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Michelle Ouellette

Ali Tehrani

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Michelle Ouellette[*] *& Ali Tehrani*[**]

I. Introduction

The California Environmental Quality Act ("CEQA")[1] has its critics. Even Governor Jerry Brown once famously called CEQA reform "the Lord's work."[2] This is perhaps because, as noted by former Governors George Deukmejian, Pete Wilson, and Gray Davis: "CEQA lawsuits are frequently filed only to extract concessions not related to the environment, or for the purpose of opposing a project for reasons having nothing to do with environmental protection."[3]

Despite these criticisms, CEQA plays a vital role in protecting California's environment and informing decision makers and the public of a proposed project's environmental impacts. Public agencies and developers are all too familiar with CEQA mercenaries—lawyers or organizations that nitpick CEQA documents, looking to extract money or concessions in exchange for an agreement not to use CEQA as a cudgel against the project. Yet, as the effects of climate change ravage California,[4] CEQA's role has never been so important. The challenge lies in balancing CEQA's noble purposes against the need for social, economic, and

* Michelle Ouellette is a partner at Best Best & Krieger LLP. She was the recipient of the Daily Journal's Environmental California Lawyer Attorney of the Year Award in 2017, and a Daily Journal headline about Michelle once read, "Enough CEQA Wins to Fill a Bucket." In her thirty year career, she has successfully litigated hundreds of CEQA cases and helped her clients proceed with hundreds of projects across California.

** Ali Tehrani is an associate attorney at Best Best & Krieger LLP. Ali litigates CEQA issues on behalf of public agency and developer clients, reviews and drafts CEQA-related documents, and helps his clients navigate through the CEQA process.

1. Cal. Pub. Res. Code, § 21000, et al (2018).

2. Adrian Glick Kudler, *There's a Last Minute Rush to Completely Overhaul California's Big Environmental Law*, CURBED LOS ANGELES (Aug. 23, 2012), https://perma.cc/6DCT-ZBC9.

3. George Deukmejian, Pete Wilson & Gray Davis, *Keep California green and golden with CEQA reforms*, SAN DIEGO UNION TRIBUNE (July 12, 2012), https://perma.cc/H9AN-Q8KV.

4. Unprecedented wildfires, record heat, and crushing drought pose increasingly difficult challenges for the Golden State. Robinson Meyer, *Why the Wildfires of 2018 Have Been So Ferocious*, THE ATLANTIC (Aug. 10, 2018), https://perma.cc/XL4N-478R.

technological development. CEQA itself recognizes the need to balance these interests.[5] This article discusses how CEQA balances these interests in the context of judicial remedies.

What happens when a court finds that a public agency has fallen short of fully complying with CEQA? Must the result be a crushing defeat for the public agency, the project proponent, and the public that stood to benefit from the project? Must the agency set aside its CEQA determination and its project approvals? Can the project move forward while the agency seeks to comply with the writ of mandate? As always with CEQA, it depends. These questions hinge, in part, on how courts exercise their substantial discretion to apply CEQA's statutory judicial remedies.

First, because judicial remedies should be narrowly tailored to fulfill CEQA's objectives, this article examines CEQA's purposes and how CEQA works. This article then briefly discusses what a CEQA violation entails, since there is no exercise of a judicial remedy without a CEQA violation. A discussion of judicial remedies and the extent to which a court has discretion to require CEQA compliance without setting aside project approvals follows. Finally, this article will address "the Lord's work"—common sense reforms that might reduce CEQA's regulatory burden without sacrificing the statute's objectives.

II. How projects comply with CEQA and what courts must do upon finding noncompliance[6]

CEQA is an environmental statute that generally applies to projects that (1) require discretionary approval from a California public agency, and (2) have the potential to result in direct or reasonably foreseeable indirect impacts on the physical environment.[7] The primary way CEQA seeks to protect the environment is by requiring preparation of an environmental impact report ("EIR") for a proposed project that "may have a significant effect on the environment."[8]

5. Cal. Code Regs. tit. 14, § 15003(j) (1970).

6. This is a very annotated discussion of CEQA's complex statutory scheme. The purpose of this section is merely to provide context. This discussion is not intended to provide a complete overview of CEQA, and it does not address various nuances and exceptions to CEQA's rules.

