

10-1-2015

Underground Environmental Regulations: Regulations Imposed As Mitigation Measures Under CEQA Violate the California Administrative Procedure Act

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Wood, Jonathan (2015) "Underground Environmental Regulations: Regulations Imposed As Mitigation Measures Under CEQA Violate the California Administrative Procedure Act," *California Western Law Review*: Vol. 52: No. 1, Article 2.
Available at: <http://scholarlycommons.law.cwsl.edu/cwlr/vol52/iss1/2>

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CALIFORNIA WESTERN LAW REVIEW

VOLUME 52

FALL 2015

NUMBER 1

UNDERGROUND ENVIRONMENTAL REGULATIONS: REGULATIONS IMPOSED AS MITIGATION MEASURES UNDER CEQA VIOLATE THE CALIFORNIA ADMINISTRATIVE PROCEDURE ACT

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INTRODUCTION

The California Environmental Quality Act (CEQA) generally forbids any governmental entity in the state from proceeding with any project unless it first discloses all of the project's significant environmental impacts and either mitigates those impacts, if feasible, or makes a finding that other considerations justify going forward with the project despite them. When the project is a statewide program rather than an isolated decision, this creates a potential problem. Simply complying with CEQA will not be enough. Any mitigation measure that adopts general standards to govern that program will likely also be a regulation subject to the California Administrative Procedure Act (California APA).¹

Recently, the California Court of Appeal held that mitigation measures that meet the California APA's definition of regulation are subject to that statute's requirements, in addition to CEQA. That case — *Center for Biological Diversity v. Department of Fish & Wildlife* — struck down mitigation measures purporting to regulate the private fish stocking industry as illegal “underground regulations.”² An “underground regulation” includes any rule that meets the California APA's' broad definition of regulation but was not enacted according to the statute's procedures.³ Such regulations are categorically unenforceable.⁴ Consequently, any agency imposing a mitigation measure under CEQA that would be considered a regulation under the

1. *Center for Biological Diversity v. Dept. of Fish & Wildlife*, 234 Cal. App. 4th 214, 259 (2015).

2. *Center for Biological Diversity*, 234 Cal. App. 4th at 258-64.

3. CAL. CODE REGS. TIT. 1, § 250 (2015).

4. CAL. GOV'T CODE § 11340.5(a) (West 2005 & Supp. 2015).

California APA will also have to formally adopt the measure as a regulation before enforcing it.

What will recognition of “underground environmental regulations” mean for the regulated public? Such recognition will probably cause a net reduction in regulatory burdens but not without some cost. The public will benefit from the California APA’s requirement that agencies consider all impacts of their regulations, rather than just environmental ones. Also, the public will benefit because the Office of Administrative Law, an outside agency, will review regulations for consistency, clarity, and necessity. Finally, broader judicial review of regulations will benefit the public.

However, compliance with the California APA’s procedural requirements may also introduce additional uncertainty and delay. CEQA generally forbids agencies from proceeding with a project unless they comply with the mitigation measures contained in the environmental impact report. Thus, programs may be delayed until formal adoption of a final regulation. Where delay would impose substantial costs, the agency has several options. These options include: (1) framing the mitigation measure to merely require the agency to pursue rulemaking; (2) adopting an emergency regulation that allows the program to proceed while the agency pursues formal adoption or; (3) adopting a statement of overriding consideration that cites the costs and burdens of delay to allow the program to continue in the interim. The last option is the most sensible and least likely to invite unnecessary litigation.

This article is organized into four parts. Part I briefly summarizes CEQA. Part II introduces the California APA and its prohibition against underground regulations. Part III explains why underground environmental regulations are invalid for being inconsistent with the California APA. Part IV addresses how underground regulations’ invalidity will impact the regulated public. Part IV also discusses agencies’ options to reduce adverse impacts.

I. CEQA

CEQA, like its federal counterpart, the National Environmental Policy Act, requires state and local agencies to publicly disclose all significant environmental impacts from any projects that the agencies approve or carry out. CEQA also requires the agencies to either

mitigate those impacts or explain why other considerations warrant allowing the project to proceed despite the impacts.⁵ CEQA's reach is as sweeping as its purposes, which include to "[d]evelop and maintain a high-quality environment now and in the future, and take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state."⁶ These actions include consideration of aesthetic, scenic, and historical values; impacts on air, water, wildlife; and noise levels.⁷ Although CEQA requires consideration of all significant environmental impacts, it does not forbid agencies from approving projects that have such impacts.⁸ Rather, its core purpose is to promote informed public decision-making, at least with regard to environmental impacts.⁹

5. See CAL. PUB. RES. CODE § 21065 (West 2007 & Supp. 2015); CAL. CODE REG. TIT. 14, § 15002 (2015). CEQA does not apply to private activities, unless they involve government participation, financing, or approval (*i.e.*, permitting). CAL. CODE REG. TIT. 14, § 15002(c); see Sean Stuart Varner, *The California Environmental Quality Act (CEQA) After Two Decades: Relevant Problems and Ideas for Necessary Reform*, 19 PEPP. L. REV. 1447, 1455-57 (1992). The CEQA Guidelines, codified in Title 14 of the California Code of Regulations, are accorded great weight by courts when interpreting CEQA. See *Muzzy Ranch Co. v. Solano Cty. Airport Land Use Comm'n*, 41 Cal. 4th 372, 380 n.2 (2007).

6. CAL. PUB. RES. CODE § 21001(a) (West 2007 & Supp. 2015).

7. See Todd Nelson, *Save Tara and the Modern State of the California Environmental Quality Act*, 45 LOY. L.A. L. REV. 289, 294-95 (2011); see also CAL. PUB. RES. CODE § 21001 (West 2007 & Supp. 2015). These impacts are evaluated compared to an environmental "baseline," which is usually what the environment would look like if the project did not proceed. Megan McQueeney, Note, *Baseline in the Sand: Communities for a Better Environment v. South Coast Air Quality Management District*, 38 ECOLOGY L.Q. 293 (2011).

8. An agency may allow a project to go forward notwithstanding significant environmental impacts by finding mitigation infeasible and adopting a statement of overriding considerations to explain why other factors outweigh those impacts. CAL. PUB. RES. CODE § 21093 (West 2007 & Supp. 2015); CAL. CODE REGS. TIT. 14, § 15002(h) (2015).

9. See *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, 43 Cal. 4th 1143, 1162 (2008). Although CEQA permits agencies to allow environmental impacts where there are significant social, economic, or recreational benefits to offset them, it does not directly require an agency to analyze these non-environmental impacts. See *Laurel Heights Improvement Assoc. v. Regents of Univ. of Cal.*, 6 Cal. 4th 1112, 1123 (1993); *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal. 3d 553, 564 (1990); CAL. CODE REGS. TIT. 14, § 15003(j) (2015).

Ordinarily, an agency proceeds through three steps in the CEQA process.¹⁰ First, it determines whether the project is subject to CEQA at all.¹¹ A project is exempt from CEQA if it would obviously not have a significant effect on the environment.¹² Projects subject to a statutory exemption are also exempt.¹³ Unless the project is exempt, the agency prepares an initial study to determine whether the project may have a significant effect on the environment.¹⁴ If the initial study does not yield substantial evidence of any significant environmental impacts, the agency prepares a “negative declaration” and the project can proceed without further review.¹⁵ The project proponent or the government may also modify the project to avoid the significant environmental effect and adopt a “mitigated negative declaration.”¹⁶

But, if the initial study concludes that the project *may* have some significant environmental impact, the agency generally must prepare an “environmental impact report” or “EIR.”¹⁷ That report is “the heart of CEQA.”¹⁸ The report must “identify the significant effects on the environment of a project, . . . identify alternatives to the project, and . . . indicate the manner in which those significant effects can be

10. CAL. CODE REGS. TIT. 14, § 15002(k) (2015).

11. CAL. CODE REGS. TIT. 14, §§ 15061, 15062 (2015).

12. CAL. CODE REGS. TIT. 14, § 15061 (2015).

13. *See* CAL. CODE REGS. TIT. 14, §§ 15061, 15261-15333 (2015).

