RURAL COUNTY REPRESENTATIVES
OF CALIFORNIA

April 27, 2023

The Honorable Pedro Nava
Chairman, Little Hoover Commission
925 L Street, Suite 805
Sacramento, CA 95814

RE: RCRC Written Comments For April 27 Hearing on the Effects of the California Environmental Quality Act (Part 3)

Dear Commissioners:

On behalf of the Rural County Representatives of California, we are pleased to provide the following comments on effects of the California Environmental Quality Act (CEQA) since its enactment over 50 years ago.

RCRC is an association of forty rural California counties and the RCRC Board of Directors is comprised of elected supervisors from each of those member counties. The views expressed in these comments are those of RCRC and do not necessarily reflect the views of individual member counties.

Counties have been on the forefront of CEQA implementation as both project proponents and as lead agencies, which gives local governments a unique perspective of the benefits, complications, and challenges associated with CEQA implementation.

I. Overview

Many consider CEQA to be one of California's flagship environmental laws while others criticize it for creating serious impediments to development. Both are true.

When enacted, CEQA was one of the state's first meaningful environmental protection laws. It established a state policy to "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state" and required "governmental agencies at all levels to develop standards and procedures necessary to protect environmental quality."[1]

CEQA is a very powerful information dissemination and environmental mitigation tool. Its core functions are to improve the government decision making process and require the

[1] [1] Assembly Bill 2045 (Select Committee on Environmental Quality) (Chapter 1433, Statutes of 1970).

disclosure and mitigation of a project's significant impacts on the environment. RCRC strongly supports these objectives and does not discount the value CEQA provides in these contexts. As such, we agree with the Center for Biological Diversity's Aruna Prabhala's testimony that "By requiring decisionmakers to disclose, evaluate and mitigate environmental harms when making major land use decisions, CEQA promotes smart, sustainable land use planning."[2]

At the same time, we also recognize that since its enactment in 1970, CEQA has expanded into a complex regulatory obligation with serious consequences resulting from procedural or substantive missteps. As such, CEQA is often rightly criticized today as a litigation trap that can be exploited by those seeking competitive gain or to stop projects altogether.

Previous witnesses have spent a great deal of time focusing on how CEQA has impacted housing development and the important role it plays in disclosing and mitigating the impacts of larger industrial projects. But the reach of CEQA is far more extensive and it has weaved itself into many aspects of everyday life for local governments.

Unfortunately, many of the recent CEQA exemptions and streamlining measures are narrowly-tailored and cluttered with ambiguous and extensive conditions that generally neuter their benefit. In some ways, CEQA has become a tool for gotcha litigation where even those projects that are exempt from CEQA can still be attacked as a result ancillary discretionary actions that were not covered by the exemption, including providing financial assistance to, rather than discretionary approval of, the underlying project. Still other statutes back into creating CEQA exemptions by eliminating local discretionary authority over projects altogether. Additionally, one-size-fits-all CEQA analytical and mitigation requirements imposed by the state simply do not work in many rural areas, as shown by the recent shift to Vehicle Miles Traveled for analysis and mitigation of a project's transportation impacts. In addition to these issues, our comments will also focus on how CEQA now overlaps with more recent laws and is used to increase project costs and burdens by facilitating arguments that California's transformative and far-reaching environmental laws are inadequate to mitigate the impacts of the project at hand.

II. CEQA has evolved into a complex and inherently uncertain process where serious consequences result from procedural and substantive missteps, making it ripe for misuse.

Several witnesses have used the number of CEQA lawsuits filed to either argue that CEQA is a serious problem or to show that the number of cases actually filed pales in comparison to the number of projects carried out in any given year. RCRC believes both points miss the mark. Far more important than the number of CEQA lawsuits filed is the ever-looming threat of litigation with the significant costs and multi-year project delays that often result. This threat, combined with the uncertain outcome of the legal process, has resulted in the preparation of much more complex and cumbersome environmental

[2] Written Testiony of Aruna Prabhala, Center for Biological Diversity, page 2.

documentation in an attempt to "bullet proof" the environmental review process from legal attack. Together, these circumstances create an environment ripe for exploitation by those seeking to misuse CEQA for their own competitive interests or Not-In-My-Back-Yard (NIMBY) purposes.

Over the years, CEQA environmental impact reports have become complex and unwieldly, largely as a result of what Christopher Elmendorf testified to at a previous hearing on this issue.[3] This can easily be seen through the changes in length and complexity of environmental impact reports over the decades. For example, in 1975 the final Environmental Impact Report for an 83-unit Golden Gate Heights Residential Development Project in San Francisco was 188 pages. In contrast, the 2018 the draft Environmental Impact Report for a smaller, 35-unit residential Ball Estates Project in Contra Costa County was well over 1,600 pages. Aside from the costs and time it takes to prepare those documents, litigation challenging the adequacy of those reports can take years to resolve and add millions of dollars in costs. Equally troubling, some have expressed frustration that opponents use CEQA litigation to delay the project past the point of economic feasibility.

A. *Examples of CEQA misuse by diverse groups to exact concessions from project proponents, attack competitors, or to kill a project altogether.*

California courts have long held that CEQA and other environmental laws "must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement."[4] That being said, cases are frequently brought (or more importantly threatened) by a wide variety of stakeholders under the minimum environmental pretext to help either exact concessions from project proponents or to kill a competitor's project altogether. As Curtis Alling previously testified, "If filed for other purposes, such as obstruction to achieve an economic interest or social goal, a lawsuit becomes a misuse of CEQA litigation."[5]

Because of the low bar for bringing an action, potential recovery of attorneys' fees by only the party bringing the action, and risk of lengthy delays, the simple threat of litigation often makes project proponents more than willing to make concessions to an opponent simply to avoid associated legal costs and construction delays.

