify final EIR).

151. *See* Residents Ad Hoc Stadium Comm. v. Bd. of Trs. of the Cal. State Univ. & Colls., 152 Cal. Rptr. 585, 593 (Ct. App. 1979).

fails to acknowledge that CEQA is meant to provide information and transparency to decision makers and the public, and limited remedies such as partial decertification adequately meets these goals.[152] A complete decertification is a more extreme remedy than necessary to meet CEQA's purpose.[153]

The review of an EIR by the court is to determine if the agency's "failure to comply with the law subverts the purposes of CEQA [when] it omits material necessary to inform[] decisionmaking and inform[] public participation."[154] If the EIR is inadequate, the court should provide a limited remedy, recognizing the discretion for which the agency operates. A complete decertification could be seen as judicial policy making because the proposed project now must overcome significant political hurdles again as opposed to the issuance of a partial decertification.[155] EIRs are typically prepared by specialists who are experts in the various areas an EIR must cover.[156] For a court to decide that the EIR is inadequate and issue a complete decertification after the document was prepared by experts and reviewed by the agency and the public, it could be seen as unwarranted judicial discretion and an erosion of an agency's traditional land use authority.[157] The lead agency's discretion to balance the project compared

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152. *See* Michelle Ouellette & Ali Tehrani, *"The Lord's Work": An Overview of CEQA's Judicial Remedies and Recommendations for Reform*, 25 HASTINGS ENV'T L.J. 85, 88–90 (2019) (citing CAL. CODE REGS. tit. 14, § 15002(a) (1970)).

153. *See CEQA Remedies Clarified*, MANATT (Nov. 2, 2012), https://www.manatt.com/insights/newsletters/real-estate-and-land-use/ceqa-remedies-clarified [https://perma.cc/5E5A-GHVE] ("[P]rovisions of Public Resources Code section 21168.9, enacted in 1993 during a real estate downturn, were clearly a legislative response to assertions that CEQA was being applied too broadly and unnecessarily impacting the development industry. This section was intended to allow courts flexibility in fashioning the remedy (i.e., does the judge put the project on ice and require an entire 'redo' or impose some lesser requirement and possibly allow part of the project to continue forward).").

154. Sierra Club v. Cnty. of Fresno, 431 P.3d 1151, 1161 (Cal. 2018).

155. *See generally* JEROME FRANK, LAW AND THE MODERN MIND (1936) (asserting that judges base decisions on submerged psychological factors); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997) (stating judges' decisions reflect class biases); GLENDON SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946–1963 (1965) (stating that judicial decision making reflects judges' ideologies); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) (stating that judicial decision making reflects judges' attitudes).

156. *See* Larry Barnett, *The Pseudo-Science of CEQA and an EIR*, SONOMA VALLEY SUN (Nov. 30, 2016), https://sonomasun.com/2016/11/30/the-pseudo-science-of-ceqa-and-an-eir/ [https://perma.cc/K6PR-NPP5]. The EIR is prepared by specialists who "have expertise in the environmental regulations that must be satisfied and ways to satisfy them." *Id.*

157. *See* Robert H. Freilich & Zachary Price, *Has California's Tri-Partite Statutory Structure Aimed at the Reduction of Greenhouse Gas Emissions and Global Warming,*

to the impacts should be challengeable to ensure that the documents relied on are adequate,[158] however, an insufficiency of the EIR should have a limited remedy.[159]

Further, the foreclosure by the fifth appellate district to allow for a partial decertification requires the entire EIR to go back through the process starting again at the draft EIR stage.[160] Thus, the agency has to go through the process again providing individuals additional opportunities to comment and fight a project during the decision-making process.[161]

Additionally, the court's decision relies on the guidelines set forth by the Office of Planning and Research[162] for a complete EIR.[163] However, the guidelines, as their name suggests should be seen as "[a] general rule, principle, or piece of advice."[164] If the fifth appellate district were to read the guidelines as advice made by the Office of Planning and Research as to how best to comply with CEQA, the court would have more flexibility as to whether it could partially decertify an EIR under CEQA rather than

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158. *See* KOSTKA & ZISCHKE, *supra* note 54.

159. *See* CAL. PUB. RES. CODE § 21168.9(b) (West 1993). The statute provides:

> However, the order shall be limited to that portion of a determination, finding, or decision or the specific project activity or activities found to be in noncompliance only if a court finds that (1) the portion or specific project activity or activities are severable, (2) severance will not prejudice complete and full compliance with this division, and (3) the court has not found the remainder of the project to be in noncompliance with this division.

Id.

160. *See generally CEQA Flowchart*, CAL. ASS'N OF ENV'T PROS., https://www.califaep.org/ceqa_flowchart.php [https://perma.cc/9UDE-GKMH] (illustrating CEQA process with a flow chart).

161. *See* CAL. CODE REGS. tit. 14, § 15088 (2018); *How to Effectively Participate in the Environmental Review Process*, CBCEARTHLAW, http://www.cbcearthlaw.com/uploads/1/1/8/8/11883175/adm_receffectively_participate_in_envt_review_final_on_letterhead-a.pdf [https://perma.cc/J8J6-XKHN].

