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Consideration of Alternatives in Environmental Impact Reports: The Importance of CEQA's Procedural Requirements

Sara Wimberger*

The Bay-Delta, the largest estuary in the western United States, is home to more than 750 plant and animal species and is home to California's greatest source of water. For more than a decade however, the Bay-Delta has also been home to a battle between agriculturalists, environmentalists, and urban water users. The Bay-Delta's ecosystem health, levee stability, and water supply and quantity is in a state of continual decline, and these interest groups have become entangled in disputes over how to address these problems. In 1994, CALFED, a group of state and federal agencies, was created in an effort to address the daunting problems facing the Bay-Delta. CALFED prepared a Program Environmental Impact Statement/Report (PEIS/R), detailing its proposed program to address what it defined as the four main problems facing the Bay-Delta: water supply instability, poor water quality, declining ecosystem health, and levee instability. Believing that all problem areas needed to be addressed concurrently, CALFED did not consider any alternatives to the program that did not satisfy all four areas. In 2000, before CALFED's program was implemented, a group of interested parties brought suit in district court, claiming that CALFED's PEIS/R was deficient and did not satisfy the requirements of the California Environmental Quality Act (CEQA). The plaintiffs asserted that under CEQA, not every goal or problem must be addressed in a single PEIS/R. Therefore, plaintiffs claimed that CALFED should have included alternatives to the program that did not address every problem. Specifically, the plaintiffs asserted that CALFED should have considered reducing water exported from the Bay-Delta, as although it would not solve the water supply instability problem, it would reduce environmental

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impact. Ultimately, the California Supreme Court decided that CALFED's PEIS/R met CEQA's requirements and that the agency was correct when it decided that it did not need to consider alternatives that did not meet each of the four goals. This Note argues that the California Supreme Court was correct in its decision, despite the fact that the decision seemingly goes against CEQA's purpose and rules. The Note will also explain why CEQA's procedural requirements are crucial and must be followed if the statute has a chance to effect substantive change. CEQA's requirement that an agency consider program alternatives that are less environmentally harmful is one way to reach major substantive change, but this Note will explain that this alternatives analysis is dependent on two other procedural requirements. First, the preparation of an EIR and its labeling as a program or project EIR affects the alternatives analysis in that programs and projects require different levels of detail in their discussion of alternatives. Second, how the goal of the EIR is narrowed will similarly affect the alternatives considered.

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INTRODUCTION

Home to over 36 million people, California is the most populous state in the nation.¹ It has the third largest land area in the country² and is the most productive agricultural state in the United States.³ Despite California’s large landmass and ever-growing population,⁴ the state’s water supply is more unstable than ever because of a three-year drought caused by consistent below-

1. U.S. Census Bureau, California QuickFacts, <http://quickfacts.census.gov/qfd/states/06000.html> (last visited Feb. 13, 2009).

2. The Geography of California, http://www.netstate.com/states/geography/ca_geography.htm (last visited Mar. 17, 2009).

3. See Cal. Dep’t of Food & Agric. Home Page, <http://www.cdfa.ca.gov> (last visited Feb. 13, 2009).

4. U.S. Census Bureau, Census 2000 Gateway, <http://www.census.gov/main/www/cen2000.html> (last visited Feb. 13, 2009); see also U.S. Geological Survey, National Water-Use Data, <http://water.usgs.gov/watuse/wumaps.color.html> (last visited Feb. 13, 2009).

average rainfall.⁵ The mismatch between water supply and demand has resulted in a “water crisis” in California.

People began to take note of California’s water problems in the first part of the 20th century when Southern California experienced a population boom.⁶ Public concern for California’s waters has grown as the problems facing the state have become more acute. With continued population growth, an agriculture industry that demands huge quantities of water to function, and periodic years of drought, California’s water supply has become increasingly limited. As water reserves in California are strained, not only do the water supply and stability decrease, but water quality, ecosystem health and fish populations also suffer.