14. CAL. CODE REGS. TIT. 14, § 15063 (2015). Due to uncertainty, it can often be difficult to determine whether a potential environmental impact is significant. John Watts, *Reconciling Environmental Protections with the Need for Certainty: Significance Thresholds for CEQA*, 22 *ECOLOGY L.Q.* 213 (1995); *see Laurel Heights Improvement Assn.*, 47 Cal. 3d 395 (1988). These determinations also often end up the subject of litigation. *See Varner, supra* note 5, at 1457-66.

15. CAL. CODE REGS. TIT. 14, §§ 15070 (2015).

16. CAL. CODE REGS. TIT. 14, § 15070(b) (2015); *see Gentry v. City of Murrieta*, 36 Cal. App. 4th 1359, 1373 (1995).

17. CAL. PUB. RES. CODE § 21080(d) (West 2007 & Supp. 2015); CAL. CODE REGS. TIT. 14, § 15080 (2015); *Laurel Heights Improvement Assn.*, 47 Cal. 3d at 392 (citing CAL. CODE REGS., TIT. 14, § 15003 (2015); *Cty. of Inyo v. Yorty*, 32 Cal. App. 3d 795, 810 (1973)).

18. *See Yorty*, 32 Cal. App. 3d 795, 810 (1973); *see also Laurel Heights Improvement Assn.*, 47 Cal. 3d at 392.

mitigated or avoided.”¹⁹ The result is often a voluminous report spanning several thousand pages.²⁰

The process begins with a draft environmental impact report. The draft must identify the project’s basic objectives so that the agency and the public can assess the project’s benefits, alternatives, and potential mitigation options.²¹ The draft report must “describe a range of reasonable alternatives to the project . . . which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.”²² This list of alternatives must include a “no project” alternative that compares the impacts of the project to the effects of not undertaking the project.²³ The draft report must identify the environmental impacts of each alternative and mitigation measures to reduce the significance of the impacts.²⁴

After preparing the draft report, the agency must make it available for public comment.²⁵ The agency must “consider” and “evaluate” every comment submitted on the draft and prepare a written response to each significant environmental issue raised by a commenter.²⁶ The

19. CAL. PUB. RES. CODE §§ 21002.1(a) (West 2007 & Supp. 2015).

20. See, e.g., California Department of Fish and Wildlife, *Final Environmental Impact Report for Hatchery Operations* (Jan. 11, 2010), <https://www.dfg.ca.gov/fish/Hatcheries/EIR/> [hereinafter *Fish Stocking EIR*] (EIR spanning tens of thousands of pages).

21. CAL. PUB. RES. CODE § 21081(b) (West 2007 & Supp. 2015); CAL. CODE REGS. TIT. 14, § 15093(a) (2015); see Sara Wimberger, Note, *Consideration of Alternatives in Environmental Impact Reports: The Importance of CEQA’s Procedural Requirements*, 36 *ECOLOGY L.Q.* 499 (2009).

22. CAL. CODE REGS. TIT. 14, § 15126.6(a) (2015); see *Laurel Heights Improvement Assn.* 47 Cal. 3d at 399-403 (1988).

23. CAL. CODE REGS. TIT. 14, § 15126.6(a) (2015); see *Save Tara v. City of West Hollywood*, 45 Cal. 4th 116, 138-39 (2008).

24. CAL. CODE REGS. TIT. 14, § 15091 (2015).

25. CAL. PUB. RES. CODE §§ 21091, 21092 (West 2007 & Supp. 2015); CAL. CODE REGS. TIT. 14, §§ 15087, 15105(a) (2015).

26. CAL. PUB. RES. CODE § 21091(d) (West 2007 & Supp. 2015); CAL. CODE REGS. TIT. 14, § 15088(c) (2015).

draft, public comments, and agency responses are then all included in a final environmental impact report for the agency's final review.²⁷

A project that will have a significant effect on the environment cannot be approved unless: (1) the final environmental impact report includes feasible and enforceable mitigation measures that reduce the effect to insignificance; (2) the effect is avoided through the adoption of an alternative or; (3) mitigation is infeasible and the project's overriding benefits outweigh the significant effect.²⁸

To streamline the CEQA process for ongoing government programs, or where many similar projects would otherwise have to go through review,²⁹ an agency can "tier" the environmental review process.³⁰ The agency tiers the review process by addressing environmental impacts and mitigation requirements common to the program as a whole in a program environmental impact report and addressing site-specific or case-specific issues in a supplemental report.³¹ Where the mitigation measures imposed under the program-wide environmental impact report render any remaining impacts of the specific project insignificant, the project may proceed under a negative declaration.³²

This process creates a potential problem, however. Unlike the run-of-the-mill environmental impact reports that apply only to a single project, a program environmental impact report sets standards that govern an entire class of projects.³³ Such mitigation measures may qualify as regulations under the California APA.

27. CAL. PUB. RES. CODE § 21100 (West 2007 & Supp. 2015); CAL. CODE REGS. TIT. 14, § 15132 (2015).

28. See CAL. PUB. RES. CODE § 21081 (West 2007 & Supp. 2015); CAL. CODE REGS. TIT. 14, §§ 15002(h), 15091(a), 15092(b), 15093(c) (2015).

29. Examples of such programs include the adoption of a general land use plan and the implementation of a statewide regulatory program or policy. CAL. CODE REGS. TIT. 14, § 15152(a) (2015).

30. See CAL. PUB. RES. CODE § 21083 (West 2007 & Supp. 2015); CAL. CODE REGS. TIT. 14, §§ 15152, 15385 (2015); see also CAL. PUB. RES. CODE §§ 21003, 21061, 21100 (West 2007 & Supp. 2015).

31. See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 431 (2007); Wimberger, *supra* note 21, at 520-21.

32. CAL. CODE REGS. TIT. 14, § 15152(f) (2015).

33. CAL. CODE REGS. TIT. 14, § 15168 (2015).

II. THE CALIFORNIA APA FORBIDS UNDERGROUND REGULATIONS

The California APA is more broadly applicable than its federal counterpart.³⁴ This broad statute's purpose is to ensure that "persons or entities affected by a regulation . . . be heard on the merits in its creation, and . . . have notice of the law's requirements so they can conform their conduct accordingly."³⁵ It was founded on the perception that there were too many regulations imposing unnecessary burdens on the state and its people.³⁶ The legislature also believed that too many regulations were imposed in secret, therefore the California APA's procedural protections were intended to "insure that due process concerns are satisfied."³⁷ As the California Supreme Court explained, increased public participation in the process also improves the quality of regulations.³⁸

"The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny."³⁹

34. *See* *Armistead v. State Pers. Bd.*, 22 Cal. 3d 198, 201-02 (1978) (the Legislature desired "to achieve in the California APA a much greater coverage of rules than Congress sought in the federal APA.").

35. *Morales v. Cal. Dep't of Corr. & Rehab.*, 168 Cal. App. 4th 729, 736 (2008).

36. *See* *Voss v. Superior Court*, 46 Cal. App. 4th 900, 908-09 (1996) ("The APA was born out of the Legislature's perception there existed too many regulations imposing greater than necessary burdens on the state and particularly upon small businesses.").

37. *See* *Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n.*, 43 Cal. 3d 1379, 1420 (1987); *see also* *Horn v. Cty. Of Ventura*, 24 Cal. 3d 605, 621 (1979) ("[W]e should not encourage legislators and rulemakers who conceivably yearn for a more comfortable past when often they did proceed without notice, without hearing, in protective secrecy.").

38. *See* *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996).

39. *Tidewater Marine Western, Inc.*, 14 Cal. 4th at 568-69 (citing *San Diego Nursery Co. v. Agricultural Labor Relations Bd.*, 100 Cal. App. 3d 128, 142-43 (1979)).