162. *See* Sierra Club v. Cnty. of Fresno, 271 Cal. Rptr. 3d 887, 893 (Ct. App. 2020). The California Governor's Office of Planning and Research "studies future research and planning needs, fosters goal-driven collaboration, and delivers guidance to state partners and local communities, with a focus on land use and community development, climate risk and resilience, and high road economic development." *About the Office of Planning and Research*, GOVERNOR'S OFF. OF PLAN. & RSCH., https://opr.ca.gov/about/ [https://perma.cc/FS9U-ZEPY].

163. CAL. CODE REGS. tit. 14, § 15000 (2005).

164. *Guideline*, LEXICO.COM, https://www.lexico.com/en/definition/guideline?locale=en [https://perma.cc/93XQ-UCNS].

the rigid requirements it imposes on itself.[165] Finally, the guidelines should be seen as just that—guidance as to how to comply with CEQA but not necessarily the only possibility—because they do not specify exactly what an EIR must contain or set standards for how an EIR should be made to analyze any environmental impacts.[166]

V. WHY SHOULD IT MATTER IF A PROPOSED PROJECT IS PARTIALLY OR COMPLETELY DECERTIFIED?

The logical question that one might ask is, so what? Whether a proposed project's EIR is partially or completely decertified does not change the fact that development likely cannot begin until the EIR is compliant with CEQA.[167] Under section 21168.9(a)(2) the court can mandate the suspension of any or all of the project activities until the agency complies with CEQA.[168]

Yet, if project approvals are overturned or voided, the decertification of the entire EIR can have devastating impacts on a proposed project. For example, many smaller development projects may struggle to financially support a project because for approximately two and a half years while the project is undergoing an EIR challenge, the land is idle, and the developer's investment is not generating any revenue.[169] Thus, while the land is not developed, the substantial investment to purchase the land for a small developer is a financial liability and any delays can jeopardize the

165. *See* Ouellette & Tehrani, *supra* note 152, at 97–98.

166. *See generally* ASS'N OF ENV'T PROS., 2021 CEQA: CALIFORNIA ENVIRONMENTAL QUALITY ACT STATUTES & GUIDELINES (2021). Almost 450 pages in length, the CEQA guidelines set parameters for how environmental review must be conducted. *Id.*

167. *See* Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal., 764 P.2d 278, 284 (Cal. 1998); No Oil, Inc. v. City of Los Angeles, 529 P.2d 66, 75 (Cal. 1974); Village Laguna of Laguna Beach, Inc. v. Bd. of Supervisors, 185 Cal. Rptr. 41, 43 (Ct. App. 1982). However, if part of a project's approvals is severable, a project in theory could proceed as to the compliant part unless enjoined. Yet, the severable aspect of the project will still have to be in compliance with CEQA. *See Ctr. for Biological Diversity II*, 226 Cal. Rptr. 3d 432, 437–38 (Ct. App. 2017).

168. CAL. PUB. RES. CODE § 21168.9(a)(2) (West 1993) ("If the court finds that a specific project activity or activities will prejudice the consideration or implementation of particular mitigation measures or alternatives to the project, a mandate that the public agency and any real parties in interest suspended any or all specific project activity or activities, pursuant to the determination, finding, or decision, that could result in an adverse change or alteration to the physical environment, until the public agency has taken any actions that may be necessary to bring the determination, finding, or decision into compliance with this division.").

169. *See supra* notes 15–18 and accompanying text.

entire project.[170] Complete decertification of the EIR and voiding project approvals can upend a small developer's project because the time to cure the EIR will be substantial.[171] Further, lending institutions will be more hesitant to lend to projects who now have a court mandate associated with their project and a completely decertified EIR rather than a project with some approvals still intact.[172] Similarly, a complete decertification can result in delay impacts for affordable housing projects and could make such a project infeasible due to rising construction costs, carrying costs, and the loss of available financing.[173] Larger developers may have more extensive funding sources and be better able to continue funding a project when a delay occurs but expected profits would be diminished and risks would be elevated.[174]

The court in *Sierra Club* failed to recognize the significant effect a complete decertification of a project EIR can have on a project because it believed approvals would be protected by legal doctrines such as "res judicata, collateral estoppel and the requirement for the exhaustion of administrative remedies."[175] While the court is correct that agencies and developers can use these legal doctrines in theory to protect approvals from further litigation, such a ruling fails to alleviate the constant cycle of

170. *See* THE WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT 14 (2016) ("These processes predispose development decisions to become centers of controversy, and can add significant costs to the overall development budget due to the delay and uncertainty they engender.").

171. *See supra* notes 160–61 and accompanying text.

172. *See* Ha Chung, Note, *Moving CEQA Away from Judicial Enforcement: Proposal for a Dedicated CEQA Agency to Address Exclusionary Use of CEQA*, 93 S. CAL. L. REV. 307, 318–19 (2020).

173. *See* THE WHITE HOUSE, *supra* note 170.

174. *See* Chung, *supra* note 172, at 315 ("The lack of uniform standards for subject areas, such as GHG emissions, leads to unpredictability, especially as local governments attempt assorted methodologies to find a particular solution that may withstand judicial review. Concurrently, developers risk having their project approvals stalled or invalidated despite having invested substantial resources to comply with CEQA.").