7. Cal. Code Regs. tit. 14, § 15378 (1970).

8. Cal. Pub. Res. Code, § 21151(a) (1977); *see also* Tomlinson v. City of Alameda, 54 Cal. 4th 281, 286 (2012). A public agency need not necessarily prepare an EIR to comply with CEQA; indeed, there are many means of CEQA compliance. Depending on the circumstances, a public agency may comply with CEQA by determining that (1) a proposed activity does not qualify as a "project" subject to CEQA; (2) the proposed activity qualifies as a "project," but that the project is exempt from CEQA; (3) a negative declaration—rather than an EIR—is appropriate for a non-exempt project based on an initial study's finding that

The EIR has been described as the "heart of CEQA."[9] In short, an EIR is a "detailed statement . . . describing and analyzing the significant environmental effects of a project and discussing ways to mitigate or avoid the effects."[10] Its purpose is "to inform the public and its responsible officials of the environmental consequences of their decisions before they are made."[11] An EIR is generally very extensive, expensive, and time consuming to prepare. For example, an EIR can be thousands of pages long, analyze dozens of potential environmental impacts,[12] and include myriad technical appendices prepared by various consultants.

A party seeking to challenge a public agency's compliance with CEQA (e.g., by challenging the adequacy of an EIR) does so by filing a petition for a writ of mandate with a court.[13] If a court finds that an agency's determination, finding, or decision does not comply with CEQA, the court must enter an order, in the form of a peremptory writ of mandate, containing one or more of three specified mandates, which are further addressed in the discussion of Public Resources Code section 21168.9(a), below.[14]

Once the court issues a writ of mandate, "[t]he trial court shall retain jurisdiction over the public agency's proceedings by way of a return to the

there is not substantial evidence, in light of the whole of the record before the agency, that the project may have a significant effect on the environment; (4) a "mitigated" negative declaration is appropriate where the initial study determines that a proposed project may have potentially significant effects, but the project applicant agrees to revise the project to eliminate or avoid those effects; or (5) an EIR must be prepared where the initial study determines that the proposed project may have a significant effect on the environment (Cal. Pub. Res. Code, § 21151(a) (1977); *Tomlinson*, 54 Cal. 4th 281). Additionally, in certain circumstances, CEQA compliance may require the preparation of other documents, such as a supplemental EIR, a subsequent EIR, or an addendum to an EIR (Pub. Res. Code, § 21166 (1972); Cal. Code Regs. tit. 14, §§ 15162, 15164 (1970).) Because this article concerns judicial remedies under CEQA—rather than a complete overview of CEQA itself—this article primarily focuses on EIRs for the sake of simplicity. However, the law, procedures, and questions raised in this article apply anytime a court determines that a public agency has prejudicially violated CEQA (e.g., when a court determines that a public agency improperly found a project exempt from CEQA or improperly prepared a negative declaration).

9. Laurel Heights Improvement Ass'n v. Regents of University of California, 6 Cal. 4th 1112, 1123 (1993).

10. Cal. Code Regs. tit. 14, § 15362 (1970).

11. *Id.*

12. *See* Cal. Code Regs. tit. 14, Appendix G (1970) (listing various environmental impacts generally studied in an EIR).

13. 1KOSTKA & ZISCHKE, PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT § 23.61 (Cont. Ed. Bar 2d ed. 2015).

14. Pres. Wild Santee v. City of Santee, 210 Cal. App. 4th 260, 286 (2012); *see also* Cal. Pub. Res. Code, § 21168.9 (2017).

peremptory writ until the court has determined that the public agency has complied with [CEQA]."[15]

III. CEQA seeks to protect the environment and inform governmental decision makers, not hinder development

To properly understand CEQA's judicial remedies, one must first understand the purposes CEQA seeks to serve. When Governor Ronald Reagan signed CEQA into law in 1970,[16] he did not intend to obstruct development in California.[17] Indeed, the State CEQA Guidelines[18] expressly provide that CEQA "must not be subverted into an instrument for the oppression and delay of social, economic or recreational development or advancement."[19] Rather,

> [t]he basic purposes of CEQA are to:
>
> (1)Inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities.
>
> (2)Identify ways that environmental damage can be avoided or significantly reduced.
>
> (3)Prevent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the changes to be feasible.
>
> (4)Disclose to the public the reasons why a governmental agency approved the project in the manner the agency chose if significant environmental effects are involved.[20]

15. Cal. Pub. Res. Code, § 21168.9(b) (2017).

16. CALIFORNIA NATURAL RESOURCES AGENCY, FREQUENTLY ASKED QUESTIONS ABOUT CEQA (2014), https://perma.cc/RR9R-3UJJ.

17. *See* Cal. Pub. Res. Code, §§ 21000, 21001 (2018).