Due to the importance of those purposes, the courts resolve any doubts about the statute's applicability in its favor.⁴⁰

The California APA's requirements include: (1) public notice of proposed and final regulations;⁴¹ (2) an opportunity for public comment;⁴² (3) a public hearing, if requested;⁴³ (4) responses to public comments;⁴⁴ and (5) submission of all regulations to an independent agency — the Office of Administrative Law.⁴⁵ Any person may challenge any regulation as contrary to law or improperly promulgated.⁴⁶

Every regulation, unless within a narrow list of enumerated exceptions, must be formally adopted through the California APA's procedures.⁴⁷ The statute defines "regulation" very broadly as "every rule, regulation, order, or standard of general application, or the amendment, supplement, or revision of any rule, regulation, order, or

40. See *Californians for Pesticide Reform v. Dep't of Pesticide Regulation*, 184 Cal. App. 4th 887, 907-08 (2010) (citing *Grier v. Kizer*, 219 Cal. App. 3d 422, 439 (1990)); see also CAL. GOV'T CODE § 11346 (West 2005 & Supp. 2015) ("This chapter shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly."); *United Sys. of Ark. v. Stamison*, 63 Cal. App. 4th 1001, 1010 (1998) (citing *Grier v. Kizer* 219 Cal. App. 3d 422, 438 (1990)); *Morales*, 168 Cal. App. 4th at 736.

41. CAL. GOV'T CODE §§ 11346.4, 11346.5, 11346.2 (West 2005 & Supp. 2015). The required notice is significant. In addition to providing the complete text of the proposed regulation, the notice must contain a statement of reasons for it and identify the studies and other evidence supporting it. CAL. GOV'T CODE § 11346.2 (West).

42. CAL. GOV'T CODE § 11346.8 (West 2005 & Supp. 2015).

43. CAL. GOV'T CODE § 11346.8(a) (West 2005 & Supp. 2015).

44. CAL. GOV'T CODE §§ 11346.8, 11346.9 (West 2005 & Supp. 2015).

45. CAL. GOV'T CODE § 11347.3 (West 2005 & Supp. 2015); CAL. CODE REGS. TIT. 1, § 250(a) (2015). The Office of Administrative Law reviews every proposed regulation to ensure that it is consistent with the law, clear, and necessary. CAL. GOV'T CODE §§ 11349.1, 11349.3 (West 2005 & Supp. 2015).

46. CAL. CODE CIV. PROC. § 1085 (West 2007 & Supp. 2015); see also CAL. GOV'T CODE § 11374 (West 2005) ("[N]o regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute."); *Clean Air Constituency v. California State Air Res. Bd.*, 11 Cal. 3d 801, 815-16 (1974).

47. *Center for Biological Diversity v. Dept. of Fish & Wildlife*, 234 Cal. App. 4th 214, 259 (2015).

standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.”⁴⁸ The California Supreme Court has interpreted the term “regulation” to include any rule that is “generally applicable”⁴⁹ and implements, interprets, or makes specific the law enforced or administered by the agency, or governing its procedures.⁵⁰ This definition is broader than the statute’s federal counterpart because it applies to any rule, not just “legislative” rules.⁵¹

The California APA contains a narrow list of regulations that are exempt from its notice and public comment requirements. These are: (1) a regulation adopted by an agency in the judicial or legislative branch;⁵² (2) a legal ruling issued by the Franchise Tax Board’s counsel or State Board of Equalization’s counsel;⁵³ (3) a form or instructions relating to the use of a form;⁵⁴ (4) a regulation that relates only to the internal management of the state agency;⁵⁵ (5) a regulation

48. CAL. GOV’T CODE § 11342.600 (West 2005 & Supp. 2015).

49. See *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 570-71 (1996). “Generally applicable” refers to any rule that applies to all members of any identifiable class, kind, or order, or declares how a certain class of cases will be decided. See *id.*; *Morning Star Co. v. State Bd. of Equalization*, 38 Cal. 4th 324, 333-34 (2006). This includes essentially anything but the application of a procedurally valid rule to a particular instance or individual.

50. See *Tidewater Marine Western*, 14 Cal. 4th at 570-77; see also *Morning Star Co.*, 38 Cal. 4th at 333-34.

51. See Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43, 44 (1992). Asimow criticizes California’s approach on the grounds that it does more harm than good, by increasing costs on agencies’ efforts to convey their interpretations of the statutes they administer to the public subject to them. See *id.* at 55-62. He argues that interpretive rules do not affect the legal rights and obligations of those subject to them, and thus don’t raise the same concerns that legislative rules do. See *id.* at 44. However, because courts defer to interpretive rules, Asimow’s premise is false. See *Tidewater Marine Western*, 14 Cal. 4th at 574-75 (criticizing Asimow’s argument on this basis).

52. CAL. GOV’T CODE § 11340.9(a) (West 2005 & Supp. 2015).

53. CAL. GOV’T CODE § 11340.9(b) (West 2005 & Supp. 2015).

54. CAL. GOV’T CODE § 11340.9(c) (West 2005 & Supp. 2015).

55. CAL. GOV’T CODE § 11340.9(d) (West 2005 & Supp. 2015). This exemption is referred to as the “internal management” exemption and is exceedingly narrow. In *Armistead v. State Personnel Board*, the California Supreme Court held that it cannot exempt any rule that significantly affects people outside the agency,

that establishes criteria or guidelines for agency staff to perform an audit, investigation, examination, or inspection, settle a commercial dispute, or negotiate a commercial arrangement;⁵⁶ (6) a regulation that embodies the only legally tenable interpretation of a provision of law;⁵⁷ (7) a regulation that establishes or fixes rates, prices, or tariffs;⁵⁸ (8) a regulation that relates to the use of public works;⁵⁹ and (9) a regulation that is directed to a specific person or group and does not apply generally throughout the state.⁶⁰

Any non-exempt regulation that has not been formally adopted through the California APA's procedures is an "underground regulation."⁶¹ Agencies that adopt underground regulations face two significant consequences. First, the agencies are categorically prohibited from enforcing the underground regulation.⁶² That

even if the regulation is only directly addressed to agency employees. *See Armistead v. State Pers. Bd.*, 22 Cal. 3d 198, 203-04 (1978) ("That [the regulation] is not readily accessible to affected employees and the public does not persuade us that [it] relates to internal management only. The section obviously was intended to be generally applied. . . . In fact, the insistence on restricted access does indeed increase our concern."); *see also Morning Star Co.*, 38 Cal. 4th at 336 (2006) ("We decline to endorse an approach that would allow an agency to avoid APA requirements simply by driving its regulations further underground."); *City of San Marcos v. Cal. Highway Comm.*, 60 Cal. App. 3d 383, 408 (1976).

56. CAL. GOV'T CODE § 11340.9(e) (West 2005 & Supp. 2015).

57. CAL. GOV'T CODE § 11340.9(f) (West 2005 & Supp. 2015). This exemption is referred to as the "lone legally tenable interpretation" exemption. It too is exceedingly narrow. If the interpretation "depart[s] from, or embellish[es] upon, express statutory authorization and language, the [agency] will need to promulgate regulations." *Engelmann v. State Bd. of Educ.*, 2 Cal. App. 4th 47, 62 (1991). This is true even if the interpretation is the most reasonable one. *Morning Star Co.*, 38 Cal. 4th at 336 ("Were this the case, the exception would swallow the rule."). The exemption only applies if the law can be interpreted *only* one way, such that the interpretation is "essentially rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute's plain language." *Id.* at 337 (citing Cal. Law Revision Com., 32D West's Ann. Gov. Code (2005 ed.) foll. § 11340.9)).