The Bay-Delta, the largest estuary in the western United States, located west of Sacramento, has especially suffered from California’s water crisis,⁷ and numerous attempts to remedy the effects of the crisis on the Bay-Delta have failed.⁸ The most urgent problems facing the Bay-Delta are the decline of ecosystem health, the nearly collapsing levees, and decreasing water supply and quality.⁹ In 1994, an organization of state and federal agencies called “CALFED” was created to address the issues facing the Bay-Delta.¹⁰ Although CALFED’s goal was to coordinate agriculturalists, environmentalists, local community members, and government agencies to find a solution to the problems plaguing the Bay-Delta, considerable disputes arose among all parties.¹¹

In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings (hereinafter *In re Bay-Delta*), decided by the California Supreme Court in the summer of 2008, dealt with claims that CALFED’s proposed environmental impact report (EIR) did not meet California Environmental Quality Act (CEQA) standards, in part because the report failed to include an alternative that considered reducing the amount of water exported from the Bay-Delta.¹² The court held that the report met CEQA standards; an alternative

5. See Department of Water Resources, California’s Drought, <http://www.water.ca.gov/drought/> (last visited Mar. 18, 2009).

6. *In re Bay-Delta Programmatic Evtl. Impact Report Coordinated Proceedings*, 184 P.3d 709, 715 (Cal. 2008).

7. CALFED Bay-Delta Program, About the Delta, <http://calwater.ca.gov/delta/about/index.html> (last visited Mar. 18, 2009).

8. CALFED Bay-Delta Program, History of CALFED Bay-Delta Program, <http://calwater.ca.gov/calfed/about/History/Detailed.html> (last visited Mar. 18, 2009).

9. See CALFED Bay-Delta Program, CALFED Bay-Delta Program Objectives, <http://calwater.ca.gov/calfed/objectives/index.html> (last visited Mar. 18, 2009).

10. CALFED Bay-Delta Program, History of CALFED Bay-Delta Program, <http://calwater.ca.gov/calfed/about/History/Detailed.html> (last visited Mar. 18, 2009).

11. See *id.*

12. See *In re Bay-Delta*, 184 P.3d 709.

that would reduce water exports did not need to be included because it would not satisfy the fundamental purpose of the CALFED program.¹³

More than a decade has passed since CALFED was created, and over three billion dollars has been spent in an effort to improve the Bay-Delta's water quality and quantity, make its levees more stable, and improve its ecosystem health.¹⁴ Despite these efforts, the Bay-Delta still faces considerable problems. Recently, while launching a new task force to take on the Bay-Delta's problems, Governor Schwarzenegger stated, "[a] healthy Delta is vital to our environment and it is vital to our economy today and far into the future."¹⁵ The Governor's statement shows that although CALFED is crucial to the state of California, the challenges the Bay-Delta faces have yet to be solved.

This Note has three parts. First, I will discuss the history of and problems facing the Bay-Delta, the key provisions of CEQA and the National Environmental Policy Act (NEPA), and the development of CALFED. In Part II, I evaluate the *In re Bay-Delta* California Supreme Court decision and discuss why I believe it was correctly decided. I explain why it was proper for the court to uphold the validity of the CALFED proposal, despite the fact that a programmatic EIR typically must include a broad set of alternatives and usually need not meet every objective. Finally, to further clarify why the *In re Bay-Delta* decision was correctly decided based on the unique facts of the case, I discuss the importance of CEQA's procedural requirements. I specifically address (1) why, in order to ensure that a sufficient range of alternatives is considered, a court must keep in mind whether it is evaluating an EIR for a "project" or a "program" and (2) why the court must ensure that the avowed goals of a project or program are not artificially narrowed in an attempt to limit the alternatives considered.

I. BACKGROUND

A. *The Bay-Delta Then and Now: The Current State of Decline and How We Got Here*

The Bay-Delta, formed by the meeting of the Sacramento and San Joaquin Rivers, is vital to California's economy.¹⁶ Generating over \$36 billion in revenue each year, California's agriculture industry is the most productive in

13. *Id.* at 721.