18. The Guidelines for California Environmental Quality Act, also known as the State CEQA Guidelines, are codified in Title 14 of the California Code of Regulations, commencing at section 15000. The State CEQA Guidelines have been developed by the Office of Planning and Research, and they are binding on all public agencies in California. (Cal. Code Regs., tit. 14, § 15000 (1970).)

19. Cal. Code Regs. tit. 14, § 15003(j) (1970); *see also* Maintain Our Desert Env't v. Town of Apple Valley, 120 Cal. App. 4th 396, 447 (2004); Pres. Poway v. City of Poway, 245 Cal. App. 4th 560, 581-582 (2016).

20. Cal. Code Regs. tit. 14, § 15002(a) (1970).

In sum, "CEQA's purpose is to compel government to make decisions with environmental consequences in mind," not to stop development.[21]

IV. A CEQA violation must be "prejudicial" to warrant a judicial remedy

Not every CEQA violation will lead a court to set aside a public agency's CEQA document or project approval.[22] Rather, in reviewing an agency's decision for compliance with CEQA, "[t]he court reviews the administrative record to determine whether the agency *prejudicially* abused its discretion."[23] "Abuse of discretion is established if the agency has not proceeded in a manner required by law, or if the determination or decision is not supported by substantial evidence."[24]

Thus, the California Supreme Court has noted, that in the CEQA context, "[i]nsubstantial or merely technical omissions are not grounds for relief."[25] However, a violation that undermines CEQA's purpose may be considered prejudicial. Thus, where the adequacy of an EIR is challenged, "[a] prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision-making and informed public participation, *thereby thwarting the statutory goals* of the EIR process."[26] The requirement that CEQA violations "be prejudicial" underscores the importance of keeping CEQA's purposes in mind when analyzing a CEQA claim and fashioning a judicial remedy for a CEQA violation.

21. Golden Gate Land Holdings LLC v. EastBay Reg'l Park Dist., 215 Cal. App. 4th 353, 365 (2013); *see also* Kings Cty. Farm Bureau v. City of Hanford, 221 Cal. App. 3d 692, 711 (1990) ("Although the purpose of CEQA is to compel government at all levels to make decisions with environmental consequences in mind, 'CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations.'").

22. *See, e.g.,* Rominger v. Cty. of Colusa, 229 Cal. App. 4th 690, 709 (2014) (finding county abused its discretion by failing to comply with CEQA's information disclosure requirements, but the abuse of discretion was not prejudicial).

23. Gilroy Citizens for Responsible Planning v. City of Gilroy, 140 Cal. App. 4th 911, 918 (2006) (emphasis added); *see also* Cal. Pub. Res. Code, §§ 21168, 21168.5 (1972).

24. *Ibid.*

25. Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth., 57 Cal. 4th 439, 463 (2013).

26. *Id.* (emphasis added); *see also* Kings Cty. Farm Bureau v. City of Hanford, 221 Cal. App. 3d 692, 711 (1990); Laurel Heights Improvement Assn. v. Regents of Univ. of Cal., 47 Cal. 3d 376, 404 (1988) (in finding abuse of discretion, California Supreme Court explained: "the EIR's *statutory goal* of public information regarding a proposed project has not been met") (emphasis added).

V. Courts have broad discretion to tailor a remedy addressing a prejudicial CEQA violation

CEQA is not designed to be draconian. When a lead agency fails to comply with CEQA, the law does not require that project approvals or the relevant CEQA documents be set aside. Rather, as discussed below, CEQA generally provides courts with broad discretion to fashion a remedy that furthers CEQA's purpose.