In some cases, these concessions are to the detriment of the public good. Housing projects often shed a significant number of planned units during the environmental review

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[3] "Under well-established caselaw, if anyone musters a "fair argument" that any physical change that a project might cause would have any more-than minor adverse effect, then the project can't proceed unless the sponsor first undertakes an exhaustive study and mitigates any physical effect that's found to be "significant." Christopher S. Elmendorf, Testimony for Little Hoover Commission Hearing on the California Environmental Quality Act, page 1, referencing *No. Oil, Inc. v. City of Los Angeles*, 118 Cal. Rptr. 34, 38 (1974).

[4] *Citizens of Goleta Valley v. Board of Supervisors of Santa Barbara County* (1990) 52 Cal.3d 553, 577.

[5] Curtis Alling, Practitioner's Testimony on the Conduct, Strengths, and Weaknesses of CEQA Presented by Curtis E. Alling, AICP, to the Little Hoover Commission, April 13, 2023, p. 4.

and mitigation process to avoid challenges and lengthy litigation delays. Unfortunately, this makes it more and more difficult for the state to overcome the tremendous housing supply deficit that has developed over the last few decades.

To highlight some of the individual cases in which CEQA litigation was misused for competitive or NIMBY purposes, we urge consideration of several of the following examples.

1. *CEQA is used by businesses to chill competition or derail competing proposals.*

One of the most egregious examples of CEQA misuse involved the *University Gateway* project, which was a proposed mixed-use infill development project undertaken by the University of Southern California (USC) and Urban Partners to provide retail and housing for 1,600 students. There, Conquest Housing, a competing housing developer, raised a number of environmental concerns throughout the process. Even though the project's parking ratio was similar to that used by Conquest's own developments, Conquest complained about it and encouraged nearby residents to raise similar concerns, even attempting to pay residents to submit complaints during the CEQA process. Conquest unsuccessfully appealed approval of the EIR and sought a writ of mandate in the local Superior Court. The court upheld the project and called Conquest's suit vexatious litigation. Not only did Conquest have a long history of filing CEQA complaints against its competitors, but one of its executives claimed his company was the "Al-Qaeda" of USC's student housing projects and "knew how to 'bomb' competing projects using CEQA." Conquest later withdrew nine other suits against Urban Partners' projects in settling a suit in which it was accused of engaging in unfair competition and violating the Racketeer Influenced and Corrupt Organizations Act (RICO), a statute designed to fight organized crime.[6]

In another example, *Moe's Stop* was a small, three-pump gas station that sought to add another three gas dispensers. It was challenged by its across-the-street neighbor and competitor, Andy's BP. The lead agency originally issued a Negative Declaration after finding the project would not have a significant effect on the environment. Andy's BP appealed the decision, arguing that the city failed to properly assess the project's traffic impacts. Andy's BP filed suit after the city council rejected its claims, thereby forcing Moe's Stop to prepare a full EIR. Even then, Andy's BP filed the only comments objecting to the EIR. Once again, Andy's BP appealed the decision and lost. By this time, Andy's BP had delayed Moe's Stop's addition of three gas pumps by seventeen months.[7]

In other cases, local governments themselves are caught in the crosshairs between business competitors. In 2021, Waste Management (franchisee) brought an action against the City of Thousand Oaks (franchisor) because the City was contemplating entering into a new exclusive solid waste franchise agreement with their competitor,

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[6] CEQA Working Group, *Business Uses CEQA to Try to Stop Competing Projects and Monopolize Student Housing at USC*.
[7] CEQA Working Group, Competitor Uses CEQA to Try to Prevent Gas Station Owner from Expanding.

Athens Services. Waste Management submitted comments arguing the City failed to consider adverse environmental impacts that would result from awarding the franchise to Athens Services, namely the potential impacts of having trucks haul trash to and from alternative sites. As a result, the City determined awarding the franchise was exempt from CEQA under the categorical exemptions for existing facilities, common-sense, and regulatory agencies for protection of the environment. That categorical exemption was adopted by the City at the City Council meeting at which the franchise agreement was being considered; however, the CEQA exemption was not separately stated on the agenda and so Waste Management sued alleging the City violated the Brown Act because the public failed to receive adequate notice the City was contemplating a CEQA exemption. It took over a year and a half before the Second District Court of Appeal ruled against the City in *G.I. Industries v. City of Thousand Oaks* (2022) 84 Cal.App.5th 814. In a decision that was subsequently depublished by the California Supreme Court, the court determined that public agencies must separately agendize determinations that projects are exempt from CEQA under the Brown Act.

In other similar cases, Waste Management unsuccessfully sought to set aside the Integrated Waste Management Board and Alameda County approvals of a competitor's (Browning-Ferris Industries of California, Inc.) solid waste facility permit, arguing that the agencies failed to adequately analyze the project's receipt or disposal of waste under CEQA. In *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, the Third District Court of Appeal ultimately rejected Waste Management's claim, arguing that it lacked standing to sue because the suit was brought for commercial and competitive purposes "rather than any demonstrable interest in the environmental concerns which are the essence of CEQA."[8] That holding was contrasted two years later in *Burrtec Waste Industries, Inc. v. City of Colton* (2002) 97 Cal.App.4th 1133 where Burrtec Industries challenged the City of Colton's approval of a Mitigated Negative Declaration allowing a competing solid waste company, Taormina Industries, to operate a solid waste facility in the City. The Burrtec Court "reasoned that the plaintiff's corporate status did not affect its right to seek redress for the city's failure to provide the public notice required by CEQA before adopting a negative declaration for a competitor's conditional use permit."[9] In 2012, the California Supreme Court ultimately disapproved *Waste Management of Alameda County*'s holding that corporations are subject to heightened scrutiny when they file citizen suits, but noted that attempting to "use CEQA to impose regulatory burdens on a business competitor, with no demonstrable concern for protecting the environment" is improper regardless of who brings the action.[10] As such, to bring an action under CEQA, competitors simply need to raise environmental, rather than purely commercial and competitive, objections.