14. Letter from Michael E. Alpert, Chairman, Little Hoover Comm'n, to Arnold Schwarzenegger, Governor of Cal. et al. 1 (Nov. 17, 2005), available at http://calwater.ca.gov/content/Documents/Little_Hoover_Commission_Review.pdf.

15. Press Release, Office of the Governor, Governor Schwarzenegger and Senator Feinstein Meet with Experts to Work on Delta Fix, Improve California's Water Infrastructure (Aug. 21, 2007), available at <http://gov.ca.gov/index.php?press-release/7204>.

16. CALFED Bay-Delta Program, About the Delta, <http://calwater.ca.gov/delta/about/index.html> (last visited Feb. 13, 2009).

the United States.¹⁷ With over 60 percent of the 5.9 million acre-feet of water that the Bay-Delta exports south each year going to agriculture, the industry has a huge impact on the Bay-Delta's water supply.¹⁸ As farming businesses grow, they require more water from the Bay-Delta. This strains the Bay-Delta's water supply, which adversely impacts both urban water users and the Bay-Delta's ecosystem.

Because of increased water demands, the Bay-Delta's ecosystem has been in a continual state of decline. The Bay-Delta is home to more than 750 plant and animal species, including 80 percent of California's commercial salmon fisheries.¹⁹ In 1993, however, two Bay-Delta fish species were listed on the federal Endangered Species list.²⁰ Contributing to the decline in fish population was the six-year drought California experienced between 1987 and 1992.²¹ Compounding the problem, large pumping plants diverted large amounts of freshwater from the Bay-Delta, causing increased destruction of fish habitat.²² It was originally thought that the listings under the Endangered Species Act (ESA) would lead to federal restrictions reducing pumping in the Bay-Delta so as to improve fish habitat.²³

In order to ensure state control over the Bay-Delta despite the federal ESA listing, Governor Pete Wilson announced a new proposal in 1993 to establish Bay-Delta water quality standards.²⁴ In enacting this new proposal, Governor Wilson rescinded a different Bay-Delta plan that he had just announced in 1992.²⁵ He may have been concerned that the 1992 plan, enacted before the ESA listing, would not be protective enough of the endangered fish species. Governor Wilson hoped his 1993 plan would prevent federal control of the Bay-Delta, control which he feared would result in a piecemeal solution and uncertain water supply.²⁶ Although Governor Wilson indicated that his new approach was developed to ensure state control, some "water-policy insiders" claim that Governor Wilson's real concern was with his 1994 campaign for reelection. In fact, Governor Wilson received campaign contributions from the

17. Cal. Dep't of Food & Agric. Home Page, *supra* note 3.

18. *In re* Bay-Delta Programmatic Env'tl. Impact Report Coordinated Proceedings, 184 P.3d 709, 715 (Cal. 2008).

19. CALFED Bay-Delta Program, *supra* note 16.

20. *In re* Bay-Delta, 184 P.3d at 717.

21. LITTLE HOOVER COMM'N, STILL IMPERILED, STILL IMPORTANT: THE LITTLE HOOVER COMMISSION'S REVIEW OF THE CALFED BAY-DELTA PROGRAM 13 (2005), available at http://calwater.ca.gov/content/Documents/Little_Hoover_Commission_Review.pdf.

22. Elizabeth Ann Rieke, *The Bay-Delta Accord: A Stride Toward Sustainability*, 67 U. COLO. L. REV. 341, 344 (1996).

23. *See id.* at 345.

24. *Id.* at 346.

25. *See* Northeast Midwest Institute, Large-scale Ecosystem Restoration Initiatives, <http://www.nemw.org/calfed.htm> (last visited Mar. 17, 2009).