58. CAL. GOV'T CODE § 11340.9(g) (West 2005 & Supp. 2015).

59. CAL. GOV'T CODE § 11340.9(h) (West 2005 & Supp. 2015).

60. CAL. GOV'T CODE § 11340.9(i) (West 2005 & Supp. 2015).

61. CAL. CODE REGS. TIT. 1, § 250 (2015).

62. CAL. GOV'T CODE § 11340.5(a) (West 2005 & Supp. 2015). The statute requires any a regulation to be struck down if there is any substantial noncompliance. CAL. GOV'T CODE § 11350 (West 2005 & Supp. 2015). This may

consequence occurs regardless of the regulation's purpose because the Legislature has clearly stated that the California APA does not permit implied exceptions.⁶³

Second, courts will not accord any deference to an agency's interpretation of a statute contained in an underground regulation.⁶⁴ The California Supreme Court explained that "[t]o hold otherwise would help to perpetuate the problem of avoidance by administrative agencies of 'the mandatory requirements of the [APA] of public notice, opportunity to be heard by the public, filing with the Secretary of State, and publication in the [California Code of Regulations].'"⁶⁵ Consequently, and regardless of the agency's expertise in interpreting and administering the statute, "courts in effect ignore the agency's illegal regulation."⁶⁶ The courts' approach significantly distinguishes the California APA from its federal counterpart, under which interpretive regulations are exempt from notice-and-comment, but nonetheless receive substantial deference.⁶⁷

mean that the prohibition will not be triggered if an agency attempts to comply in good faith but makes some minor error. But there has never been a case in which a court found that happened. Rather, whenever the courts have found that the California APA was violated, the regulation could not be enforced. *See, e.g.,* Reilly v. Superior Court, 57 Cal. 4th 641, 649 (2013).

63. *See* State Water Res. Control Bd. v. Office of Admin. Law, 12 Cal. App. 4th 697, 703-04 (1993).

64. *See* Armistead v. State Pers. Bd., 22 Cal. 3d 198, 204-05 (1978); *see also* Yamaha Corp. of Am. v. State Bd. of Equalization, 19 Cal. 4th 1, 19-20 (1998).

65. *Armistead*, 22 Cal. 3d at 205.

66. *Yamaha Corp. of Am.*, 19 Cal. 4th at 20.

67. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945). This may change, however. The Supreme Court has recently hinted that it may be reconsidering the traditional deference accorded to regulations that do not undergo notice and comment. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring); *id.* at 1211 (Scalia, J., concurring); *id.* at 1213 (Thomas, J., concurring). Scholars have called for the court to reject deference in such circumstances. *See, e.g.,* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 631-96 (1996). There also seems to be recent reluctance to apply more traditional deference. *See* King v. Burwell, 135 S. Ct. 2480, 2488-89 (2015); Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014).

III. THE CALIFORNIA APA APPLIES TO REGULATIONS ADOPTED THROUGH CEQA

Mitigation measures adopted in program environmental impact reports may implicate the prohibition against underground regulations.⁶⁸ When mitigation measures impose new standards that will govern all applications of the program, these standards are “underground environmental regulations.”

A. The California APA and CEQA Contain Different Procedural Requirements

At first, it may seem paradoxical to claim that a mitigation measure could conflict with the California APA. CEQA is notorious for imposing significant procedural delays on projects.⁶⁹ One might naturally expect that CEQA’s and the California APA’s procedures would be largely redundant, but this is not so. Those two statutes differ in many significant respects and the Legislature and the California Supreme Court have made clear that procedural requirements imposed under a separate statute do not exempt a regulation from the California APA’s mandates.⁷⁰ In California, the

68. CAL. CODE REGS. TIT. 14, § 15168 (2015).

69. Because of these burdens, CEQA has been a major source of litigation abuse. See Jennifer L. Hernandez & David Friedman, *In the Name of the Environment: Litigation Abuse Under CEQA* (Aug. 2015) (<http://www.hklaw.com/publications/in-the-name-of-the-environment-litigation-abuse-under-ceqa-august-2015/>); Katherine V. Mackey, Note, *Reforming “The Blob”: Why California’s Latest Approach to Amending CEQA Is a Bad Idea*, 39 COLUM. J. ENVTL. L. 357, 357-60 (2014); Stephen J. Dubner, *Why Bad Environmentalism Is Such an Easy Sell: A New Freakonomics Radio Podcast*, FREAKONOMICS.COM (Oct. 24, 2013) (<http://freakonomics.com/2013/10/24/why-bad-environmentalism-is-such-an-easy-sell-a-new-freakonomics-radio-podcast-2/>); George Skelton, *Abuse pollutes state environmental law*, L.A. TIMES (Mar. 11, 2013) (<http://articles.latimes.com/2013/mar/11/local/la-me-cap-environment-20130311>).

70. See CAL. GOV’T CODE § 11346(a) (West 2005 & Supp. 2015) (California APA’s procedural requirements “shall not be superseded or modified by any subsequent legislation *except to the extent that the legislation shall do so expressly.*”); *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 568-69 (1996) (Industrial Welfare Commission regulations are subject to analogous procedural requirements *and* expressly exempted from the California APA);

only lawful way to adopt regulations is through the California APA's procedures.

Due to of the vastly different purposes underlying the two statutes, their procedural requirements differ in significant ways. The California APA requires more detailed notice regarding the content of the proposed regulation, its purposes, and the evidence supporting it than CEQA.⁷¹ The California APA also requires agencies to exert greater efforts to publicize proposed regulations.⁷²

The California APA also requires agencies to analyze a broader array of issues than CEQA. Under the California APA, an agency has an affirmative obligation to consider "the [regulation's] potential for adverse economic impact on California business enterprises and individuals,"⁷³ and the impact on "creation or elimination of jobs" and "creation of new businesses or the elimination of existing businesses" within the state.⁷⁴ CEQA, by contrast, does not require any consideration of economic impacts.⁷⁵

Those substantive differences carry over to the agency's obligation to respond to public comments. Under the California APA, an agency must summarize *every* objection or recommendation made during the public comment period "together with an explanation of

Mountain Lion Found. v. Fish & Game Com.; 16 Cal. 4th 105, 133-34 (1997) (compliance with California APA's procedures does not imply compliance with CEQA).

71. Compare CAL. GOV'T CODE § 11346.2 (West 2005 & Supp. 2015) (requiring the notice to contain the express terms of the regulation and studies supporting it) with CAL. PUB. RES. CODE § 21092(b)(1) (West 2007 & Supp. 2015) (requiring only a brief description of the proposal); see CAL. GOV'T CODE § 11346.5 (West 2005 & Supp. 2015) (requiring agencies to identify the statutory authorization for any proposed regulation and the types of businesses likely affected by the regulation's significant adverse economic impacts).

72. Compare CAL. GOV'T CODE § 11346.4(a) (West 2005 & Supp. 2015) (requiring notice to a representative number of small businesses, publication in the California Regulatory Notice Register, and publication on the agency's Web site) with CAL. PUB. RES. CODE § 21092(b)(3) (West 2007 & Supp. 2015) (requiring either publication in a newspaper, posting of notice at affected sites, or direct mailing to affected property owners).

73. CAL. GOV'T CODE § 11346.3(a) (West 2005 & Supp. 2015).

74. CAL. GOV'T CODE § 11346.3(b)(1) (West 2005 & Supp. 2015).

75. CAL. CODE REGS. TIT. 14, § 15358 (2015) ("Effects analyzed under CEQA must be related to a physical change.").

how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change,” regardless of the subject of the public comment.⁷⁶ CEQA, however, myopically focuses on environmental impacts; an agency must only respond to public comments that address environmental issues.⁷⁷

Finally, the California APA contains a unique requirement: agencies must submit regulations to the Office of Administrative Law for review of their “necessity, authority, clarity, consistency, reference, and nonduplication.”⁷⁸ If a proposed regulation fails any of the criteria, it is returned to the agency and, if any significant changes are required, the promulgation process may have to begin anew.⁷⁹

B. Program EIRs are Particularly Likely to Contain Underground Environmental Regulations

A survey of existing program environmental impact reports highlights the particular seriousness of this issue. Not only is there a significant risk that many program EIRS may contain underground environmental regulations, but they also deal with significant environmental and human health issues. Discussion of examples of the types of programs that may be affected highlights this issue.