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[8] *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1229.
[9] *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2012) 52 Cal.4th 155, 168.
[10] *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2012) 52 Cal.4th 155, 170.

2. *CEQA objections by NIMBY groups have impacted vital housing and afterschool programs.*

In 2006, the City of San Francisco and *Booker T. Washington Community Service Center* worked together on a proposal to replace the center's dilapidated building with a new community center and 48 units of affordable housing to provide job training, afterschool programs, and similar services to the underserved. By that time, the center had already occupied the now-dilapidated building for over 50 years and provided those same services to ethnically diverse low-income and very-low-income residents. The project would have expanded afterschool program capacity from 100 to 150 students and included child care facilities and a gymnasium. When the draft EIR was released, NIMBY groups like Presidio Heights Association of Neighbors and Neighbors for Fair Planning voiced their concerns about the size and aesthetics of the building and inadequate parking. Those groups sued after the project was approved in mid-2010. The suit was dismissed in mid-2011, but the decision was appealed. The Court of Appeals upheld the EIR in May 2013: three years after the original project approval.[11] Three years can be a very long delay in bringing expanded services and afterschool programs to low-income and very-low-income constituencies. Unfortunately, projects that serve these groups are often the target of CEQA litigation by those who fear how the project will impact property values or change the character of a given community.

In 2002, the City of Berkeley issued a proposed mitigated negative declaration for the *Sacramento Senior Housing* project to demolish a vacant one-story building that formerly housed a clothing store. It was to be replaced by a new 40-unit infill housing project to serve low-income senior citizens, some of whom were formerly homeless. Neighbors for Sensible Development (NSD) objected, claiming that an EIR was required for the project because it would have significant effects on the environment with respect to hazardous materials and aesthetics. They complained that there was "no urgent need for affordable senior housing," "that the Project site would be better used as a commercial facility," and that "the Project would block sunlight to adjacent properties," among other things. The city approved the project and the group filed a petition for writ of mandate in July 2002. Concerning aesthetics, the lead agency noted that the site housed a vacant single-story building in need of significant rehabilitation and so the new building "could not degrade the existing visual character."[12] After losing at the superior court, NSD appealed. The Court of Appeals issued its decision over two years after initial project approval. It quickly disposed of the hazardous materials argument and thoroughly discussed aesthetic impacts, finding that an EIR is not required where the sole environmental impact is the aesthetic merit of a building in a highly-developed area. The NIMBY challenges cost the City of Berkeley nearly $2 million in legal expenses and increased the project's cost by

[11] *Neighbors for Fair Planning v. City and County of San Francisco* (2013) 217 Cal.App.4th 540.
[12] *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 578-580.

$3 million: a very significant amount for a project to provide affordable housing for low income seniors.[13]

In response to these challenges raising dubious CEQA claims based on aesthetic impacts, the Legislature subsequently enacted Assembly Bill 2341 (Mathis, Chapter 298, Statutes of 2018) which provided a temporary exemption from consideration of aesthetic effects of certain projects to refurbish, convert, repurpose, or replace an abandoned, dilapidated, or vacant building where the project includes construction of housing. The Legislature is currently considering whether to extend that sunset date in AB 356 (Mathis); however, a proposed sunset repeal was replaced by a five-year sunset extension by the Assembly Natural Resources Committee.

3. *Trade unions utilize CEQA to extract project concessions.*

For several years, project proponents have complained about project opponents using the threat of CEQA litigation (and the resulting costs and multi-year delay) to extract concessions like project-labor agreements requiring the use of union labor. The process begins with the submission of comments alleging that the environmental review is flawed because it failed to address a particular environmental issue. In some cases, the law firm representing the trade union and submitting CEQA comments on their behalf will also be engaged in negotiating a project labor agreement on the same project.[14]

In 2014, *Kinkisharyo International* walked away from plans to enter into a contract with Los Angeles County's Metropolitan Transportation Authority (Metro) to hire 250 workers and build 175 train cars at a new $50 million, 400,000 square foot factory in Palmdale. The International Brotherhood of Electrical Workers (IBEW) Local 11 insisted that Kinkisharyo allow it to organize the workers by card check without a secret ballot election. When Kinkisharyo objected, a law firm representing the trade union and a new group called the Antelope Valley Residents for Responsible Development (AVRRD) submitted 500 pages of comments and alleged that the "decision and project violate the California Environmental Quality Act, CEQA guidelines and other federal, state, and local regulations."[15] When the group appealed the CEQA approval, Kinkisharyo pulled the plug on the project and decided to build its manufacturing facility elsewhere.[16] Kinkisharyo noted that AVRRD and IBEW refused to withdraw their appeals or give assurances that they would not file suit. It said that those actions "made moving forward with the construction of the facility too risky" because it would preclude Kinkisharyo from meeting