175. Sierra Club v. Cnty. of Fresno, 271 Cal. Rptr. 3d 887, 895 (Ct. App. 2020) (citing Ione Valley Land, Air, & Water Def. All., LLC v. Cnty. Of Amador, 244 Cal. Rptr. 3d 791, 796 (Ct. App. 2019)) (rejecting argument that a full decertification of an EIR as opposed to a partial decertification allowed for new challenges "because whether the EIR has been decertified does not alter the fact that the sufficiency of a component of the EIR has been litigated and resolved" (quoting Ione Valley Land, Air, & Water Def. All., 244 Cal. Rptr. at 796)).

litigation.[176] In order for an agency or developer to protect certain project approvals from future challenges, the agency has to employ lawyers to petition the court to apply legal doctrines such as res judicata.[177] Therefore, continued litigation over a project's approvals would further increase the cost of the development project, which would get passed along to the eventual tenants of the project.[178] Additionally, lawyers prefer not to have a development project's future hinge on reliance of res judicata or collateral estoppel and would prefer a judicial writ that clearly lays out the necessary items for the project to comply with CEQA while keeping in place those approvals already endorsed.[179] A judicial writ is also advantageous to the challenger as it allows the challenging party to ensure the project meets the requirements laid out by the court to comply with CEQA.[180] Any variances from the judicial writ can then be brought to the court's attention.

Further, although a developer may theoretically be protected by the aforementioned legal doctrines, it is not inconceivable that a court could find a reason to allow a challenge of aspects of the EIR that would ordinarily be protected. The fifth appellate district's strict requirement of a "complete," final EIR might open the door to further litigation because the court's past judgments or environmental challenges to the EIR could be seen to extend to an incomplete EIR.[181] Thus, no aspects of an incomplete EIR would be protected because by its very nature it is incomplete.[182] Although there are no cases that have allowed such a challenge on this issue, it creates additional uncertainty. Similarly, renewed challenges of an EIR may be warranted under the fifth appellate district's rigid requirement because the new EIR is different from the previously litigated version.

In addition, if a court has the ability to partially decertify an EIR, using such a remedy could provide a clear roadmap to developers as to what parts of the EIR need to be corrected while not greatly increasing the costs

176. *See* Chung, *supra* note 172, at 309.

177. *Res Judicata*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been—but was not—raised in the first suit.").

178. *See* THE WHITE HOUSE, *supra* note 170, at 5–6.

179. Generally, in land use cases, a challenger is attempting to stop a project and the remedial focus of injunctions and restraining orders are not rule-based, but standard-based. Thus, the standard-based analysis that courts use is flexible and leads to uncertainty for the parties involved.

180. *See* Coon, *supra* note 61.

181. *See id.*

182. *See* Sierra Club v. Cnty. of Fresno, 271 Cal. Rptr. 3d 887, 894–95 (Ct. App. 2020).

and time already spent by the developer.[183] Allowing only a complete decertification of an EIR could inadvertently impact the development community by incentivizing challengers to stall and force developers back to the table to renegotiate or rehash approvals that they already acquired.[184]

The court's strict view that a full decertification is the appropriate remedy is a missed opportunity by the court to provide a clear map for the agency and developer as to what needs to be fixed in order to comply with CEQA. CEQA itself was never envisioned to be a bar on development, but if any deficiencies in an EIR can set aside all the approvals gained up to that point, then it effectively has become one.[185]

VI. RESOLVING THE SPLIT: SOLUTIONS TO AUTHORIZING PARTIAL DECERTIFICATION UNDER CEQA

Whenever there is a split within districts of a court, there are often legislative and judicial solutions to resolving the difference. In this particular case, the partial decertification versus complete decertification issue also highlights some broader concerns with CEQA and the continued litigation over development project EIRs. Thus, the available solutions below not only resolve the current split in California courts, but also attempt to address some of the underlying issues of CEQA that become relevant if partial decertification is recognized as a remedy.

A. Standardizing Environmental Impact Analysis

Standardizing how potential environmental impacts are measured within an EIR is necessary if partial decertification becomes a more common remedy. For example, a court reviewing an EIR may be more willing to partially decertify an EIR than they previously had been because they believe the EIR could better analyze a certain impact. Thus, if courts apply partial decertification more liberally than accepting the EIR outright, there would be little actual benefit to such a remedy. Instead, the litigation of development projects would continue, leading to potentially more challenges and additional

183. *See Why Does It Cost So Much to Build in California? And Why It Still Matters in the Current Crisis.*, UC BERKELEY TERNER CTR. FOR HOUSING INNOVATION (Mar. 30, 2020), https://ternercenter.berkeley.edu/blog/why-does-it-cost-so-much-to-build-housing-california/ [https://perma.cc/N343-4TS4].
184. *See* Gray, *supra* note 2.
185. *See id.*

judicial review, which only further increases the costs and delays of development.[186]

EIRs are unique to each project because they must take into account specific air, land, and water issues applicable for a tract of land.[187] Additionally, each EIR can differ by the methodology by which it measures aspects of environmental impact that development will have on a community.[188] The failure to have a consistent standard to measure greenhouse gas emissions or vehicle miles traveled[189] can create varied opinions as to whether an EIR adequately covers a potential impact.[190] It is up to the local agency to apply the rules promulgated by the California Natural Resources Agency, which creates a lack of uniformity.[191] Different interpretations of the requirements under CEQA have led to the disagreement between parties on the adequacy of an EIR and leaves a reviewing court in a difficult situation to examine an EIR, which may not be the court's strength.[192]

For example, the standards for what needs to be analyzed in an EIR are vague and leave it to the party drafting the EIR to determine what information and analysis is included. In *East Sacramento Partnerships for a Livable City v. City of Sacramento*, the neighborhood group challenged the EIR of a project for failing to analyze significant health risks posed to future residents due to the proximity to freeways and a landfill.[193] The court

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186. *See, e.g.*, CAL. PUB. RES. CODE § 21003(f) (West 1993) ("[I]t 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.").