A. Public Resources Code Section 21168.9 provides courts with broad discretion to fashion a narrowly tailored remedy that furthers CEQA's purpose without unduly burdening development

The judicial remedies for a CEQA violation are governed by section 21168.9 of the Public Resources Code.[27] This provision was initially enacted in 1984—fourteen years after CEQA became law—to provide courts "with *some flexibility in tailoring the remedy* to the specific CEQA violation."[28] To provide courts with even more flexibility, section 21168.9 was amended in 1993 to "expand the authority of courts to *fashion a remedy* that permits a part of the project to continue while the agency seeks to correct its CEQA violations."[29]

This flexibility allows courts to exercise substantial discretion in fashioning a remedy for a CEQA violation. For example, to remedy a CEQA violation, a court may:

- issue a writ of mandate directing the public agency to void its approval of the project;[30]
- allow project approvals and EIR certification to remain in place, but direct the public agency to take certain measures to comply with CEQA;[31]
- allow project construction to proceed, except for those aspects of construction affected by the CEQA violation;[32] or

27. Cal. Pub. Res. Code, § 21168.9 (1972).

28. POET, LLC v. California Air Resources Bd., 218 Cal. App. 4th 681, 756 (2013) (emphasis added) [hereinafter *POET I*].

29. *Id.* (emphasis added).

30. *See, e.g.,* Save Tara v. City of West Hollywood, 45 Cal. 4th 116, 127-128 (2008); John R. Lawson Rock & Oil, Inc. v. State Air Res. Bd., 20 Cal. App. 5th 77, 102 (2018) ("Directing an agency to void its approval of the project is a typical remedy … for a CEQA violation").

31. *See, e.g.,* POET I, 218 Cal. App. 4th at 756.

32. *See, e.g.,* Pres. Wild Santee v. City of Santee, 210 Cal. App. 4th 260 (2012); Anderson First Coal. v. City of Anderson, 130 Cal. App. 4th 1173 (2005).

- rescind project approval and require the project, if constructed while CEQA litigation was pending, to be "modified, torn down, or eliminated to restore the property to its original condition."[33]

To understand how this range of outcomes is possible, one must look to Public Resources Code section 21168.9, which provides courts with discretion to narrowly tailor writs of mandate to fulfill CEQA's purposes without unduly obstructing the project. In particular, section 21168.9 provides, in its entirety:

> (a) If a court finds, as a result of a trial, hearing, or remand from an appellate court, that any determination, finding, or decision of a public agency has been made without compliance with [CEQA], the court shall enter an order that includes one or more of the following:
>
> (1) A mandate that the determination, finding, or decision be voided by the public agency, in whole *or in part*.
>
> (2) *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 suspend *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 [CEQA]*.
>
> (3) *A mandate that the public agency take specific action as may be necessary to bring the determination, finding, or decision into compliance with [CEQA]*.
>
> (b) Any order pursuant to subdivision (a) shall include *only those mandates which are necessary to achieve compliance with [CEQA]* and *only those specific project activities in noncompliance with [CEQA]*. The order shall be made by

33. Woodward Park Homeowners Ass'n v. Garreks, Inc., 77 Cal. App. 4th 880, 889 (2000).

> the issuance of a peremptory writ of mandate specifying what action by the public agency is necessary to comply with [CEQA]. 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 [CEQA], and (3) the court has not found the remainder of the project to be in noncompliance with [CEQA]. 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 [CEQA].
>
> (c) Nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way. Except as expressly provided in this section, *nothing in this section is intended to limit the equitable powers of the court.*[34]

Section 21168.9 thus provides courts with broad discretion to fashion judicial remedies under CEQA. Accordingly, if a trial court determines that a CEQA document is inadequate in some but not all respects, the court need not necessarily direct the public agency to set aside its approvals of the CEQA document and the project in their entirety. Indeed, section 21168.9 repeatedly emphasizes that to the extent possible, judicial remedies should be narrowly tailored to further the purposes of CEQA. Notably:

- Subsections (1), (2), and (3) of section 21168.9(a) are in the disjunctive.[35] For example, a court may require a public agency to further review a potential environmental impact under section 21168.9(a)(3), *without* voiding any part of a project approval under section 21168.9(a)(1) and *without* suspending any project activity under section 21168.9(a)(2).[36]

34. Cal. Pub. Res. Code, § 21168.9 (1972).

35. Cal. Pub. Res. Code, § 21168.9(a) (1972) ("the court shall enter an order that includes *one or more* of the following . . .") (emphasis added).