26. Rieke, *supra* note 22, at 347.

agricultural community whose livelihood depends on a stable water supply for their crops and farm animals.²⁷

In addition to agricultural interests and ecosystem concerns, there is regional competition over the control of the Bay-Delta's water supply.²⁸ The Bay-Delta supplies water to about two-thirds of California's households, providing drinking water to approximately 24 million people.²⁹ Although California's water supply is not growing, California's population has been growing at the highest rate in the nation,³⁰ making it very difficult for water supply to keep up with demand. Additionally, there is a mismatch in where the majority of California's water supply comes from and where the majority of the demand is located—75 percent of California's water run-off occurs north of Sacramento, while 75 percent of the demand for water is south of Sacramento.³¹

In an effort to address this north-south struggle, Californians voted on a referendum in 1993 that would have put taxpayer money toward building a peripheral canal around the Bay-Delta to move water to Southern California more easily.³² Voters, mostly from Northern California, rejected the referendum because they felt that the canal would only expedite the removal of water to Southern California at the expense of people living in Northern California.³³

Notwithstanding the ESA listing and the governor's and voters' efforts, both Congress and "Club Fed," a group of four federal agencies, attempted to address the Bay-Delta problems.³⁴ Since they each had different agendas, the groups rarely agreed.

27. *Id.*

28. See *In re Bay-Delta Programmatic Env'tl. Impact Report Coordinated Proceedings*, 184 P.3d 709, 714 (Cal. 2008).

29. *Id.* at 715; CALFED Bay-Delta Program, *supra* note 16.

30. See PUB. POLICY INST. OF CAL., CALIFORNIA'S POPULATION (2006), <http://www.ppic.org/main/publication.asp?i=259> (last visited Feb. 13, 2009).

31. *In re Bay-Delta*, 184 P.3d at 715; see also Martha Davis, Stepping Outside the Box: Water in Southern California, Speech at UCLA Environment Symposium (Mar. 3, 1998), available at <http://www.monolake.org/waterpolicy/outsidebox.htm> (noting that, as of 1998, although 45 percent of California's residents live in the LA basin, it accounts for only 6 percent of California's habitable land and 0.6 percent of the state's water stream flow).

32. Rieke, *supra* note 22, at 346.

33. *Id.*

34. LITTLE HOOVER COMM'N, *supra* note 21, at 13–14. Congress created the Central Valley Project Improvement Act, and the U.S. Environmental Protection Agency, Fish and Wildlife Service, Bureau of Reclamation, and National Marine Fisheries Service created the Federal Ecosystem Directorate (known as "Club Fed"). *Id.*

B. *Creation and Key Sections of CEQA and NEPA*

1. *CEQA and NEPA Were Created to Improve the Environment*

NEPA, which was enacted in 1970,³⁵ has several purposes, among which are (1) to promote efforts to reduce environmental harm in order to improve public health, and (2) to establish the Council of Environmental Quality (CEQ).³⁶ In order to effectuate the environmental-protection goals of NEPA, the CEQ requires that any party prepare an environmental impact statement (EIS) when proposing a major federal action that may significantly affect the quality of the human environment.³⁷ This requirement has wide-reaching effects because of the broad definition of what federal actions require an EIS. A “federal action” is defined as any proposal that potentially requires federal involvement or responsibility.³⁸ The CEQ considers an action “major” if it has the possibility of significantly affecting the environment.³⁹ Accordingly, the EIS requirement applies to both state agencies and private actors who receive government support (i.e., in the form of government subsidies or permitting).⁴⁰

The EIS must include: environmental impacts of the action, unavoidable adverse environmental effects, and alternatives to the proposed action.⁴¹ NEPA requires that all reasonable alternatives which satisfy at least some of the purposes and needs of the project be considered.⁴²

CEQA was created after NEPA⁴³ in an effort to bring the environmental impacts of government projects to the attention of state and local decision makers.⁴⁴ Many of the reasons the California Legislature enacted CEQA

35. Alvin L. Alm, *NEPA: Past, Present, and Future*, EPA J., Jan.–Feb. 1988, available at <http://www.epa.gov/history/topics/nepa/01.htm>; see also National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2006).

36. 42 U.S.C. § 4321.

37. 42 U.S.C. § 4332(C).

38. 40 C.F.R. 1508.18.