187. *See* Chung, *supra* note 172, at 311.

188. *See id.*

189. *See Measuring Transportation Impacts Using Vehicle Miles Traveled (VMT)*, DUDEK (July 24, 2019), https://dudek.com/measuring-transportation-impacts-using-vehicle-miles-traveled/ [https://perma.cc/79KB-Y7HX] ("For Land use projects, VMT must be analyzed per capita, per employee, and on a net basis"). However, the agency has more discretion for transportation projects:

> There are a number of methodology options available for calculating and estimating VMT, including travel demand models (trips or tour based models), sketch models (CalEEMod, Sketch 7, UrbanFootprint, MXD etc.), and spreadsheet models (VMT calculator or estimator); research into regional or local transportation plans and policies; and data (travel surveys such as California Household Travel Survey).

Id. These different models can create different estimated VMTs for a transportation project and alter the analysis of an EIR.

190. CAL. CODE REGS. tit. 14, § 15130 (2010).

191. *See* Chung, *supra* note 172, at 334.

192. *See id.* at 333–34.

193. E. Sacramento P'ships for a Livable City v. City of Sacramento, 209 Cal. Rptr. 3d 774, 786–87 (Ct. App. 2016).

correctly determined that CEQA required analysis of the development of the project on the existing environmental hazards.[194] However, the case demonstrates that without clear standards for what must be analyzed in an EIR, challenges can occur that require litigation and a decision by the court to determine whether such an issue deserves analysis in the project EIR.[195] In 2015, the California Supreme Court clarified whether an EIR under CEQA had to analyze existing effects of the environment on future residents when it held that,

> agencies subject to CEQA generally are not required to analyze the impact of existing environmental conditions on a project's future users or residents. But when a proposed project risks exacerbating those environmental hazards or conditions that already exist, an agency must analyze the potential impact of such hazards on future residents or users. In those specific instances, it is the *project's* impact on the environment—and not the *environment's* impact on the project—that compels an evaluation of how future residents or users could be affected by exacerbated conditions.[196]

Additionally, in *Center for Biological Diversity I*,[197] the EIR was challenged as to the methodology the agency used to measure significant impacts of greenhouse gas emissions based on a hypothetical business-as-usual scenario[198] as compared to existing baseline greenhouse gas emissions for the project site.[199] While evaluating the challenge to the EIR, the court determined that "the EIR employs its calculation of project reductions from business-as-usual emissions in an attempt to show the project incorporates efficiency and conservation measures sufficient to make it consistent with achievement of A.B. 32's reduction goal."[200] Still, the court found the project EIR inadequate because it lacked substantial evidence of its finding that no significant impact would occur in regards to greenhouse gas emissions.[201]

194. *Id.* at 787.
195. *See generally E. Sacramento P'ships for a Livable City*, 209 Cal. Rptr. 3d 774.
196. Cal. Bldg. Indus. Ass'n v. Bay Area Air Quality Mgmt. Dist., 362 P.3d 792, 794 (Cal. 2015).
197. *Ctr. for Biological Diversity I*, 361 P.3d 342 (Cal. 2015).
198. The business-as-usual scenario was the forecast by the California Air Resource Board assuming no conservation or regulatory efforts were made to reduce greenhouse gas emissions at the time of the forecast. *Id.* at 348.
199. *Id.* at 349.
200. *Id.* at 353.
201. *Id.* at 354.

Interestingly, the California Natural Resources Agency[202] submitted an amicus curiae brief in support of finding the EIR adequate, stating:

> While we urge the Court to reject the use of a "business as usual" scenario to evaluate the significance of an individual proposed project's greenhouse gas emissions looking forward, we similarly urge the Court to uphold the Department's greenhouse gas analysis as properly within its discretion and lawful at the time.[203]

This example demonstrates that the lack of clear and precise requirements in regard to what an EIR must evaluate creates uncertainty as to its adequacy. The decision also "poses significant hurdles for project proponents going forward with new, heightened requirements for EIR analysis of environmental and health impacts and a more scrutinizing, independent legal standard of review for challenges to the adequacy of an EIR."[204]

In both *Sacramento Partnerships for a Livable City* and *Center for Biological Diversity I*, litigation was required to determine whether the EIR was adequate.[205] However, if partial decertification was available and EIRs lack standardized measurements for certain environmental impacts, courts may be tempted to overuse partial decertification to have an EIR reanalyze an impact with different methodologies.[206] Therefore, the discretionary guidelines[207] of an EIR create additional vulnerabilities to an EIR that partial decertification may not protect against.

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202. The California Natural Resources Agency is the leading steward of California's natural environment. *Who We Are*, CAL. NAT. RES. AGENCY, https://resources.ca.gov/About-Us/Who-We-Are [https://perma.cc/M8UT-SY97]. The agency's mission is "to restore, protect and manage the state's natural, historical and cultural resources for current and future generations using creative approaches and solutions based on science, collaboration, and respect for all the communities and interests involved." *Id.*

203. Amicus Curiae Brief of the Governor's Office of Planning and Research and the California Natural Resources Agency at 16–17, *Ctr. for Biological Diversity I*, 361 P.3d 342 (Cal. 2015) (No. S217763).