36. *See, e.g.*, POET, LLC v. State Air Res. Bd., 12 Cal. App. 5th 52 (2017) [hereinafter *POET II*].

- Section 21168.9(a)(1) authorizes a court to direct a public agency to void its project approvals "in whole *or in part*."[37]
- Section 21168.9(a)(2) authorizes a court to direct a public agency to suspend "any or all" specific project activities only if the court finds that such activity undermines CEQA's basic purposes.[38]
- Section 21168.9(b) emphasizes that judicial remedies under CEQA *must* be narrowly tailored, to the extent possible.[39]
- Section 21168.9(c) underscores that courts may fashion remedies pursuant to their "equitable powers."[40]

Section 21168.9 thus does not require courts to set aside EIR certification or project approvals every time the court finds a CEQA violation. Rather, courts could—and should—craft narrow judicial remedies that further CEQA's purpose without unduly obstructing project development.

B. Courts have repeatedly used their discretion under Public Resources Code Section 21168.9 to leave portions of project approvals and EIR certifications in place despite finding CEQA noncompliance

Many courts have used their discretion under Public Resources Code section 21168.9 to fashion narrowly tailored remedies that permit at least portions of a project to proceed, despite finding that a public agency has failed to fully comply with CEQA.[41] These decisions are a valuable example of how courts may balance the need to fulfill CEQA's important purposes with California's social, economic, and environmental interests.

1. The following examples support allowing a project to proceed despite some CEQA noncompliance

a) Court balanced CEQA compliance and continued development

Anderson First Coalition v City of Anderson is an excellent example of a court narrowly tailoring its judicial remedy to ensure compliance with CEQA

37. Cal. Pub. Res. Code, § 21168.9(a)(1) (1972).
38. Cal. Pub. Res. Code, § 21168.9(a)(2) (1972).
39. Cal. Pub. Res. Code, § 21168.9(b) (1972) (court's order "shall include *only those mandates which are necessary to achieve compliance with [CEQA]* and *only those specific project activities in noncompliance with [CEQA]*") (emphasis added).
40. Cal. Pub. Res. Code, § 21168.9(c) (1972).
41. *See, e.g., Anderson*, 130 Cal. App. 4th at 1173.

without needlessly obstructing development.[42] This case stemmed from the City of Anderson's approval of a shopping center comprised of an 184,000 square-foot Wal-Mart Supercenter, three other commercial retail pads, and a gas station.[43] The petitioner challenged the project's approval on the basis that, among other things, the environmental impacts of the proposed gas station were not fully analyzed in the EIR.[44] The trial court, pursuant to Public Resources Code section 21168.9, severed the gas station from the rest of the project and ordered the real parties in interest to suspend all activity on the gas station until its environmental impacts were properly analyzed.[45] However, the court allowed construction and operation of the rest of the project to proceed.[46]

The appellate court affirmed based on Public Resources Code section 21168.9, subdivisions (a)(1) and (b).[47] Specifically, the appellate court held that the gas station was properly severable from the remainder of the project where (1) the infirmities in the EIR were limited solely to impacts associated with the proposed gas station; (2) the construction and operation of the gas station were specific project activities severable from the remainder of the project; (3) severance of the gas station from the remainder of the project would not prejudice complete and full compliance with CEQA; and (4) the remainder of the project was in full compliance with CEQA.[48]

The appellate court also rejected the petitioner's argument that the severance remedy under Public Resources Code section 21168.9(b) "was originally designed to address only relatively minor matters of noncompliance with CEQA."[49] In rejecting the argument, *Anderson* noted that section 21168.9 was amended in 1993 to expand the trial court's authority to fashion a remedy, and that "the issuance of a writ need not always halt all work on a project."[50]

42. *Anderson*, 130 Cal. App. 4th at 1173.
43. *Id.* at 1177.
44. *Id.* at 1177–78.
45. *Id.* at 1177–79.
46. *Id.*
47. *Id.* at 1179–80.
48. *Anderson*, 130 Cal. App. 4th at 1180–81.
49. *Id.* at 1181.
50. *Id.*

b) *POET, LLC v. California Air Resources Board* and *POET, LLC v. State Air Resources Board* illustrate courts' ability to balance CEQA compliance and project completion