39. 40 C.F.R. 1508.18 (“Major reinforces but does not have a meaning independent of significantly.”).

40. *Id.*

41. CAL. PUB. RES. CODE § 21,002.1. Although it will not be discussed in this Note, the EIS must include two other sections: short- and long-term uses and productivity, and any irreversible commitments of resources were the proposal approved. 42 U.S.C. § 4332(C).

42. Council on Env'tl. Quality, Environmental Impact Statement, 40 C.F.R. §§ 1502.14(a)–(c) (1979); Council on Env'tl. Quality, Terminology and Index, 40 C.F.R. § 1508.25(b)(2) (1979); see also RONALD E. BASS ET AL., *THE NEPA BOOK: A STEP-BY-STEP GUIDE ON HOW TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT* 94 (2d ed. 2001).

43. Because CEQA was based on NEPA and many provisions in CEQA parallel those in NEPA, federal judicial interpretations of NEPA may be instructive in CEQA cases to the extent that the provisions at issue are similar. *No Oil, Inc. v. City of Los Angeles*, 529 P.2d 66, 86, n.21 (1974).

44. Madeline June Kass, *Little NEPAs Take on Climate Goliath*, 23 NAT. RESOURCES & ENV'T 40, 41 (2008).

parallel the goals of NEPA.⁴⁵ Although NEPA and CEQA have many similar goals, CEQA's listed purposes are more extensive than those of NEPA.⁴⁶

The purposes of CEQA include taking necessary action to "[d]evelop and maintain a high-quality environment" through protection, rehabilitation, and enhancement of California's environmental quality; providing Californians with clean air and water; preserving fish and wildlife; requiring government agencies to develop standards and procedures to protect the environment; and ensuring that government agencies consider short- and long-term costs and benefits, and alternatives to proposed actions.⁴⁷ In order to effectuate the purposes of the legislation, CEQA established environmental standards and procedures and also required the preparation of environmental impact reports (EIRs).⁴⁸ Agencies interpreting CEQA guidelines are to do so in a way that affords "the fullest possible protection to the environment."⁴⁹

2. *CEQA Requires Agencies to Prepare EIRs to Inform the Public and Force the Consideration of Alternatives*

Just as NEPA requires an EIS, CEQA requires that parties prepare an EIR when proposing a project that may have a significant environmental impact.⁵⁰ The purpose of the EIR is to identify the significant environmental effects of a project, identify alternatives to the project, and indicate ways the significant effects can be avoided.⁵¹ In considering the significant environmental effects of the proposed project, the discussion is limited to the effects of the project as compared against the environmental "baseline," or the condition of the environment as it exists at the time of the report.⁵² The scope of the EIR and

45. See National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2006); CAL. PUB. RES. CODE § 21,000 (West 2009). The California Legislature declared that CEQA was necessary in order to (1) maintain the quality of the environment; (2) allow the environment to be pleasing to man; (3) understand the relationship between ecology and public welfare; (4) identify and prevent the reaching of critical thresholds; (5) realize citizens' responsibility to contribute to the preservation of the environment; (6) coordinate efforts by public and private interests; and (7) regulate activities to prevent environmental damage. CAL. PUB. RES. CODE § 21,000.

46. See CAL. PUB. RES. CODE §§ 21,000–01; see also 42 U.S.C. § 4321.

47. CAL. PUB. RES. CODE § 21,001.

48. *Id.* § 21,002.1. See also *infra* Part I.B.2.

49. *Friends of Mammoth v. Board of Supervisors*, 502 P.2d 1049, 1056 (Cal. 1972).

50. CAL. PUB. RES. CODE § 21,002.1 (West 2009). The project must be at least partially supported by a public agency. See CAL. PUB. RES. CODE § 21,000(g) (West 2009); see also CAL. PUB. RES. CODE § 21,065 (defining "project" as being something "directly undertaken by [a] public agency" or "undertaken by a person [who] is supported, in whole or in part," by a public agency); *Friends of Mammoth v. Bd. of Supervisors*, 502 P.2d 1049, 1054–55 (Cal. 1972) (holding that CEQA's EIR requirement applies to private projects that receive governmental approvals).