204. Kathryn L. Oehlschlager & Benjamin C. Lee, *California Supreme Court Requires De Novo Review for EIR Adequacy Challenges and Imposes Heightened EIR Requirements Connecting Environmental Impacts with Specific Health Consequences*, CEQA CHRONS. (Dec. 31, 2018), https://www.ceqachronicles.com/2018/12/california-supreme-court-requires-de-novo-review-for-eir-adequacy-challenges-and-imposes-heightened-eir-requirements-connecting-environmental-impacts-with-specific-health-consequences/ [https://perma.cc/43C4-V5UN].

205. *See* E. Sacramento P'ships for a Livable City v. City of Sacramento, 209 Cal. Rptr. 3d 774 (Ct. App. 2016); *Ctr. for Biological Diversity I*, 361 P.3d 342.

206. *See generally* Chung, *supra* note 172.

207. CAL. CODE REGS. tit. 14, § 15123 (2005).

B. Limiting Acceptable Challenges of an EIR

CEQA's design to include a litigation enforcement mechanism also creates instances where EIRs are challenged on grounds outside the scope of CEQA. For example, in *Preserve Poway v. City of Poway*, project opponents[208] argued that an EIR was needed due to the significant impact on Poway's horse-friendly community character.[209] The court correctly found that community character was not part of the environment under CEQA, but the issue required litigation for the court to decide whether such a characteristic must be included in the analysis.[210] If challenges were found statutorily unwarranted under CEQA, a reviewing court will not be tempted or allowed to partially decertify an EIR to authorize additional analysis.

1. Remedies if CEQA Challenge Is Unwarranted

a. Anti-SLAPP Motion

A benefit to limiting the acceptable challenges to an EIR is it reduces the likelihood that an EIR is litigated due to nonenvironmental factors such as the "horse-friendly 'community character'" of current land.[211] By expressly limiting certain challenges, it also provides courts and defendants its own litigation mechanism: an anti-SLAPP (Strategic Lawsuit Against Public Participation) motion.[212]

Recently, the fourth district concluded that a malicious prosecution action against losing CEQA plaintiffs could survive an anti-SLAPP motion.[213]

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208. The group, Preserve Poway, was created by individuals that opposed this very project. Pres. Poway v. City of Poway, 199 Cal. Rptr. 3d 600, 603 (Ct. App. 2016).

209. *See id.* at 602–03.

210. *Id.* at 610.

211. *See id.* at 603.

212. CAL. CIV. PROC. CODE § 425.16 (West 2023).

213. *See* Arthur F. Coon, *Is More Litigation the Remedy for Meritless CEQA Litigation? Fourth District Concludes Malicious Prosecution Action Against Losing CEQA Plaintiffs Survives Anti-SLAPP Motion*, MILLER STARR REGALIA (May 17, 2021), https://www.ceqadevelopments.com/2021/05/17/is-more-litigation-the-remedy-for-meritless-ceqa-litigation-fourth-district-concludes-malicious-prosecution-action-against-losing-ceqa-plaintiffs-survives-anti-slapp-motion/ [https://perma.cc/93W2-DFZG]. An anti-SLAPP motion seeks to protect defendants from meritless lawsuits and "has two steps: (1) the defendant must show the challenged allegations or claims arise from protected activity, and if so (2) the plaintiff must show its claims have at least 'minimal merit' in order for them to proceed." *Id.*

In *Clews Land and Livestock, LLC v. City of San Diego*, the court found that the plaintiff's argument for the preparation of an EIR on the basis of noise impacts by the school on the existing horse ranch were insignificant in the context of the environment as a whole.[214] Litigation ensued as to an anti-SLAPP motion against the party that challenged the project under CEQA and the fourth district concluded that the party lacked probable cause for pursuing the challenge due to noise impacts of the EIR.[215] By either having the legislature or agency list what challenges are unsubstantiated, anti-SLAPP motions could reduce inappropriate challenges to projects under CEQA. The change would also disincentivize "a 'shotgun' attack asserting numerous theories of CEQA noncompliance . . . [as one] may be held liable for maliciously prosecuting untenable *theories* of CEQA noncompliance."[216] Thus, an anti-SLAPP motion could in theory be a potential remedy for maliciously prosecuted CEQA cases and prevent abuses by challengers.[217]

C. Codifying the Second and Fourth District's Remedy of Partial Decertification[218]

The specific inclusion of the "in part" language by the legislature in section 21168.9 likely indicates the legislature intended to allow the remedy of a partial decertification of an EIR.[219] Thus, the legislature should further clarify the law by amending the current statute to be more explicit in the remedies available to the court reviewing an EIR under CEQA, effectively codifying the second and fourth appellate districts' interpretation of section 21168.9.

For example, the legislature could add subsection (4) to section 21168.9(a), stating "[t]he court is to read section (1) to allow partial decertification of a determination, finding, or decision and the court must apply the least restrictive remedy available under this section." Such an amendment to the current statute would explicitly allow partial decertification while also requiring a reviewing court to choose partial decertification over a complete decertification as long as it is consistent with CEQA generally.

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214. Clews Land & Livestock, LLC v. City of San Diego, 227 Cal. Rptr. 3d 413, 440 (Ct. App. 2017).

215. *See* Dunning v. Johnson, 278 Cal. Rptr. 3d 607, 622 (Ct. App. 2021).