In March 2012, the Department of Fish and Wildlife⁸⁰ approved a supplemental environmental impact report for its suction dredge permitting program.⁸¹ This report found that suction dredge mining⁸²

76. CAL. GOV'T CODE § 11346.9(a)(3) (West 2005 & Supp. 2015).

77. CAL. PUB. RES. CODE § 21091(d)(2)(A) (West 2007 & Supp. 2015).

78. CAL. GOV'T CODE § 11349.1(a) (West 2005 & Supp. 2015).

79. CAL. GOV'T CODE § 11349.4(a) (West 2005).

80. Prior to 2013, the Department of Fish and Wildlife was named the Department of Fish and Game. To avoid confusion, this article will refer to the Department only using its current name.

81. California Department of Fish and Game, *Suction Dredge Permitting Program: Final Subsequent Environmental Impact Report* (Mar. 2012) [hereinafter *Suction Dredge EIR*], <https://www.wildlife.ca.gov/Licensing/Suction-Dredge-Permits>; see CAL. FISH & GAME CODE §§ 5653, 5653.1 (West 2013 & Supp. 2015); CAL. CODE REGS., TIT. 14 §§ 228, 228.5 (2015).

82. Suction dredge mining involves the use of a motorized pump and hose to suck up streambed materials, which is then run through a sluice box to trap gold and other dense materials, after which the water and remaining sediment is dumped back

can increase noise pollution, destabilize streambeds, stir up mercury and other materials contained in streambeds, interfere with fish and other protected wildlife, and disturb cultural resources.⁸³ To address these concerns, to the extent of the Department's statutory authority,⁸⁴ the environmental impact report proposed several regulations governing the number of permits, reporting requirements, and time, place, and manner restrictions.⁸⁵

The State Water Resources Control Board prepared a program environmental report addressing the environment impacts of biosolids when used as fertilizers.⁸⁶ That report found that uncontrolled land application of biosolids could have several significant adverse environmental impacts such as polluting groundwater, poisoning fish, depleting protected wildlife, contaminating food, and exposing residents and agricultural workers to radionuclides.⁸⁷ To mitigate these impacts, the report established screening and reporting requirements, grazing restrictions, and restrictions on chemical buildups in the soil.⁸⁸

The Department of Conservation prepared a programmatic environmental impact report addressing the environmental impacts of

into the stream. See Adrienne DelCotto, *Suction Dredge Mining: The United States Forest Service Hands Miners the Golden Ticket*, 40 ENVTL. L. 1021, 1026-27 (2010).

83. *Suction Dredge EIR* at 5-61.

84. The Department only has statutory authority to regulate suction dredge mining to ensure that it is not deleterious to fish. CAL. FISH & GAME CODE § 5653(b) (West 2013 & Supp. 2015). Since the Department has no current statutory authority to adopt regulations to address the other significant environmental impacts, the state legislature has enacted a moratorium on suction dredge mining until legislation is enacted giving the Department sufficient authority to regulate this mining's impacts. *Id.* §§ 5653, 5653.1; see *People v. Rinehart*, 230 Cal. App. 4th 419 (2014), review granted (Cal. Jan. 21, 2015) (federal preemption challenge to the moratorium).

85. *Suction Dredge EIR* at 1-2-1-4.

86. California State Water Resources Control Board, *Final Statewide Program EIR Covering General Waste Discharge Requirements for Biosolids Land Application* (June 2004), http://www.swrcb.ca.gov/water_issues/programs/biosolids/peir.shtml. (Introduction)

87. *See id.* at ES-14.

88. *See id.*

oil and gas well stimulation treatments, *i.e.*, fracking.⁸⁹ The report found that fracking, in addition to posing risks of spills, could have adverse impacts on air quality, fish, wildlife, vegetation, greenhouse gas emissions, and water quality.⁹⁰ To address these impacts, the report adopted several mitigation measures, including restrictions on which water sources may be used, how wells are designed, how close wells can be to various areas, and requirements to install protective devices to reduce impacts to biological or water resources.⁹¹

Another example includes the Department of Fish and Wildlife's program environmental impact report governing state and private fish stocking in waters throughout California.⁹² The report identified impacts on several amphibian and fish species from predation and competition for food, increased risk of invasive species, and potential impacts to water quality.⁹³ To address these concerns, the fish stocking report proposed several mitigation measures, including new requirements for two programs administered by the department.⁹⁴ The report modified the "Fishing in the City" program, through which the Department encouraged fishing opportunities for urban residents by imposing a new evaluation protocol to determine which water bodies would be stocked with fish. The report also required participating businesses to adopt monitoring and reporting programs to ensure that

89. California Department of Conservation, *Analysis of Oil and Gas Well Stimulation Treatments in California: Final Environmental Impact Report* (June 2015), http://www.conservation.ca.gov/dog/Pages/SB4_Final_EIR_TOC.aspx.

90. *See id.* ES-8-21.

91. *See id.* The Department has since identified these measures as underground environmental regulations and acknowledged they must be formally promulgated. *See* Department of Conservation, *SB 4 EIR Certification Statement* (July 1, 2015), <ftp://ftp.consrv.ca.gov/pub/oil/SB4EIR/Documents/SB%204%20EIR%20Supervisor%27s%20Certification%20Statement.pdf>.

92. California Department of Fish and Wildlife, *Final Environmental Impact Report for Hatchery Operations* (Jan. 11, 2010), <https://www.dfg.ca.gov/fish/Hatcheries/EIR/>.

93. *See id.* at ES-6.

94. *See* Center for Biological Diversity v. Dept. of Fish & Wildlife, 234 Cal. App. 4th 214, 258-59 (2015); *see also* *Fish Stocking EIR*, *supra* note 92.

their facilities were free of invasive species.⁹⁵ The mitigation measures also included new requirements for obtaining a private stocking permit — which is required to stock fish in any water, including private ponds or lakes — by mandating that a Department biologist apply an evaluation protocol to determine whether the stock fishing would impact any of the “decision species.”⁹⁶

Because each of those program environmental impact reports adopt mitigation measures that will apply to all of the decisions made under the program, the programs appear to implicate the California APA. However, the mitigation measures probably do not implicate the California APA due to anything specific to them, but rather due to the nature of a program environmental impact report.

C. The California APA Applies to Underground Environmental Regulations

Until recently, mitigation measures had never been challenged as underground environmental regulations. In *Center for Biological Diversity v. Department of Fish and Wildlife*,⁹⁷ an organization representing recreational fishermen and associated businesses challenged the mitigation measures adopted in the fish stocking environmental impact report discussed above.⁹⁸ In adopting these mitigation measures, the Department of Fish and Wildlife did not follow the California APA’s procedures.⁹⁹ During litigation, the Department did not deny that the mitigation measures fell under the statute’s definition of regulations, but argued that they were exempt.¹⁰⁰

95. See *Center for Biological Diversity*, 234 Cal. App. 4th at 224, see also California Department of Fish and Wildlife, *Fishing in the City Program Overview*, <https://www.wildlife.ca.gov/Fishing-in-the-City/Overview>.

96. See *Center for Biological Diversity*, 234 Cal. App. 4th at 230; see also CAL. FISH & GAME CODE § 6401 (West 2013) (requiring a permit to stock fish); CAL. CODE REGS., TIT. 14, § 238.5 (2015) (regulation governing fish stocking permits).

97. *Center for Biological Diversity*, 234 Cal. App. 4th 214.

98. *Id.* at 225.

99. See *id.* at 225-31.

100. See *id.* at 260.

The Department could not have argued that the mitigation measures were not regulations under the California APA. Those mitigation measures established an evaluation protocol that dictated whether and how waters across the state would be stocked by the state or private entities.¹⁰¹ The mitigation measures also imposed ongoing monitoring and reporting requirements on all private aquaculture facilities.¹⁰² The mitigation measures easily satisfied *Tidewater's* two-part test.¹⁰³ The measures were generally applicable because the protocol applied to every stocking decision and the monitoring requirement would be imposed on every facility in the state.¹⁰⁴ Also, by imposing requirements on stocking decisions and aquaculture facilities, the measures implemented, interpreted, or made specific the law being enforced.¹⁰⁵ Consequently, the court held that the California APA applies to regulations adopted as mitigation measures under CEQA.¹⁰⁶

The court also rejected the exemption defenses on grounds that indicate that the exemptions will rarely, if ever, insulate mitigation measures from attack under the California APA.¹⁰⁷ The Department argued that the internal management exemption applied to the evaluation protocol for government stocking because it was directed to the Department's own biologists.¹⁰⁸ The Department acknowledged that stocking decisions affect third parties, such as vendors and urban residents who rely on the state-stocked waters for recreation.¹⁰⁹ But, the Department argued that those impacts were incidental and thus should not forbid application of the internal management exemption.¹¹⁰ For this argument, the Department relied on *Californians for Pesticide Reform v. California Department of*

101. *Fish Stocking EIR* at 4-210-211, 4-214215.