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[13] CEQA Working Group, *NIMBY Group Use CEQA Lawsuit to Stop Affordable Housing Project for Seniors*.
[14] Kevin Dayton, "Revised List of Union Actions in 2013 Under the California Environmental Quality Act," California Policy Center Union Watch, September 3, 2013 indicating that California Unions for Reliable Energy submitted comments through Adams Broadwell Joseph & Cardozo while that firm was contemporaneously negotiating a project labor agreement for the City of Pasadena's Glenarm Power Plant Repowering Project.
[15] Charles Bostwick, "Kinkisharyo Says 'Sayonara,'" *Antelope Valley Press*, October 14, 2014, http://www.multibriefs.com/briefs/abccc/ibew2.pdf.
[16] Loren Kaye, California Foundation for Commerce and Education, "CEQA Juggernaut Rolls Through the High Desert," *Fox & Hounds*, October 20, 2014.

its delivery commitments and increase the project's costs by several million dollars. Kinkisharyo made it quite clear that all engaged in the discussions knew that the union's "'environmental' objections were simply a pretext to gain leverage in their attempt to force us to agree to a card check agreement regarding the unionizing of our workforce."[17]

B. *Low threshold for bringing an action and awarding attorneys' fees was intended to benefit truly under-resourced groups by enabling them to bring challenges, but has had unintended consequences as it is is unfair in its application, precludes prevailing defendants from recovering, and increases burdens on taxpayers.*

Despite extensive analyses, the bar for delaying a project for years is fairly low – it merely takes someone making a fair argument that the lead agency should have studied more alternatives, evaluated other types of impacts on the environment, or imposed additional mitigation measures. The is one of the reasons several recent major CEQA streamlining laws preclude the court from enjoining construction unless it finds the project presents an imminent threat to public health and safety or the site contains unforeseen important Native American artifacts or unforeseen important historical, archaeological, or ecological values that would be materially, permanently, and adversely affected by the continuation of work on the project.[18] Unfortunately, those provisions have been reserved for precious few projects involving arenas and the legislative office buildings.

Worse yet, attorneys' fees are only awarded to the party bringing the action and are not recoverable by the defendant for successfully defending the lawsuit. While well-intentioned to lower the bar for individuals and under resourced community groups to bring challenges, the rule also increases costs for taxpayers at-large. Not all project proponents are developers seeking to earn profit on their investments, as many CEQA "projects" are undertaken by local governments themselves. For those local government projects, litigation results in increased cost for all taxpayers, since those costs cannot be recovered from outside sources even if the local government ultimately prevails.

To address these issues, RCRC suggests that California pursue several measures to increase transparency, accountability, and equity in bringing CEQA actions, including:

- Standardizing the restriction on courts enjoining construction of projects unless the project presents an imminent threat to public health and safety or the site contains unforeseen important Native American artifacts or unforeseen important historical, archaeological, or ecological values that would be materially, permanently, and adversely affected by the continuation of work on the project. Standardizing this relief would ensure that all projects are treated equitably and that preferential treatment is not reserved for mega projects like the Sacramento Kings Basketball Arena and the California Capitol Annex.

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[17] Kinkisharyo International, L.L.C. letter to David Walter, City of Palmdale Economic Development Manager, October 10, 2014, http://theavtimes.com/wp-content/uploads/2014/10/Kinkisharyo-withdrawal-letter.pdf.
[18] Public Resources Code Sections 21168.6.6 (Sacramento Kings Basketball Arena) and 21189.53 (California Capitol Annex Project and related state office buildings).

- Requiring disclosure of the entities contributing funds to CEQA litigation. There is currently no transparency as to who is behind efforts to challenge projects under CEQA or whether they have competitive or non-environmental motivations.
- Allowing the award of attorneys' fees to a prevailing defendant in a range of circumstances that avoids chilling the ability for impacted individuals and under-resourced community groups to challenge projects.

III. CEQA "relief" and streamlining are often focused on well-funded projects, while most exemptions are narrowly-tailored and often cluttered with factors that neuter or preclude their utility.

A. Special treatment for high-profile projects.

Over the years, a number of measures have been enacted by the Legislature to provide CEQA relief or streamlining for various types of projects. The Legislature has occasionally been criticized for providing relief and streamlining for the biggest projects while neglecting to address the deeper systemic problems with CEQA that give rise to the requested relief. While some of those measures merely expedite judicial review of CEQA litigation, others also limit the court's ability to stay or enjoin construction unless certain findings are made, and one is a clean exemption. These measures include:

- **SB 7 (Atkins, Chapter 18, Statutes of 2021)** requires judicial review of CEQA litigation within 270 days for Environmental Leadership Projects certified by the Governor to meet stringent environmental and labor standards and result in a minimum investment of $100 million upon completion of the project. The bill extended and expanded upon AB 900 (Buchanan, Chapter 354, Statutes of 2011)
- **AB 734 (Bonta, Chapter 959, Statutes of 2018)** requires resolution of CEQA litigation within 270 days of filing the certified recording of proceedings with the court for a project involving a baseball park (for the Oakland Athletics) and adjacent residential, retail, commercial, entertainment, or recreational uses in Oakland.
- **AB 987 (Kamlager-Dove, Chapter 961, Statutes of 2018)** requires resolution of CEQA litigation within 270 days for a proposed basketball arena and related development in the City of Inglewood (proposed home of the Los Angeles Clippers).
- **AB 1826 (Committee on Budget, Chapter 40, Statutes of 2018)** requires resolution of CEQA litigation within 270 days for the new California Capitol Annex and related state office buildings. The bill also precludes a court from staying or enjoining construction of the project unless it finds the project presents an imminent threat to public health and safety or the site contains unforeseen important Native American artifacts or unforeseen important historical, archaeological, or ecological values that would be materially, permanently, and adversely affected by the continuation of work on the project.
- **SB 743 (Steinberg, Chapter 386, Statutes of 2013)** requires resolution of CEQA litigation within 270 days for an entertainment and sports complex in Sacramento for the Sacramento Kings basketball team. The bill also precludes a court from staying or enjoining construction of the project unless it finds the project presents an imminent threat to public health and safety or the site contains unforeseen important Native American artifacts or unforeseen important historical, archaeological, or ecological

values that would be materially, permanently, and adversely affected by the continuation of work on the project.