Both POET, LLC v. California Air Resources Bd., 218 Cal. App. 4th 681 (2013) ("*POET I*")[51] and POET, LLC v. State Air Res. Bd., 12 Cal. App. 5th 52 (2017) ("*POET II*")[52] illustrate the wide discretion that courts have to narrowly fashion judicial remedies that fulfill CEQA's purposes without unduly obstructing a project. These cases stem from the California Air Resources Board's ("CARB") approval of low carbon fuel standard ("LCFS") regulations pursuant to the California Global Warming Solutions Act of 2006.[53]

In *POET I*, the appellate court held that CARB violated CEQA in its approval of the regulations, ordered CARB to void its approval of LCFS regulations, and directed CARB to correct its CEQA violations.[54] Despite voiding CARB's approval of LCFS regulations, the court held that "the LCFS regulations should remain in operation so long as [CARB] is diligent in taking the action necessary to bring its approval of the project into compliance with CEQA."[55] Based on its interpretation of subdivisions (a)(1), (a)(2), (b), and (c) of Public Resources Code section 21168.9, *POET I* held that "a court's decision to void the approval of a regulation, ordinance or program does not necessarily require the court to invalidate or suspend the operation of the regulation, ordinance or program."[56] "Instead, in extraordinary cases, the court may exercise its inherent equitable authority to maintain the status quo and allow the regulations to remain operative."[57] In deciding not to suspend the LCFS regulations, despite voiding their approval, the court emphasized the importance of crafting a judicial remedy that furthers CEQA's purposes.[58] In particular, the appellate court emphasized that leaving LCFS regulations in place provides more protection for the environment than suspending their operation pending CARB's compliance with CEQA.[59]

POET II addressed whether CARB satisfied the writ of mandate issued after *POET I* and corrected its CEQA violations.[60] The appellate court held that CARB failed to comply with the previously issued writ of mandate and that its attempt to

51. *POET I*, 218 Cal. App. 4th 681 (2013).
52. *POET II*, 12 Cal. App. 5th 52 (2017).
53. *Id.* at 56-57.
54. *POET I*, 218 Cal. App. 4th at 760.
55. *Id.* at 763.
56. *Id.* at 761.
57. *Id.*
58. *Id.* at 758, 762.
59. *Id.* at 762.
60. *POET II*, 12 Cal. App. 5th at 57.

comply with the writ was not in good faith.[61] Despite this, the appellate court did not suspend the LCFS regulations.[62] Instead, the appellate court held, once again, that the beneficial effects of the regulations outweighed their potential adverse impacts.[63] In reaching this conclusion, the court again underscored that judicial remedies under CEQA should further CEQA's purposes, explaining that "*the goals of CEQA* should not be compromised to punish agency bad faith."[64]

2. *LandValue 77, LLC v. Board of Trustees of California State University* held that a project approval must be set aside if any portion of the EIR fails to comply with CEQA, but subsequent cases rejected this holding

Despite the overwhelming textual evidence that judicial remedies under CEQA should be narrowly tailored, *LandValue 77, LLC v. Board of Trustees of California State University*[65] held that a public agency must set aside all project approvals and the certification of the EIR, where the court finds that an EIR is inadequate in some, but not all, respects.[66]

LandValue 77 involved a challenge to the approval of a mixed-use development project and the EIR certification for that project.[67] The trial court determined the EIR inadequately analyzed three limited environmental impacts of the proposed project.[68] Nonetheless, the trial court did not require decertification of the entire EIR and did not overturn the entire project approval.[69] The appellate court reversed, holding that "the trial court's determination that the final EIR was inadequate in certain respects requires an order directing the Board of Trustees to set aside its certification of the final EIR as well as its approval of the project."[70]

In reaching this conclusion, the appellate court (1) noted that the trial court did not sever the project under Public Resources Code section 21168.9(b), and (2) relied on a treatise, which addressed the application of section 21168.9 when a project has not been severed.[71] The treatise provides that when a trial court has not severed a project pursuant to section 21168.9(b), and the EIR is inadequate in some