102. *See id.* at 4-211-212.

103. *See Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 570-77 (1996).

104. *Center for Biological Diversity*, 234 Cal. App 4th at 261-62.

105. *See id.* at 262-64.

106. *Id.* at 225.

107. *Id.* at 259-64.

108. *Id.* at 260.

109. *See id.*

110. *See id.*

Pesticide Regulation,¹¹¹ which construed the exemption to apply to an “agency’s rule [that] does not require the individuals or entities affected to do anything they are not already required to do.”¹¹²

The application of this exemption brings up an important question because most agencies could argue that their mitigation measures (provided the measures were crafted properly) regulate their own employees and only incidentally affect third parties. Almost any mitigation measure could be framed as a requirement that mandates an agency official to consider certain factors when exercising discretionary authority to grant a permit or permission for private action. Under the Department’s argument, such mitigation measures would categorically escape review under the California APA.

Perhaps unsurprisingly, the Court of Appeal did not find this giant loophole in the California APA. Rather, the court narrowly interpreted *Californians for Pesticide Reform*¹¹³ to only apply to internal agency policies that do not impose new duties on the agency or any member of the public that would substantively affect a public program.¹¹⁴ The evaluation protocol “significantly affects numerous citizens, both those who run established fish stocking businesses and those, especially children, who enjoy participating in the program.”¹¹⁵ In light of these significant external impacts, the California APA’s aim, providing affected parties an opportunity to be heard, would be

111. *Californians for Pesticide Reform v. Cal. Dept. of Pesticide Regulation*, 184 Cal. App. 4th 887 (2010).

112. See *Center for Biological Diversity*, 234 Cal. App. 4th at 260; see also *Californians for Pesticide Reform*, 184 Cal. App. 4th at 909. *Californians for Pesticide Reform* upheld an agency’s policy to prioritize certain pesticides for toxicity reviews under a statute that mandated the review of all pesticides. See *Californians for Pesticide Reform*, 184 Cal. App. 4th at 893-94. According to that decision, this policy falls within the internal management exception because it “will not determine if the pesticides will undergo review, but merely prioritize when the pesticides will undergo review.” *Id.* at 909. Consequently, the policy did not impose any new duties on the agency or any member of the public, but merely provided for the optimum allocation of the agency’s resources to perform a preexisting duty. See *id.*

113. See *Californians for Pesticide Reform*, 184 Cal. App. 4th at 887.

114. See *Center for Biological Diversity*, 234 Cal. App. 4th at 261.

115. See *id.*; see also *Armistead v. State Pers. Bd.*, 22 Cal. 3d 198, 204-05 (1978).

frustrated if the mitigation measure could be enforced without going through the statute's procedures.¹¹⁶

That reasoning should generally foreclose agency reliance on the internal management exception when defending underground environmental regulations. Any such regulation would likely have some significant impact on a third party, either the person subject to the regulation or someone else related to the program. After all, if the regulation did not affect parties external to the agency, it would not mitigate any significant environmental impacts.

The Department also argued that the mitigation measures were exempt from the California APA as the only legally tenable interpretation of existing law.¹¹⁷ The Department pointed to several statutes and regulations related to fish stocking's environmental impacts and argued that it could only reconcile these numerous obligations through the proposed mitigation measures.¹¹⁸ The Department's argument was not a traditional argument for the exemption. The Department did not, for instance, argue that a statute or regulation expressly compelled any of the mitigation measures.¹¹⁹ Instead, the Department made a practical argument — the Department needed the mitigation measures to satisfy its obligations under CEQA and many other statutes and regulations.¹²⁰

That argument too, if successful, would have exempted many, if not all, underground regulations from the California APA. An agency would only have to point to CEQA's obligation to mitigate environmental impacts and any other relevant statutory or regulatory restrictions and then assert that the mitigation measures were the only means to comply with all of the requirements.

This argument, if accepted, could have the consequence of shifting the burden of persuasion from the agency to the plaintiff challenging the underground environmental regulation. The

116. See *Center for Biological Diversity*, 234 Cal. App. 4th at 262.

117. See *id.* at 262.

118. See *id.* at 262-63; see also 16 U.S.C. § 1531 (Endangered Species Act) (2012); CAL. FISH & GAME CODE § 2301(a) (West 2013 & Supp. 2015); CAL. CODE REGS., TIT. 14, § 671 (2015); CAL. CODE REGS., TIT. 14, § 238.5 (2015).

119. See *Center for Biological Diversity*, 234 Cal. App. 4th at 262-63 (2015).

120. See *id.*

Department's argument implied that the challenger must articulate some alternative regulation that complied with existing laws.¹²¹

The Court of Appeal was not persuaded, however. Instead, the court reaffirmed that the exemption only applies to regulations that are patently compelled by existing law or regulation such that the interpretation is essentially rote or ministerial.¹²² The mitigation measure imposing monitoring and reporting requirements for invasive species was not compelled by a statute that forbade possession or transfer of those species and required any species found to be reported to the Department.¹²³ Although the mitigation measure might have been the most practical means of enforcing that requirement, it was not the only legally tenable way to do so.¹²⁴ The court similarly rejected the application of the exemption to an evaluation protocol for private fish stocking permits.¹²⁵ Though several laws restricted private stocking and the Department's permitting decisions, the particular protocol contained in the underground regulation was not set out in any of them.¹²⁶

As a consequence, agencies that adopt underground environmental regulations will rarely, if ever, be able to rely on the lone legally tenable interpretation exemption. This exemption is no broader in those circumstances than any other, notwithstanding CEQA's requirements to mitigate.

IV. WHAT ARE THE CONSEQUENCES OF PROHIBITING UNDERGROUND ENVIRONMENTAL REGULATIONS?

Consistent with the California APA's purpose, the prohibition against underground environmental regulations is likely to be

121. *See id.*

122. *See id.* at 262-63; *Morning Star Co. v. State Bd. of Equalization*, 38 Cal. 4th 324, 336 (2006).

123. *See Center for Biological Diversity*, 234 Cal. App. 4th at 262; *see also* CAL. FISH & GAME CODE § 2301(a) (West 2013 & Supp. 2015); CAL. CODE REGS., TIT. 14, § 671 (2015).

124. *See Center for Biological Diversity*, 234 Cal. App. 4th at 262-63.

125. *See id.* at 263-64.

126. *See id.*; *see also* CAL. CODE REGS., TIT. 14, § 238.5 (2015).

deregulatory over all.¹²⁷ Three changes will contribute to that deregulatory effect: (1) agencies must address all consequences of their regulations; (2) the Office of Administrative Law must review the regulation's mitigation measures; and (3) any person may obtain judicial review of a regulation's rationale.

First, the California APA, unlike CEQA, requires agencies to address *all* consequences of their regulations, not just environmental ones.¹²⁸ Thus, the public will have an opportunity to raise more issues in the promulgation process, including the costs and burdens associated with mitigation measures.¹²⁹ Also, the agency will have to grapple with those impacts.¹³⁰

Under CEQA, agencies give little consideration to the costs of mitigation.¹³¹ So long as mitigation measures are "feasible," they can be imposed.¹³² Under this feasibility standard, however, agencies do not carefully weigh the costs and benefits of regulation. A mitigation measure is "feasible" if it is *capable* of being accomplished in a reasonable time.¹³³ For example, a mitigation measure that costs 10 dollars for every 1 dollar of environmental benefit is feasible, but not advisable. In fact, agencies have little incentive to consider efficiency because CEQA does not require agencies to respond to comments criticizing compliance costs.¹³⁴

127. See CAL. GOV'T CODE § 11340 (West 2005 & Supp. 2015) (legislative findings of "an unprecedented growth in the number of administrative regulations" which are "frequently unclear and unnecessarily complex" and "confusing to the persons who must comply," resulting in an "unnecessary burden on California citizens," "discourage[ing] innovation, research, and development of improved means of achieving desirable social goals.").