- **SB 292 (Padilla, Chapter 353, Statutes of 2011)** provided for expedited judicial review procedures for a proposed downtown Los Angeles football stadium and convention center (Farmers Field).
- **AB 81 X3 (Hall, Chapter 30, Statutes of 2009)** exempted from CEQA any activity or approval related to development, planning, design, site acquisition, subdivision, financing, leasing, construction, operation, or maintenance of stadium complex and associated development for a stadium complex in the City of Industry. Interestingly, this CEQA exemption was shuttled through the Assembly Committee on Arts, Entertainment, Sports, Tourism, and Internet Media and not the Assembly Natural Resources Committee which has long had primary jurisdiction over CEQA.

B. Reverse engineered CEQA exemptions.

Despite resisting efforts to extend expedited CEQA litigation review for housing projects,[19] the Legislature ultimately back-ended itself into a much broader CEQA exemption through Senate Bill 35 (Wiener, Chapter 366, Statutes of 2017) by eliminating local discretionary review of multifamily housing projects that meet specified labor standards. Since CEQA is only triggered by discretionary governmental actions, SB 35's creation of a streamlined, ministerial permit review process for these projects effectively exempts them from the CEQA process. In a similarly approach, Assembly Bill 2162 (Chiu, Chapter 753, Statutes of 2018) also provided CEQA exemptions for supportive housing by eliminating local discretion through making these projects "by right" in areas already zoned for multifamily and mixed-use development. RCRC believes the Legislature should not have to eliminate local discretion to get CEQA reform.

C. Reactionary measures adopted by necessity, but miss opportunities for meaningful CEQA reform.

While the Legislature has paid a great deal of attention to expediting CEQA litigation review and limiting judicial remedies for a small handful of major projects (some of which ultimately floundered), it has missed opportunities to make meaningful changes to some of the underlying problems with CEQA implementation that gave rise to the need for those bills over the course of more than a decade.

In a similar vein, the Legislature has been quite reactionary to adverse court decisions that have jeopardized housing and education projects proposed by the University of California. In *Save Berkeley's Neighborhoods v. Regents of University of California*, the Court of Appeal found the University of California failed to comply with CEQA when it "increased enrollment well beyond the growth projected in [a] 2005 EIR without conducting further environmental review."[20] This decision, which was denied review by

[19] See Assembly Bill 641 (Mayes) of 2015 which sought to require resolution of CEQA litigation for housing projects within 270 days.
[20] (2020) 51 Cal.App.5th 226, 232.

the California Supreme Court in March 2022, effectively capped UC Berkeley admissions at 2020-21 levels until it complied with CEQA. Because the decision would have forced UC Berkeley to reject over 3,000 applicants for Fall 2022 admission, the Legislature introduced and enacted a budget trailer bill[21] over the course of three days to provide the university an additional 18 months to perform the required environmental review before any enrollment restrictions took place. Subsequently, the Legislature adopted Senate Bill 886 (Wiener, Chapter 663, Statutes of 2022) which exempts from CEQA public university housing projects that meet certain environmental and labor standards.

This year, the Legislature is reacting to another court decision that jeopardizes UC Berkeley student housing. Assembly Bill 1307 (Wicks and Luz Rivas) would declare noise generated by unamplified voices of residents is not a significant effect on the environment for residential projects. The bill responds to a more recent decision, *Make UC a Good Neighbor v. Regents of University of California* (2023) 88 Cal.App.5th 656, which blocked a proposed student housing project at People's Park in part because the court found the CEQA review failed to assess potential noise impacts from student parties.

Like medications that alleviate the symptoms of an illness without addressing the underlying conditions themselves, the bills referenced above provide Band-Aids to address immediate crises and facilitate major projects. Unfortunately, they fail to address the underlying challenges and legal uncertainties in implementing CEQA. Similarly, some of these decisions and actions show an inherent tension between CEQA and other major state objectives. To that end, more action is needed by both the Legislature and the Judiciary to address some of the underlying problems with CEQA and better align it with the state's other major priorities.

There are even opportunities for the Executive Branch to contribute to the solution. One of the first steps would be to eliminate arbitrary restrictions on the use of Categorical Exemptions, as noted below. Furthermore, the Administration could develop proactive solutions to harness infrequent occurrences, like being able to quickly capture excess flood flows and use them for groundwater recharge. It should be noted that most recent emergency proclamations contain CEQA exemptions to facility timely and effective emergency response. While certainly appropriate, RCRC laments that it often takes an emergency to create a CEQA exemption to address issues that involve clear environmental hazards and pose risks to human lives, such as when Governor Newsom waived CEQA for "priority fuels reduction projects" to address wildfire risks in a March 22, 2019 emergency proclamation.

D. Statutory exemptions.

There are numerous statutory and categorical exemptions that apply to a variety of projects; however, those exemptions are often narrowly tailored or constrained by a number of exceptions or ambiguities that undermine their utility.