61. *POET II*, 12 Cal. App. 5th at 100.
62. *Id.* at 101-02.
63. *Id.* at 101.
64. *Id.* (emphasis added).
65. LandValue 77, LLC v. Board of Trustees of Cal. State Univ., 193 Cal. App. 4th 675, (2011).
66. *Id.* at 681–83.
67. *Id.* at 677.
68. *Id.* at 678.
69. *Id.*
70. *Id.* at 683.
71. *LandValue 77*, 193 Cal. App. 4th 675 at 681–82.

respect, the local agency must set aside all project approvals and the EIR certification in its entirety.[72]

The appellate court relied on this treatise, but ultimately reached a conclusion that was more extreme than what was expressed in the treatise. In particular, the appellate court categorically "reject[ed] the idea of partial certification" of an EIR.[73] The court explained that "[t]he statutes and CEQA Guidelines provide for the certification of an EIR when it is complete, and the concept of completeness is not compatible with partial certification. In short, an EIR is either complete or it is not."[74] The court then held that when an EIR is legally inadequate, the project approvals must be set aside.[75]

Subsequent cases have—with good cause—expressly disagreed with *LandValue 77*'s holding. In *Preserve Wild Santee v. City of Santee*, the appellate court expressly rejected the argument that "whenever a trial court finds an EIR inadequate, the trial court must decertify the EIR and vacate all related project approvals."[76] *Preserve Wild Santee* explained "a reasonable, commonsense reading of section 21168.9 plainly forecloses plaintiffs' assertion that a trial court must mandate a public agency decertify the EIR and void all related project approvals in every instance where the court finds an EIR violates CEQA."[77] The appellate court held that "[s]uch a rigid requirement directly conflicts with the "in part" language in section 21168.9, subdivision (a)(1), which specifically allows a court to direct its mandates to "parts of determinations, parts of findings, or parts of decisions."[78] The appellate court further held that "[s]uch a rigid requirement also conflicts with the language in section 21168.9, subdivision (b), limiting the court's mandate 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."[79] Moreover, *Preserve Wild Santee* expressly dismissed *LandValue 77*'s contrary conclusion on the basis that both *LandValue 77* and the treatise it relied on ignored the "in part" language of section 21168.9(a)(1).[80]

More recently, the appellate court in *Center for Biological Diversity v. Department of Fish & Wildlife*[81] examined both *LandValue 77* and *Preserve Wild Santee*, and ultimately agreed with the reasoning and holding of *Preserve Wild*

72. *LandValue 77*, 193 Cal. App. 4th 675 at 681–82.
73. *Id.* at 682.
74. *Id.*
75. *Id.* at 683.
76. Preserve Wild Santee v. City of Santee, 210 Cal. App. 4th 260, 286 (2012).
77. *Id.* at 288.
78. *Id.*
79. *Id.*
80. *Id.* at 289.
81. Center for Biological Diversity v. Dept. of Fish & Wildlife, 17 Cal. App. 5th 1245 (2017).

Santee.[82] In *Center for Biological Diversity*, the trial court found the EIR defective as to certain issues, and issued a writ directing the public agency to, (1) void portions—not all—of the EIR; (2) enjoin all project activity until the EIR complied with CEQA; and (3) suspend two of the six approvals for the project.[83] The issue was whether section 21168.9 prohibits partial decertification of an EIR, and whether project approvals may be left in place after the EIR for the project is decertified. In agreeing with *Preserve Wild Santee*, the appellate court noted that section 21168.9 "clearly allows a court to order partial decertification of an EIR" as long as, pursuant to subdivision (b) of section 21168.9, the court determines that the voided portions are severable and that the remainder of the EIR fully complies with CEQA.[84] *Center for Biological Diversity* further distinguished *LandValue 77* on the basis that the trial court in that case did not determine that the project was severable under Public Resources Code section 21168.9(b).[85] Moreover, *Center for Biological Diversity* explained that under subdivision (b) of section 21168.9, "if the court finds that it will not prejudice full compliance with CEQA to leave some project approvals in place, it *must* leave them unaffected."[86]

The reasoning in *Preserve Wild Santee* and *Center for Biological Diversity* appears to have a stronger statutory basis than the court's reasoning in *LandValue 77*. As evidenced by *Preserve Wild Santee*, *Center for Biological Diversity*, *Anderson*, and the *POET* cases, CEQA affirmatively requires a court to narrowly fashion a judicial remedy consistent with section 21168.9, particularly when the project is severable. Still, as *LandValue 77* illustrates, ambiguity exists. Reform of Public Resources Code section 21168.9 is warranted to remove ambiguity and to make clear that judicial remedies under CEQA should be tailored as narrowly as possible to further CEQA's purposes without unduly obstructing projects from proceeding forward.