128. See *supra* notes 71-77.

129. See CAL. GOV'T CODE §§ 11346.2, 11346.45, 11346.9(a)(3) (West 2005 & Supp. 2015).

130. See CAL. GOV'T CODE § 11346.9 (West 2005 & Supp. 2015); see also Sebastian Medvei, *Lifting the Veil: Why California Environmental Impact Reports Should Provide More Non-environmental Information When Determining the Feasibility of Alternatives to Developments*, 42 SW. L. REV. 737, 737-38 (2013).

131. See CAL. PUB. RES. CODE § 21100 (West 2007 & Supp. 2015).

132. See *id.*; Laurel Heights Improvement Assn. v. Regents of Univ. of Cal., 47 Cal. 3d 376, 400-01 (1988).

133. CAL. CODE REGS., TIT. 14, § 15364 (2015).

134. See CAL. PUB. RES. CODE § 21091 (West 2007 & Supp. 2015).

By reducing the risk that regulations will impose substantial costs with meager benefits, the obligation to consider and respond to public concerns regarding costs and burdens associated with underground environmental regulations will likely cause agencies to behave more rationally.¹³⁵ That result will probably also change how mitigation measures are expressed because it will encourage performance standards over prescriptive standards.¹³⁶

Second, the California APA will require the Office of Administrative Law to review regulatory mitigation measures.¹³⁷ According to Asimow, this is a significant check and may explain why many agencies have adopted underground regulations.¹³⁸ The review requires agencies to demonstrate that mitigation measures are necessary, statutorily authorized, clear, and not duplicative.¹³⁹ Under CEQA, no independent agency reviews the data and policy arguments to determine whether the new regulation is necessary.¹⁴⁰ Instead, only the agency that will exercise this authority, which has little incentive to keep its own power in check, considers that question.¹⁴¹

Finally, if appeals to the agency and Office of Administrative Law do not yield any results, anyone may obtain judicial review of the rationale behind the regulation. Although judicial review in the context of a challenge to an agency's weighing of a regulation's costs and benefits is deferential, some review is better than nothing. Under CEQA, one cannot challenge a mitigation measure on the grounds that it does not satisfy cost-benefit analysis.¹⁴²

Center for Biological Diversity may be a somewhat unique case. The private stocking permit program is ministerial — if the permit is

135. *Cf. Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (“One would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.”).

136. *See* CAL. GOV'T CODE § 11340(d) (West 2005 & Supp. 2015).

137. CAL. GOV'T CODE §§ 11349.1, 11349.3 (West 2005 & Supp. 2015).

138. Asimow, *supra* note 51, at 55-62.

139. *See* CAL. GOV'T CODE § 11349.1(a) (West 2005 & Supp. 2015).

140. *See Sierra Club v. Cal. Coastal Comm'n*, 35 Cal. 4th 839, 859-60 (2005); *see also* CAL. PUB. RES. CODE § 21004 (West 2007 & Supp. 2015).

141. *See id.*

142. *See* CAL. PUB. RES. CODE § 21100 (West 2007 & Supp. 2015).

consistent with the valid regulations governing the program,¹⁴³ the Department must grant it. As a consequence, the invalidation of the underground regulations allows the program to continue as it had before its illegal adoption. Thus, judicial recognition of underground environmental regulations was clearly deregulatory in that case.

However, judicial recognition of underground environmental regulations can also come with some costs, particularly where the program is not ministerial. Failure to implement mitigation imposed under CEQA can result in an injunction against further implementation of the program.¹⁴⁴ Because agencies will be required to jump through additional procedural hoops before implementing mitigation measures, those affected by a program may experience additional uncertainty, delay, and associated costs.¹⁴⁵ Depending on the program, the additional uncertainty, delay, and costs may be extremely important. If the program involves permitting a time-sensitive activity, a delay of a few months may set the program back much longer. For instance, farmers who must plant and fertilize their crops at a particular time of year may lose out on an entire crop if the state cannot permit the use of fertilizers while it formally promulgates regulations.¹⁴⁶ Similarly, uncertainty can be quite taxing on program participants. Industries that must make investments in anticipation of future regulation, for instance, face the prospect of wasting investment in safeguards if the formally promulgated regulation differs substantially from what was anticipated in the environmental impact report.¹⁴⁷

143. CAL. CODE REGS. TIT. 14, § 238.5 (2015).

144. See *Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal. 3d 376, 423 (1988) (traditional equitable principles guide the decision whether to enjoin a project while an agency corrects CEQA errors).

145. CEQA's procedures alone already impose substantial delay and costs on participants. See Varner, *supra* note 5, at 1483-85.

146. California State Water Resources Control Board, *Final Statewide Program EIR Covering General Waste Discharge Requirements for Biosolids Land Application* (June 2004), 14-15, http://www.swrcb.ca.gov/water_issues/programs/biosolids/peir.shtml.

147. Note that this is true regardless of whether the regulation ultimately adopted is more burdensome or less than what was expected. Any change that would make past investments inefficient would have these impacts. Industries that

At first blush then, prohibiting underground environmental regulations may increase the risk that a program will have to be suspended during the period between the recognition of significant environmental impacts and the promulgation of a regulation under the California APA. In the recent environmental impact report analyzing fracking throughout the state, for instance, the Department of Conservation concluded that it could not finalize and implement several mitigation measures because the measures would be underground environmental regulations.¹⁴⁸ Consequently, only mitigation measures that do not constitute regulations will be implemented until formal regulations are adopted.¹⁴⁹ Fortunately, the Department of Conservation prepared that environmental impact report pursuant to a specific piece of legislation and, it appears, that delay will not translate into a moratorium.¹⁵⁰ However, if that fortunate result had not occurred, the state's economy would likely have been substantially affected because fracking, which is responsible for 20 percent of the oil produced in the state,¹⁵¹ would have stopped until those regulations were adopted. That delay would

stand to lose significant amount from such changes are likely to delay making these investments, exacerbating the delay problem.

148. Department of Conservation, *SB 4 EIR Certification Statement*, 3-4 (July 1, 2015), <ftp://ftp.consrv.ca.gov/pub/oil/SB4EIR/Documents/SB%204%20EIR%20Supervisor%27s%20Certification%20Statement.pdf>.

149. *See id.*

150. *Id.* at 4-8. Perhaps unsurprisingly, the Department of Conservation was promptly sued after finalizing its environmental impact report. *See Center for Biological Diversity v. California Department of Conservation*, No. 34-2015-800002149-CU-WM-GDS (Sacramento Sup. Ct. filed July 30, 2015). However, the complaint does not appear to challenge the decision not to implement the underground environmental regulations. *See Complaint, Center for Biological Diversity v. California Department of Conservation*, No. 34-2015-800002149-CU-WM-GDS (Sacramento Sup. Ct. filed July 30, 2015), http://www.californiaenvironmentallawblog.com/wp-content/uploads/sites/449/2015/07/15-7-28-SB4_fracking_petition.pdf.

151. California Council on Science and Technology, *Independent Scientific Assessment of Well Stimulation in California*, Vol. 1, at i (Jan. 2015), <http://ccst.us/publications/2015/2015SB4-v1ES.pdf>.

have resulted in the loss of about 40 million barrels,¹⁵² worth approximately \$160 million.¹⁵³

What options, other than those that would lead to litigation under the California APA or CEQA, does an agency have to avoid suspending implementation of a program while it formally adopts regulations? One option would be to frame the mitigation measure as a vague requirement that the agency consider and, if appropriate, adopt regulations to mitigate any environmental impact. Such an approach would be fully consistent with the California APA, but could expose the agency to challenge under CEQA. CEQA states that mitigation measures should be “fully enforceable”¹⁵⁴ and someone might challenge such an aspirational mitigation measure as being inconsistent with that requirement.