[21] Senate Bill 118 (Budget and Fiscal Review, Chapter 10, Statutes of 2022).

Statutory exemptions typically provide much more certainty to a project proponent; however, there has been a growing trend to include a number of restrictions that dramatically reduce the situations in which they can be used. Additionally, some of those restrictions can open the door to legal challenges over whether the exemption should even apply at all, thereby facilitating the litigation and project delays that the exemptions were intended to avoid.

Some witnesses have provided a list of existing CEQA exemptions and relief measures to the Little Hoover Commission for consideration; however, many measures citied are largely unusable, unworkable, or create other major CEQA problems for jurisdictions.

One of the first mentioned, SB 1925 (Sher, Chapter 1039, Statutes of 2002) sought to exempt from CEQA the construction of residential housing for agricultural employees, low-income families, and residential infill projects. Unfortunately, the exemptions are burdened with so many requirements and location restrictions as to be completely unworkable. The project must also meet the exhaustive list of conditions contained in Public Resources Code Section 21159.21, in which subdivision (j) establishes a blanket prohibition on the use of these exemptions within the boundaries of a state conservancy. It should be noted that the language not only precludes housing on land *owned* by a state conservancy, but on all lands falling *within the jurisdictional boundaries* of a state conservancy. While several new conservancies have been established since enactment of SB 1295, the shaded areas on the following map indicate that the exemption is unavailable in roughly half of the state.

Source: California State Geoportal: California State Conservancies.

RCRC agrees with Curtis Alling that these exemptions should be simplified or at least corrected, especially for the types of projects not otherwise covered by SB 35's streamlined ministerial permit approval process. [22]

[22] Curtis Alling, Practitioner's Testimony on the Conduct, Strengths, and Weaknesses of CEQA Presented by Curtis E. Alling, AICP, to the Little Hoover Commission, April 13, 2023, page 2.

While Senate Bill 743 (Steinberg, Chapter 386, Statutes of 2013) did provide some CEQA relief for development in infill areas, its required shift to use Vehicle Miles Traveled (VMT) for analysis and mitigation of a project's transportation impacts created a one-size-fits-all solution that is unworkable in many rural areas of the state, as mentioned later in this testimony.

Finally, AB 1197 (Santiago, Chapter 340, Statutes of 2019) provides a broad exemption for supportive housing and emergency shelters to address the housing and homeless crises; however, the relief is limited to the City of Los Angeles. While Los Angeles certainly has tremendous challenges that necessitate a speedy resolution unhindered by CEQA litigation delays, they are not unique in that respect and many other local governments would have benefitted from a broader exemption.

There is also a growing trend to condition statutory CEQA relief on requirements to pay prevailing wage, use union labor, or include project labor agreements. These trends are frustrating in light of the way in which many of those organizations have traditionally used CEQA and the threat of litigation to achieve those objectives on a project-by-project basis. We agree with Dan Dunmoyer from the California Building Industry Association that these requirements can significantly increase project costs;[23] however, we also note that these requirements can seriously constrain the utility of these CEQA exemptions in rural areas that do not have the skilled and trained workforce or pool of contractors who pay prevailing wages like many higher-density urban areas do.

E. Categorical exemptions.

In addition to statutory exemptions, the Legislature delegated authority to the Office of Planning and Research and Natural Resources Agency to include in the CEQA Guidelines a list of classes of projects that have been determined not to have a significant effect on the environment and that shall be exempt from CEQA.[24] These categorical exemptions apply to a wide variety of minor projects at existing facilities, replacement or reconstruction work, construction of small structures, minor alterations to land, information/data collection, accessory structures, etc.

The Legislature has precluded the use of Categorical Exemptions on projects that may result in damage to scenic resources, projects where the sites is included on the Cortese List because a release of hazardous substances occurred at the site, or where the project may cause a substantial adverse change in the significance of a historical resource. Beyond these circumstances, the CEQA guidelines preclude the use of categorical exemptions where the cumulative impact of successive projects of the same type in the same place, over time is significant. Additionality, categorical exemptions cannot be used where there is a reasonable possibility the activity will have a significant effect on the environment due to unusual circumstances. Finally, certain categorical exemptions for

[23] Dan Dunmoyer, President and CEO of the California Building Industry Association, California Environmental Quality Act – Impact on Housing from a Builder Perspective, page 3.
[24] Public Resources Code Section 21084.

small structures, minor alterations to land or land use limitations, information collection/research, and accessory structures are also prohibited where the project may be located in a particularly sensitive environment.

Taken as a whole, these "exclusions" narrow applicability of the categorical exemptions and open up several grounds for project opponents to delay construction through legal challenges. Furthermore, the statutory bar on application at Cortese List sites could have a chilling impact on use of Categorical Exemptions for many routine activities on thousands of sites throughout the state where leaking underground storage tanks have been removed and cleaned up and pollution remediated. Cortese List sites include hundreds of municipal and state corporation yards, equipment repair facilities, municipal airports (often in rural areas), fire stations, administration buildings, courthouses, correctional facilities, highway patrol stations, state parks, closed landfills, etc.