216. Coon, *supra* note 213.

217. *Id.*

218. CEQA reform at the legislative level has been very difficult, and concerns about CEQA have been discussed for decades. *See* ELISA BARBOUR & MICHAEL TEITZ, CEQA REFORM: ISSUES AND OPTIONS 27–34 (2005), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.366.8463&rep=rep1&type=pdf [https://perma.cc/RVN9-JEQS].

219. *See* CAL. PUB. RES. CODE § 91168.9 (West 1993).

Another option would be to amend section 21168.9(a)(1)[220] to read: "A mandate that the determination, finding, or decision be voided by the public agency, in whole or in part, while choosing the least restrictive remedy consistent with this section." Again, such an amendment would codify the second and fourth appellate district's interpretation of the statute allowing for partial decertification as a remedy.

In either amendment, it would be paramount for the legislature to include the purpose of the amendment in the legislative history and clarify that the amendment is intended to codify the remedy of partial decertification.[221]

1. Recent Reliance on Temporary Legislative Fixes

In 2019, Governor Gavin Newsom signed Assembly Bill (AB) 1197 that exempted from the requirements of CEQA certain supportive housing and emergency shelters approved or carried out by the City of Los Angeles.[222] According to the author,[223] one reason for the bill was to protect "actions such as funding and planning decisions taken by the local agency to fund [supportive housing and emergency shelters from] . . . being challenged under CEQA and thus delaying the project."[224] The state legislature realized that residents were using CEQA to prevent homeless shelters from being built in their community claiming impacts of noise, litter, discharge of sewage, and public safety.[225] Instead of allowing this specific exemption, which expires in 2025, the legislature should have fixed the underlying issues with CEQA and prevented unfounded EIR challenges. For instance, the

220. Section 21168.9(a)(1) currently reads: "A mandate that the determination, finding, or decision be voided by the public agency, in whole or in part." *Id.*

221. *See* Chris M. Micheli, *California Courts and the Use of Legislative Intent Materials*, NAT'L L. REV. (Jan. 16, 2019), https://www.natlawreview.com/article/california-courts-and-use-legislative-intent-materials [https://perma.cc/N4XT-5QW9]. It is common practice for courts to review certain legislative materials to determine the legislative intent when there are disputes about statutory language. *Id.*

222. A.B. 1197, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

223. The author of AB 1197 is assembly member Miguel Santiago representing District 53, Los Angeles. *See id.*

224. OFF. OF S. FLOOR ANALYSIS, THIRD READING (SEPT. 9, 2019), A.B. 1197, 2019–2020 Leg., Reg. Sess., at 6 (Cal. 2019).

225. Jenna Chandler, *Governor Signs Law to Fast-Track LA Homeless Shelters, Affordable Housing Developments*, CURBED L.A. (Oct. 1, 2019, 2:43 PM), https://la.curbed.com/2019/10/1/20887172/assembly-bill-1197-homeless-shelters-hhh-ceqa [https://perma.cc/YS2V-HNM8].

legislature could pass a law limiting challenges to a project EIR to specific environmental concerns such as loss of habitat and protection of water resources, or it could amend the CEQA guidelines specifically disallowing challenges such as litter and public safety that have little nexus with environmental protection. The problems that homeless shelters face based on challenges to their project such as financing issues and uncertainty due to litigation are the exact same issues faced by developers trying to build new homes, apartments, and businesses in California communities.[226] The uncertainty that is created by challenges of an EIR under CEQA effectively stalls any type of project.

a. California Berkeley Case

More recently, the California legislature had to fast track a bill to prevent the University of California, Berkeley from cutting enrollments for the upcoming school year.[227] In 2015, UC Berkeley had prepared an EIR for its campus Long Range Development Plan, but the University over the years enrolled significantly more students than the EIR had anticipated.[228] The court then ordered UC Berkeley to freeze campus enrollment at the 2020–21 level due to the university's impact on nearby neighborhoods.[229] The California Supreme Court denied UC Berkeley's request to stay enforcement of the trial court order capping enrollment; however, Justice Liu issued a dissenting statement making it clear that he "would not be surprised if this stark consequence prompts political actors to rethink the balance that CEQA currently strikes between the interests of parties like SBN [Save Berkeley's Neighborhoods] and UC Berkeley."[230] While Justice Liu believed that CEQA need not devolve into a zero-sum

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226. *See id.*

227. Evan Symon, *Gov. Newsom Signs Bill Overriding Supreme Court Decision to Halt Enrollment at UC Berkeley*, CAL. GLOBE (Mar. 15, 2022, 12:44 PM), https://californiaglobe.com/governor/gov-newsom-signs-bill-overriding-supreme-court-decision-to-halt-enrollment-at-uc-berkeley/ [https://perma.cc/CEU2-H7Y3].

228. *First District Court of Appeal Finds University of California's Decision to Increase Enrollment Is Not Exempt from CEQA Review*, THOMAS L. GRP. (Oct. 29, 2020), https://www.thomaslaw.com/blog/first-district-court-of-appeal-finds-university-of-californias-decision-to-increase-enrollment-is-not-exempt-from-ceqa-review/ [https://perma.cc/9RKU-UQ8V].

229. *Judge Orders UC Berkeley to Freeze Enrollment Over Impact on Neighborhoods*, NBC BAY AREA (Aug. 25, 2021, 4:47 AM), https://www.nbcbayarea.com/news/local/judge-orders-uc-berkeley-to-freeze-enrollment-over-impact-on-neighborhoods/2640159/ [https://perma.cc/EHQ4-B8LH].