51. *Id.*

52. CAL. CODE REGS. tit. 14, § 15,126.2(a) (2009).

the alternatives considered may change depending on whether the EIR is prepared for a large-scale “project” or a smaller “program.”⁵³

As the “heart of CEQA,” the EIR informs the public of the possible environmental impacts of the proposed project.⁵⁴ Therefore, it fosters “informed self government” while protecting the environment.⁵⁵

Further, every EIR must include a discussion of alternatives to the proposed project.⁵⁶ The alternatives considered must “feasibly attain most of the basic objectives of the project” while “avoid[ing] or substantially lessen[ing] any of the significant [environmental] effects of the project.”⁵⁷ While the alternatives need not satisfy *all* project objectives, any alternative considered *must* be able to satisfy the fundamental purpose of the project.⁵⁸ The only other iron-clad rule governing consideration of alternatives is that a “no project” alternative must be included.⁵⁹ The no-project alternative must evaluate what would happen in the reasonably foreseeable future were no project approved.⁶⁰

As mentioned above, alternatives need only be considered if they can feasibly attain most project objectives.⁶¹ To determine whether an alternative is feasible, agencies may consider the “economic, environmental, social, and technological factors” involved, but may not refuse to consider an alternative merely because it would be more costly.⁶² An alternative is infeasible and need not be considered if it does not satisfy the fundamental purpose of the project.⁶³ However, if an alternative would only “impede to some degree the attainment of the project objectives,” it still may be feasible and therefore must be considered.⁶⁴ If an alternative is determined to be infeasible, the EIR should briefly explain the alternative and the reasons why it was rejected.⁶⁵

In implementing the final project, CEQA generally requires that the project with the least environmental impact be adopted.⁶⁶ However, CEQA

53. *See id.* § 15,160 (stating that EIRs may vary depending on the circumstances). *See also infra* Part II.B.

54. *County of Inyo v. Yorty*, 108 Cal. Rptr. 377, 388 (Cal. Ct. App. 1973).

55. *Laurel Heights Improvement Ass’n of San Francisco, Inc. v. Regents of Univ. of Cal.*, 764 P.2d 278, 283 (Cal. 1988); *see also Yorty*, 108 Cal. Rptr. at 388; *No Oil, Inc. v. City of Los Angeles*, 529 P.2d 66 (Cal. 1974); *Citizens of Goleta Valley v. Bd. of Supervisors*, 801 P.2d 1161, 1167 (Cal. 1990).

56. CAL. PUB. RES. CODE § 21,061 (West 2009).

57. CAL. CODE REGS. tit. 14, § 15,126.6(a) (2009).

58. *See id.* § 15,126.6(a).

59. *See id.* § 15,126.6(e).

60. *Id.* § 15,126.6(e)(2).

61. *See id.* § 15,126.6(a).

62. CAL. PUB. RES. CODE §§ 21,002, 21,061.1; *see also* tit. 14, § 15,126.6(f)(1); *Citizens of Goleta Valley v. Bd. of Supervisors*, 801 P.2d 1161, 1169 (Cal. 1990).

63. *See Goleta Valley*, 801 P.2d at 1174.

64. CAL. CODE REGS. tit. 14, § 15,126.6(b) (2009).

65. *Id.* § 15,126.6(c).