Still other categorical exclusions are arbitrarily narrow in scope, like the Class 32 exemption for infill development projects. Class 32 only applies to projects that occur within city limits on a site that is substantially surrounded by urban uses. Unfortunately, this restriction fails to take into consideration that there are frequently unincorporated county "islands" within cities. There are also unincorporated areas that are surrounded by urban uses on both city and county lands. *RCRC suggests expansion of the Class 32 exemption to include unincorporated areas to ensure that it can be used to promote infill development on unincorporated islands that are surrounded by a city and also where the unincorporated area is otherwise still completely surrounded by urban uses.*

Finally, a 2021 observation by the Fifth District Court of Appeal on the use of categorical exemptions could ultimately have a chilling impact and lead to under-identification of the potentially applicable categorical exemptions that may be claimed for a project. In *Los Angeles Department of Water and Power v. County of Inyo*, the court observed that categorical exemptions "tend to be mutually exclusive and, therefore, if an activity is potentially covered by one exemption it probably falls outside the coverage of the other exemptions."[25] Given the recency of the decision, it is unclear what impact the observation will ultimately have on CEQA implementation; however, it is fairly common for CEQA Notices of Exemption to claim that the project is eligible for multiple categorical exemptions. Regardless, it is an example of courts creating more uncertainty for those seeking to use Categorical Exemptions.

IV. One-size-fits all approaches to CEQA evaluation and mitigation, like the shift to reliance on Vehicle Miles Traveled, do not work.

RCRC agrees with witness Jennifer Ganata's statement that "For a state as large and diverse as California, it seems infeasible to continuously call for one-size-fits-all solutions that will not necessarily fit in all places."[26] California is a truly diverse state in terms of

[25] 67 Cal.App.5th 1018, 1039.
[26] Written Testimony for Jennifer Ganata, Little Hoover Commission Hearing on the Effects of the California Environmental Quality Act (Part 1), page 5.

demographics, geography, and economics, so rigid one-size-fits-all legislative and regulatory frameworks are not only inappropriate in some situations, but actually chill innovation and frustrate adaptation.

California's 58 counties are extremely diverse in terms of total population, population density, percentage of land under public ownership, economies, median household income, etc. While five California counties have over 2 million residents each (Los Angeles County is the most populous at over 10 million residents), 19 counties have 70,000 or fewer residents, and eight counties have fewer than 20,000 residents. Similarly, while seven counties have a population density of over 1,000/square mile, 18 counties have a population density of under 25/square mile and nine counties have population densities of less than 10/square mile.

It is amidst this backdrop that many local governments have become extremely frustrated with rigid and universal mandates, such as the recent shift requiring measurement of a project's transportation impacts in terms of vehicle miles traveled (VMT) rather than the previous level of service (LOS) metric.

SB 743 (Steinberg, Chapter 386, Statutes of 2013) not only provided CEQA relief for a proposed new basketball arena for the Sacramento Kings, but it also required the Office of Planning and Research to update the CEQA Guidelines to require the use alternative metrics (including VMT) to evaluate and mitigate a project's transportation impacts for projects within a transit priority area (TPA). The revised CEQA Guidelines ultimately require all projects throughout the state (not just those in TPAs) to analyze a project's transportation impacts in terms of VMT rather than the traditional LOS.[27]

While VMT may be a useful metric to evaluate transportation impacts in dense urban communities, it is poorly suited for application in in rural jurisdictions. In rural communities, homes, businesses, and services are located much farther apart than in urban areas. This merely reflects the reality of life in rural areas which is often driven by the fact that either the federal or state government own most of the land in those jurisdictions and that the dominant local economies are industries like agriculture where populations are interspersed among larger, open areas dedicated to productive use. These geographic factors, combined with the low population densities, make VMT a misleading metric that is unsuited for use in measuring or mitigating a project's transportation impacts in rural areas.

Even OPR's December 2018 Technical Advisory on Evaluating Transportation Impacts in CEQA recognizes that in rural areas, "fewer options may be available for reducing VMT."[28] Hindsight has shown this to be a serious understatement. Traditional opportunities to reduce VMT, including development of transit, increased walking, shifting to infill development, carpooling, reduced parking, and imposition of congestion pricing

[27] 14 California Code of Regulations Section 15064.3.
[28] California Office of Planning and Research, Technical Advisory on Evaluating Transportation Impacts in CEQA, December 2018, page 19.

are either not available or not realistic in rural settings. Most mitigation options included in CalTrans' SB 743 Program Mitigation Playbook[29] are unworkable in rural California.

Given the tremendous chasm between the number and cumulative transportation impacts of projects in the state's urban areas and the number and impacts of projects in rural areas, use of VMT outside of urban areas will not meaningfully contribute to achievement of the state's climate change and air quality objectives, will inhibit rural efforts to more effectively measure and mitigate a project's true transportation impacts, and increase project costs, delays, and litigation in rural areas.

V. CEQA has become a tool for opponents to argue that California's comprehensive environmental laws fail to adequately protect the environment.

Since CEQA's enactment in 1970, California has adopted a comprehensive array of laws aimed at protecting environmental quality. California needs not rely on the federal Clean Air Act and Clean Water Act, as many of the state's statutes and regulations surpass the stringency of the federal requirements. The argument that California's "regulatory requirements…don't come close to moving the needle on new technology adoption to address emissions on a large scale"[30] is surprising given the transformative technology shift and emissions reductions associated with ARB's on-road and off-road diesel regulations and the new round of fleet electrification requirements[31] and California's sweeping renewable energy, solar construction, and electrification requirements. On the contrary, California's environmental laws have resulted in comprehensive and state-wide environmental benefits that CEQA never would have been able to achieve on a case-by-case basis of mitigating each project's significant effects on the environment.