VI. Recommendations for reform of Public Resources Code Section 21168.9

Public Resources Code section 21168.9 is relatively well-drafted and provides courts with valuable discretion to narrowly tailor remedies effectuating CEQA's purposes. Nonetheless, this article suggests three ways to reform section 21168.9—or State CEQA Guidelines implementing section 21168.9—to ensure that remedies further CEQA's purposes without needless collateral damage.

82. *Center for Biological Diversity*, 17 Cal. App. 5th at 1253–54.
83. *Id.* at 1251.
84. *Id.* at 1252.
85. *Id.* at 1254.
86. *Id.* at 1255.

First, section 21168.9 could be amended to codify the holdings of *POET I* and *POET II*.[87] Specifically, section 21168.9 or State CEQA Guidelines could be amended to (1) explicitly encourage courts to fashion equitable remedies to address a CEQA violation where the court determines that such a remedy furthers CEQA's purpose; and (2) provide that an agency may proceed with a project, or individual project activities, during the remand period where the court has exercised its equitable discretion to permit project activities to proceed during that period.[88] Moreover, State CEQA Guidelines could be amended to advise that project approvals should remain in place where, as in the *POET* cases, the environment will be given a greater level of protection if the project remains operative during the remand period. These revisions would further CEQA's goal of protecting the environment, while also easing the burden on public agencies to approve regulations, ordinances, general plans, or similar items.

Second, section 21168.9 could be amended to limit a court's authority to vacate project approvals unless the court finds that failure to vacate the approvals would result in an imminent threat of actual environmental damage. This encourages courts to suspend—rather than vacate—project approvals until the public agency takes all necessary action to comply with CEQA.[89]

Third, section 21168.9 could be amended to codify existing case law and make clear that application of its judicial remedies is appropriate only where the court finds a *prejudicial* violation of CEQA.[90] Again, this would ensure that the application of judicial remedies under section 21168.9 furthers CEQA's purposes, rather than unduly obstructs a project.

These reforms, if adopted, would further define the extensive discretion of courts to fashion narrowly tailored remedies that advance CEQA's purposes without unnecessarily obstructing development. Ultimately, CEQA is not perfect, and these recommended reforms will not solve everything. The process of tinkering with CEQA to further its environmental and informational purposes without unduly hindering development is a tightrope that legislators will likely walk for as long as CEQA exists.

87. *POET I*, 218 Cal. App. 4th at 760-63; *POET II*, 12 Cal. App. 5th at 100–101.

88. OFFICE OF PLAN. & RES., PROPOSED UPDATES TO THE CEQA GUIDELINES (November 2017), https://perma.cc/96KX-GRQ4 (Proposing updates to the State CEQA Guidelines, including the addition of § 15234 memorializing the outcome of *POET I*).

89. *See Center for Biological Diversity*, 17 Cal. App. 5th at 1251 (suspending—rather than vacating—two of six project approvals).

90. *See, e.g., Neighbors for Smart Rail*, 57 Cal. 4th at 463.

VII. Conclusion

Governor Jerry Brown may have referred to CEQA reform as "the Lord's work," but CEQA itself serves an important purpose in protecting the environment and keeping both decision makers and the public informed.[91] When a court finds that a public agency has violated CEQA, Public Resources Code section 21168.9 gives the court discretion to narrowly tailor judicial remedies to further CEQA's important purposes, without unduly obstructing proposed projects and development. CEQA reform should not compromise CEQA's important purpose, but rather ensure that its purpose is achieved while minimizing unnecessary obstacles to development.

91. Cal. Code Regs. tit. 14, § 15002(a); *see also Golden Gate Landholdings*, 215 Cal. App. 4th at 365.