66. CAL. PUB. RES. CODE § 21,002 (West 2009); *see also id.* § 15,093(a).

allows an agency to approve an alternative that would cause more harm to the environment if the agency publishes a “statement of overriding concern.”⁶⁷

C. *The History of CALFED and its EIRs for the In re Bay-Delta Litigation*

1. *CALFED Was Born of Chaos: Local, State, and Federal Agencies Failed to Improve the Bay-Delta*

In 1994, Club Fed and the state of California agreed to coordinate their efforts to improve the Bay-Delta.⁶⁸ As part of Governor Wilson’s plan to ensure a stable water supply for Californians, he announced the creation of CALFED at a press conference by stating that “peace ha[d] broken out” in California and there would be no more warring over water.⁶⁹ Comprised of eight state agencies and ten federal agencies, CALFED was seen as a way to coordinate the efforts of state and federal government agencies while addressing the concerns of “three notorious adversaries—environmentalists and agricultural and urban water users.”⁷⁰

CALFED was to be administered over thirty years, as stated in the Framework Agreement and the Bay-Delta Accord.⁷¹ In the Framework Agreement, signed in June 1994, the CALFED agencies agreed to implement water quality standards and establish solutions for problems related to “ecosystem quality, water quality, water supply reliability, and levee system vulnerability.”⁷² The Bay-Delta Accord (the Accord),⁷³ published in December 1994, contained temporary measures to protect the environment and ensure regulatory stability in the Bay-Delta.⁷⁴

There were to be three phases to the CALFED program, each with a distinct purpose: Phase I, from 1995 to 1996, defined CALFED’s goals and developed a proposal to meet those goals;⁷⁵ Phase II, from 1996 to 2000,

67. *Id.* § 15,093(b). *See also infra* Part II.A.2.

68. CALFED Bay-Delta Program, History of CALFED Bay-Delta Program, <http://calwater.ca.gov/calfed/about/History/Detailed.html> (last visited Feb. 13, 2009).

69. Rieke, *supra* note 22, at 348.

70. LITTLE HOOVER COMM’N, *supra* note 21, at 14; *see also In re Bay-Delta Programmatic Env’tl. Impact Report Coordinated Proceedings*, 184 P.3d 709, 717–18 (Cal. 2008). The California Bay-Delta Authority oversees the CALFED program. CAL. WATER CODE §§ 79,401(h)(6), 79,403.5(a), 79,410 (West 2009); LITTLE HOOVER COMM’N, *supra* note 21, at iii.

71. *In re Bay-Delta*, 184 P.3d at 718.

72. *Id.* at 717–18.

73. Principles for Agreement on Bay-Delta Standards Between the State of California and the Federal Government, Dec. 15, 1994, *available at* <http://www.calwater.ca.gov/content/Documents/library/SFBayDeltaAgreement.pdf>.

74. *In re Bay-Delta*, 184 P.3d at 718.

75. *See infra* Part I.C.2.

included the creation of EIRs to meet standards set by NEPA and CEQA; and Phase III comprised the implementation of the preferred program.⁷⁶

CALFED released the first draft of the required programmatic environmental impact statement/environmental impact report (“PEIS/R”)⁷⁷ in March 1998.⁷⁸ Public comments were accepted from June 25, 1999 to September 23, 1999.⁷⁹ CALFED published the final PEIS/R in July 2000.⁸⁰ Twelve federal and state agencies signed the Record of Decision (ROD) on August 28, 2000, marking the start of what should have been phase III’s implementation of the PEIS/R.⁸¹

2. *The Fundamental Purpose of CALFED Is Tied to the Achievement of the Four Program Objectives*

The PEIS/R lists CALFED’s goals in three sections: a mission statement, a set of four primary objectives for the CALFED program, and a set of solution principles.⁸² The mission statement called for CALFED “to develop a long-term comprehensive plan [to] restore ecological health and improve water management for beneficial uses of the Bay-Delta system.”⁸³ The four primary objectives were to improve ecosystem quality, water supply, and water quality, and reduce the vulnerability of the Bay-Delta infrastructure.⁸⁴ The six solution principles did not list specific goals but were established to provide a measure of acceptability for alternatives.⁸⁵ One of the principles was to “reduce major conflicts among beneficial uses of water.”⁸⁶

CALFED explained that the mission statement alone did not state its entire purpose, but rather that the mission statement, objectives, and solution principles together reflected the program’s purpose.⁸⁷ Therefore, in order to achieve the fundamental purpose of the program, CALFED said that all four

76. *Id.* at 718–720; see also LITTLE HOOVER COMM’N, *supra* note 21, at 15–16.