Unfortunately, CEQA fails to provide project proponents with any certainty that their investments in complying with the state's rigorous environmental laws will satisfy CEQA's requirement to mitigate the project's significant effect on the environment. As the Center for Biological Diversity seems to argue, CEQA is not merely concerned with ensuring that projects comply with the state's environmental laws and standards, but instead is used to "maximize opportunities" to address environmental issues.[32]

While California's environmental laws have increased in stringency over time. CEQA itself seems to have taken little notice of those changes. Rather than shy away from questions about whether CEQA should include standards-based review for consistency with environmental laws, we believe that California has matured enough over the last fifty years for the state to take a comprehensive look at how CEQA interacts (and should

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[29] CalTrans SB 743 Program Mitigation Playbook, July 2022, vmt-mitigation-playbook-07-2022.pdf (ca.gov).
[30] Written Testimony of Sean B. Hecht for Little Hoover Commission: Hearing on the Effects of the California Environmental Quality Act (CEQA), page 4.
[31] Health and Safety Code Section 39602.5(b) gives ARB explicit authority to adopt and enforce technology forcing regulations that "anticipate the development of new technologies or the improvement of existing technologies."
[32] Written Testimony of Aruna Prabhala, Center for Biological Diversity, page 5.

interact) with the universe of other state environmental laws and safeguards. To this end, the Legislature should establish statutory changes to establish clear standards that will reduce uncertainty for entities attempting to mitigate their project's significant effects on the environment. Furthermore, California should have an honest discussion about the interaction between CEQA, those environmental laws, and various other competing state priorities, including housing, supplies of safe, affordable drinking water, and grid decarbonization.

VI. Attempts to update/modernize CEQA have failed largely as a result of the complex litigation trap that the law has become.

Some witnesses have suggested several measures to "improve" CEQA going forward. These include references to a CEQA 2.0 proposal that was rejected by the Legislature in the form of Senate Bill 950 (Jackson) of 2020, requirements to translate key CEQA documents, and suggestions to incorporate principles of environmental justice into CEQA.[33]

RCRC has been heavily involved in legislative efforts on all those topics over the last several years. Unfortunately, the biggest impediment to their adoption by the Legislature is the criticism that CEQA is already a complex litigation trap and that these measures will just make CEQA even riper for abuse and increase the difficulty of doing business in California.

With respect to Senate Bill 950 and CEQA 2.0, RCRC readily admits that there were several components in the bill that sought to reduce litigation abuse, expedite judicial review, and streamline the construction of transitional and supportive housing in urbanized areas[34]. At the same time, we strongly objected to a proposed case transfer process that would have significantly increased costs and logistical challenges for 30 counties and 75 cities by requiring them to defend themselves in distant urban venues, thereby placing small rural counties at a distinct disadvantage and/or forcing them to rely on expensive outside counsel on a wide variety of governmental actions.

Senate Bill 950 was also one of several measures that sought to require translation of various CEQA notices, documents, and public hearings. To be clear, RCRC does not categorically oppose translation requirements; however, we had grave misgivings about embedding those requirements in CEQA without clearly defining expectations, significantly increasing resources for local governments to carry out those responsibilities,

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[33] Remarks of Douglas Philip Carstens to Milton Marks "Little Hoover" Commission, pages 14-15, 17-18.

[34] While conceptually supportable, RCRC did voice concerns that this new CEQA exemption would only have been available in an urbanized area, which are cities with a population (individual or collective) of at least 100,000 or unincorporated islands within those cities and where the population density is at least 5,000 per square mile. While the "urbanized area" definition included in Public Resources Code Section 21071 was intended to limit sprawl caused by housing developments, this metric is inappropriate for siting facilities that serve homeless and at-risk populations. RCRC suggested expanding this exemption, as rural counties would have been unable to use it exemption despite the fact that they face many of the same challenges in planning for and siting transitional and supportive housing.

and including iron-clad protections to ensure that failed or faulty translations would not be grounds for action under the law.

With respect to suggestions to require consideration of environmental justice principles in CEQA, this was proposed in Assembly Bill 1001 (C. Garcia) of 2022. Many local governments strongly opposed AB 1001 - not out of a hostility to the author's underlying objectives - but from the bill's construction and the practical realities of its implementation. Many stakeholders argued that CEQA is a deeply flawed vehicle for "requiring consideration of environmental justice principles" because of such a requirement could significantly increase the risk of costly and prolonged litigation. Local governments are sensitive to the need to increase engagement by those who are most acutely impacted by a proposed project; however, building this requirement into CEQA will make a law already often maligned because of its susceptibility to litigation abuse even worse because it injects even more ambiguous requirements into CEQA that are likely to involve both procedural and substantive obligations on public agencies. Rather than embed environmental justice principles in CEQA (which is inherently intended to mitigate environmental impacts on *all* Californians), local governments sought to find a pathway to improve community engagement outside of the CEQA context. Local governments had been engaged in other legislative efforts to address these issues through jurisdiction-wide land use planning processes, including through supplementing existing requirements for cities and counties to address environmental justice in their general plans.

As should be clear, CEQA is already highly litigious and project opponents will seek to use any inherent ambiguity or arguable noncompliance as a pathway to delay or kill a project. Unfortunately, many of the proposed "improvements" to CEQA have failed to gain traction because the law itself has become too complex, litigious, and misused by a broad array of stakeholders.

VII. Conclusion

In closing, RCRC appreciates the opportunity to provide testimony to the Little Hoover Commission on the California Environmental Quality Act. RCRC stands ready to work on recommendations to help better effectuate CEQA's goals of properly disclosing and mitigating a project's significant impacts on the environment, improving and expediting the CEQA litigation review process, reviewing and increasing the utility of statutory and categorical exemptions, reconciling CEQA with a plethora of environmental laws developed since its enactment, and preventing CEQA misuse.

Sincerely,

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