230. Save Berkeley's Neighborhoods v. Regents of the Univ. of Cal., No. S273160, 2022 Cal. LEXIS 1724, at *14 (Cal. Mar. 3, 2022).

game,[231] the legislature quickly passed Senate Bill 118 intended to "focus campus environmental review on campus populations, and allows campuses to respond to a court ruling involving exceeded enrollment projections before enrollment cuts are enacted."[232] The highly publicized UC Berkeley CEQA issue could be the catalyst for codification of partial decertification because the legislature seems to prefer flexible solutions rather than rigid requirements.

2. The Insufficiency of Other Legislative Remedies

Others have proposed the creation of a state-level or regional CEQA agency comprised of experts that would certify EIRs prepared by the agency for big or controversial projects.[233] The proposed CEQA agency would adjudicate CEQA disputes for which it did not review and certify the project EIR.[234] Proponents of the proposal argue that one of the potential benefits of the scheme would be that "a dedicated CEQA agency should be able to avoid the extreme remedy of vacating entire CEQA documents and, instead, give suggestions and mandates to bring CEQA documents into compliance."[235]

While on the surface, a CEQA agency may be enticing to allow for more consistent application and review of CEQA to EIRs and projects, the creation of an agency might not create the necessary clear guidelines for what must be reviewed in an EIR and what challenges are acceptable. The agency would face the same issues that judges and the development community face in trying to understand the guidelines and apply them to a certain project. Further, such an agency would eliminate local municipalities' traditional land use authority because the CEQA agency would have significant power when certifying a project's EIR and the agency's own politics might not align with the municipalities it oversees.[236] Additionally, if the local municipalities were to lose local land use authority, it would seem

231. *Id.* at *15.
232. S.B. 118, 2021–2022 Leg., Reg. Sess. (Cal. 2022).
233. *See* Chung, *supra* note 172, at 334–35.
234. *See id.* at 337.
235. *Id.* at 338.
236. For example, it is not inconceivable to believe that a CEQA agency would be comprised of environmental advocates who may disagree with a city's desire to develop certain land and make complying with CEQA more difficult due to their environmental interests.

that the CEQA agency's decision would be insulated from the constituents for which local leaders are responsive.[237]

D. California Supreme Court: How the Court Should Interpret the Statute

The easiest resolution to the current split between the fifth appellate district and the second and fourth appellate districts would be a ruling by the California Supreme Court clearly allowing partial decertification.[238] To ensure that the California Supreme Court's decision is not misinterpreted or read narrowly by lower courts that partial decertification is only available in that one case based on those facts, the California Supreme Court should choose to review a case from the fifth appellate district in which partial decertification was denied and answer the singular question regarding partial decertification. For instance, if the California Supreme Court were to review a second appellate district decision allowing partial decertification and upheld the court's remedy, the fifth appellate district could still attempt to differentiate their cases based on the specific set of facts present.[239]

When reviewing such a case, the California Supreme Court should read the "in part" and "order shall be limited" language of section 21168.9 to not only allow partial decertification, but also to require a court to use the remedy of partial decertification when severability is found. By ruling that partial decertification is an appropriate remedy to a fifth appellate district decision, it would definitively allow courts to use the remedy of partial decertification.

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237. *See generally* CHRISTINE DIETRICK & JON ANSOLABEHERE, CITY OF SAN LUIS OBISPO, LAND USE 101: A FIELD GUIDE (2015), https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2015/Land-Use-101-Webinar-Paper.aspx [https://perma.cc/4CFM-CQV5].

238. The state supreme court is likely the best branch to resolve the partial decertification issue. The California State Constitution "gives the Supreme Court the authority to review decisions of the state Courts of Appeal . . . [t]his reviewing power enables the Supreme Court to decide important legal questions and to maintain uniformity in the law." *About the Supreme Court*, SUPREME COURT OF CAL., https://www.courts.ca.gov/13069.htm [https://perma.cc/2U8E-36ZH].

239. Although the *Sierra Club* case had already been to the California Supreme Court twice, the case could have been a great opportunity if appealed a third time for the California Supreme Court to answer definitively whether partial decertification is an appropriate remedy. Further, the California Supreme Court could have interpreted section 21168.9 to require the partial decertification remedy as long as it is not counter to CEQA.

E. Executive Action Options

When the executive or legislative branches realize that a certain project or type of project is going to be challenged under CEQA, they have often used exemptions to get around the specific issue.[240] Former Governor Jerry Brown[241] once provided, "I've never met a CEQA exemption I didn't like."[242] But rather than negotiating exemptions for certain projects, the California governor could make use of his executive power to reform CEQA and apply further pressure on the legislature to reform CEQA.