Another potential option to reduce that risk would be framing the mitigation measure as a requirement that the agency adopt a particular regulation on an emergency basis while it pursues formal adoption of permanent regulations. The California APA allows state agencies to impose emergency regulations immediately, for up to 180 days, if necessary to avoid serious harm to the public peace, health, safety, or general welfare.¹⁵⁵ Such regulations can be readopted for up to two additional ninety day periods.¹⁵⁶ That approach could provide an agency with a maximum of six months to formally promulgate the regulation. Although that procedure was designed to allow agencies to proceed while complying with California APA’s procedures, the allotted time may be insufficient. The procedure may not provide the agency with enough time to complete that process if the regulation is

152. California Department of Conservation, *Well Counts and Production of Oil, Gas, and Water by County – 2013*, ftp://ftp.consrv.ca.gov/pub/oil/annual_reports/2013/2013%20County%20Production.pdf.

153. See California Energy Commission, *Alaska North Slope Crude Oil Prices 2005-July 2015*, http://energyalmanac.ca.gov/petroleum/ans_crude_prices/index.html.

154. CAL. PUB. RES. CODE § 21081.6(b) (West 2007 & Supp. 2015); see also CAL. CODE REGS., TIT. 14, § 15126.4(a)(2) (2015); *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 444 (2007).

155. CAL. GOV’T CODE §§ 11342.545 (West Supp. 2015), 11346.1(h) (West 2005 & Supp. 2015); CAL. CODE REGS. TIT. 1, § 48 (2015).

156. CAL. GOV’T CODE § 11346.1(h) (West 2005 & Supp. 2015).

complex or significantly affects stakeholders. The agency may also face a challenge under CEQA on the grounds that, because the emergency regulation is only temporary, the mitigation is not “fully enforceable.” The agency may also face a challenge under the California APA if the mitigation measure effectively pre-commits the agency to adopting a particular regulation.

An agency would be better off by acknowledging in the environmental impact report that it cannot impose requirements absent formal regulations. That would prevent the agency from fully mitigating the impacts of the program. The agency could also adopt a statement of overriding consideration to allow the program to continue while the agency separately promulgated regulations. CEQA does not require the agency to delay or temporarily suspend a program if the delay would result in substantial adverse impacts to the state, its industries, or program participants.¹⁵⁷ Rather, the agency may allow the program to proceed if economic, legal, social, technological, or other considerations make mitigation unfeasible and “specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment.”¹⁵⁸

In the suction dredge mining environmental impact report, for instance, the Department of Fish & Wildlife concluded that it did not have statutory authority to impose measures required to fully mitigate the impacts of the mining.¹⁵⁹ By statute, the Department is limited to regulating suction dredge mining to ensure that such mining does not harm fish.¹⁶⁰ Consequently, the Department acknowledged that it could not feasibly mitigate some environmental impacts in light of its limited statutory authority.¹⁶¹ Having regulated all of the impacts that it could, the Department found that overriding economic, legal, social,

157. CAL. PUB. RES. CODE § 21081 (West 2007 & Supp. 2015); *see* CAL. CODE REGS., TIT. 14, §§ 15043, 15091, 15093 (2015).

158. CAL. PUB. RES. CODE § 21081 (West 2007 & Supp. 2015).

159. *See supra* note 81, at 3-56-3-68.

160. Dredges and Dredging — Licenses and Permits — Rules and Regulations, S.B. No. 637, Cal. 2015 Legis. Serv. (West).

161. *See supra* note 84 and accompanying text.

and other benefits outweighed the remaining impacts.¹⁶² Suction dredge mining is a unique case, however, because the state legislature imposed a permanent moratorium on the use of suction dredges until regulations fully mitigating the dredging's impacts can be finalized, which will require additional legislation.¹⁶³

In most cases in which delay in implementing a program would unduly burden the state or program participants, an agency should easily be able to satisfy the standard for adopting a statement of overriding consideration under CEQA. First, the agency must show that full mitigation is infeasible.¹⁶⁴ The agency could find that the California APA's prohibition against underground environmental regulation is a "specific . . . legal . . . consideration" that makes imposition of such mitigation measures infeasible.¹⁶⁵ That consideration is not dissimilar from the Department of Fish and Wildlife's conclusion that suction dredge mining mitigation measures were infeasible because the Department lacked statutory authority to enforce the measures. In either case, the law forbids the agency from imposing the identified mitigation measure, rendering enforcement infeasible.¹⁶⁶

Next, the agency would have to determine whether "specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment."¹⁶⁷ Courts review such decisions deferentially because balancing those policy considerations "lies at the core of the lead agency's discretionary responsibility under CEQA and is, for that reason, not

162. See California Department of Fish & Wildlife, *Findings of Fact as Lead Agency for the Suction Dredge Permitting Program*, 53-54 (Mar. 16, 2012), <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=44270&inline=1>.

163. See *supra* note 85, at 1-4-5.

164. See *Kenneth Mebane Ranches v. Superior Court*, 10 Cal. App. 4th 276, 291 (1992) (citing *Golden Gate Bridge etc. Dist. v. Muzzi*, 83 Cal. App. 3d 707, 713 (1978)).

165. CAL. PUB. RES. CODE § 21081(a)(3) (West 2007 & Supp. 2015).

166. See *Sierra Club v. Cal. Coastal Comm'n*, 35 Cal. 4th 839, 858-62 (2005); see also Stephen L. Kostka & Michael H. Zischke, *Practice Under the California Environmental Quality Act* § 14.25 (CEB 2013).

167. CAL. PUB. RES. CODE § 21081(b) (West 2007 & Supp. 2015).

lightly to be overturned.”¹⁶⁸ So long as the agency demonstrates that it considered all of the benefits of the program and its impacts, and the decision is supported by substantial evidence, the program will be upheld.¹⁶⁹ The agency’s decision could be based on a statutory duty to implement the program, if there is one;¹⁷⁰ the economic consequences of delay; the distributional consequences of delay, particularly if the program affects poor or underserved communities; or any other legitimate policy grounds that weigh in favor of allowing the agency to continue implementing the program while separately pursuing adoption of new regulations.

One of the main benefits of this approach is that the agency’s ability to separately adopt emergency regulations or formally promulgate permanent regulations will not be prejudiced. The approach also would not bind the agency if, during the process of promulgating those regulations, the agency discovered that the regulations were ill advised or there were unforeseen alternatives that more efficiently mitigate the program’s impacts. That is precisely why the California APA mandates the procedures it does. Regulated parties not only have access to greater information regarding the consequences of regulations, but also have incentives to bring those consequences to light. Government bureaucrats, on the other hand, may only be able to speculate about the consequences of their regulations, particularly if those consequences are outside their area of expertise.

CONCLUSION

Individuals and businesses regulated by, or participating in, state programs should welcome judicial recognition that the California APA applies to regulations adopted under CEQA documents. Prohibiting underground environmental regulations will result in agencies being unable to impose burdensome new requirements

168. *See City of Marina v. Bd. of Trustees of the Cal. State Univ.*, 39 Cal. 4th 341, 368 (2006).

169. *See California Native Plan Soc. v. City of Santa Cruz*, 177 Cal. App. 4th 957, 983 (2009); *Concerned Citizens of South Central Los Angeles v. Los Angeles Unified School Dist.*, 24 Cal. App. 4th 826, 849 (1994).

170. *See id.*

without first submitting the requirements to full notice, comment, and review by the Office of Administrative Law. At a minimum, that will ensure that agencies must acknowledge and address the broader impacts of such mitigation measures, rather than only considering their environmental impacts.

However, that result may also result in added delay and uncertainty for individuals affected by statewide programs. Agencies have several options to mitigate those consequences, including changing how they frame mitigation measures, using emergency regulations, and adopting statements of overriding considerations. Judicious use of these options will help ensure that the California APA furthers its purpose of reducing regulatory burdens, rather than exacerbating them by unnecessarily stalling implementation of government programs.