First, the governor as head of the executive agencies in California could direct the Natural Resources Agency to adopt more concise CEQA guidelines.[243] The agency assists public agencies' compliance with CEQA, and CEQA itself "requires the Secretary of the Natural Resources Agency, in consultation with the Governor's Office of Planning and Research (OPR), to periodically adopt, amend and repeal the CEQA Guidelines."[244] Thus, the governor could unilaterally direct the agency to create a more standardized approach to requirements in an EIR and also clarify the remedy available to a reviewing court.[245]

Second, the Attorney General of the State of California could play a more significant role in CEQA cases. For example, the attorney general oversees and enforces CEQA and "has filed public comment letters alerting local

240. *See* Justin Ewers, *CEQA Roundup: A Win for The Kings and Steinberg. But for CEQA Reform?*, CA FWD (Sept. 13, 2013), https://cafwd.org/news/ceqa-roundup-a-win-for-the-kings-and-steinberg-but-for-ceqa-reform/ [https://perma.cc/46MQ-C62W] (discussing the last minute California bill to streamline the CEQA process for the Sacramento Kings basketball arena).

241. California has two former governors by the name Jerry Brown as they are father and son. This reference is to the son, Governor Jerry Brown, who served as the 34th and 39th Governor of California. *List of California Governors,* GOVERNORS, https://governors.library.ca.gov/list.html [https://perma.cc/2QBB-2CQ4].

242. James Brasuell, *How About California Exempt Bike Lanes From the Long Environmental Review Process?*, CURBED L.A. (Aug. 2, 2012, 12:38 PM), https://la.curbed.com/2012/8/3/10344190/how-about-we-exempt-bike-lanes-from-lengthy-environmental-review [https://perma.cc/494W-XW9E] (quoting Governor Brown).

243. *See Who We Are*, CAL. NAT. RES. AGENCY, https://resources.ca.gov/About-Us/Who-We-Are [https://perma.cc/9Q3S-YPSV].

244. *Legal*, CAL. NAT. RES. AGENCY, https://resources.ca.gov/admin/Legal [https://perma.cc/JQ8B-34XC].

245. According to section 21083, OPR is delegated authority to review the guidelines at least every two years. CAL. PUB. RES. CODE § 21083(f) (West 2004). However, the guidelines could be updated more often than the statutory mandate. *See id.*

agencies to potential violations of CEQA, filed and intervened in lawsuits, entered settlements, and submitted 'friends of the court' briefs in significant appellate cases."[246] Therefore, in future appellate cases in districts that have yet to answer the question as to whether the court can partially decertify a project's EIR,[247] the attorney general should submit amicus briefs interpreting section 21168.9 in support of partial decertification. Additionally, the attorney general could release a general statement as to their interpretation of the section 21168.9 and the rationale behind such an interpretation.[248]

Finally, the governor could act as a catalyst and pressure the legislature to codify the second and fourth appellate districts' interpretation or fix CEQA more generally. The governor, unlike the legislature, can speak with a single voice and use their platform to advocate for change. For example, the governor could call for reform during the State of the State Address,[249] a housing bill signing event,[250] or informal meetings with legislatures.

VII. CONCLUSION

The current split between whether or not an EIR can be partially decertified has real impacts on the certainty regarding a development project. Partial decertification allows the agency and developer to rely on the court's determination to fix any deficiencies in the project's EIR to comply with CEQA. The advantage of a partial decertification is that it saves time, reduces costs, and makes complex litigation clearer as to what in the EIR needs to be reanalyzed. Lawyers and their clients are much more comfortable relying on a judicial decision as to what aspects of a specific EIR are defective

246. *California Environmental Quality Act (CEQA)*, OFF. OF THE ATT'Y GEN., https://oag.ca.gov/environment/ceqa [https://perma.cc/T8N9-K23L].

247. California has six courts of appeal, so three courts of appeal have yet to answer the question regarding partial decertification (California Court of Appeal, First District; California Court of Appeal, Third District; and the California Court of Appeal, Sixth District). *Courts*, CAL. COURTS, https://www.courts.ca.gov/courts.htm [https://perma.cc/PC97-U2SH].

248. Although such a statement would not have any force of law, it could be used by California courts to inform decisions moving forward. Additionally, the statement could motivate the legislature to enact a law similar to those outlined in this Comment. *See supra* Section VI.B.

249. *See* Gavin Newsom, Governor, State of the State Address before a joint session of the California Legislature (Feb. 12, 2019) (transcript available at https://www.gov.ca.gov/2019/02/12/state-of-the-state-address/ [https://perma.cc/UBQ8-BYUB]). Governor Newsom stated in a State of the State Address, "In recent years, we've expedited judicial review on CEQA for professional sports. It's time we do the same thing for housing." *Id.*

250. *See* Hannah Brem, *California Governor Signs Bills to Ease Housing Shortage*, JURIST (Sept. 30, 2021, 9:14 AM), https://www.jurist.org/news/2021/09/california-governor-signs-bills-to-ease-housing-shortage/ [https://perma.cc/APM9-AYN3].

and making the correction than reliance on legal doctrines such as res judicata or collateral estoppel alone. However, the debate of partial versus entire decertification is only one small aspect of CEQA. CEQA litigators blame the statute for playing a part in the housing crisis because "[i]nstead of three months getting approval, [they] can spend 10 years in 39 public hearings, getting sued four times over."[251]

Thus, the clarification of whether a court can partially decertify a project's EIR could help create certainty and a clear roadmap for agencies and developers. However, there is much work to be done to reform CEQA to balance the need to disclose a project's significant environmental impacts while not completely halting development.

251. Manuela Tobias, *What One Thing Do Republican Recall Candidates Blame for California's Housing Crisis?*, CAL MATTERS (Sept. 7, 2021), https://calmatters.org/politics/2021/09/newsom-recall-republicans-ceqa-housing/ [https://perma.cc/UDJ7-F9ZV].