77. The report is labeled a PEIS/R because it was required to satisfy both CEQA and NEPA requirements, and because it was prepared for a “program” rather than a “project,” discussed *supra* at Part III.B.1.

78. *In re Bay-Delta*, 184 P.3d at 720.

79. CALFED BAY-DELTA PROGRAM, *Introduction to FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT/ENVIRONMENTAL IMPACT REPORT (2000)*, available at http://calwater.ca.gov/calfed/library/Archive_EIS.html (second of two unnumbered pages).

80. *Id.*

81. CALFED BAY-DELTA PROGRAM, PROGRAMMATIC RECORD OF DECISION 10, 83–85 (2000), available at <http://www.calwater.ca.gov/content/Documents/ROD8-28-00.pdf>.

82. CALFED BAY-DELTA PROGRAM, *supra* note 79, at 1–5.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

objectives had to be met simultaneously.⁸⁸ Given the history of failed attempts to address the Bay-Delta's problems, CALFED believed that any solution would necessarily implicate a variety of interrelated "physical, ecological and socioeconomic" problems that could not be addressed in a vacuum.⁸⁹ Explaining the interrelated nature of the problems facing the Bay-Delta, CALFED stated:

Single-purpose projects have the potential to solve one problem but create other problems, and thereby engender opposition to future actions. The CALFED Bay-Delta Program has taken a different approach, recognizing that many of the problems in the Bay-Delta system are interrelated. Problems in one resource problem area cannot be solved effectively without addressing problems in all four problem areas at once. This greatly increases the scope of our efforts but ultimately will enable us to make progress and move forward to a lasting solution.⁹⁰

CALFED seemed to believe, as Governor Wilson had announced, that a holistic approach was the answer to the Bay-Delta's problems.⁹¹

3. *CALFED Considered a Range of Alternatives to the Bay-Delta Program, but Ultimately Included Only a Few Alternatives in the Final PEIS/R*

During Phase I of the program development process, CALFED created a list of possible alternatives by identifying fifty action categories that would allow CALFED to resolve the Bay-Delta's problems while also satisfying the four program objectives.⁹² Because CALFED was intended to be a comprehensive approach to the Bay-Delta problems, the CALFED agencies only considered alternatives that would achieve all four program objectives.⁹³ In the first round of consideration, CALFED included a list of over one hundred alternatives. In order to narrow the list, it held public meetings and workshops and solicited public comments on this preliminary list of alternatives.⁹⁴

During Phase II, CALFED used the public comments to narrow the list, leaving enough alternatives to offer a reasonable range of solutions but not so many as to preclude detailed analysis.⁹⁵ From the original list of over one hundred alternatives, ten remained at the end of Phase II.⁹⁶ CALFED evaluated the alternatives and again solicited public comments. The public comment

88. CALFED BAY-DELTA PROGRAM, *supra* note 79, at 1-6; *see also In re Bay-Delta Programmatic Evtl. Impact Report Coordinated Proceedings*, 184 P.3d 709, 724 (Cal. 2008).

89. *See* CALFED BAY-DELTA PROGRAM, *supra* note 79, at 1-6 to 1-7.

90. *Id.* at 1-2.

91. Rieke, *supra* note 22, at 348.

92. CALFED BAY-DELTA PROGRAM, *supra* note 81, at 11.

93. *Id.* at 1-6.

94. *Id.* at 11.

95. *Id.* at 12-13.

96. *In re Bay-Delta*, 184 P.3d at 719.

period was very successful—as CALFED received around 1,500 letters and 2,400 pre-printed letters or postcards, and 800 individuals testified at the 16 hearings held in California.⁹⁷ CALFED used the comments received to narrow the alternatives from twelve to four in the final PEIS/R.⁹⁸

II. *IN RE BAY-DELTA* LITIGATION: FARMERS AND RURAL LAND OWNERS CHALLENGE CALFED'S PEIS/R IN COURT

A. *The District Court Upheld the PEIS/R; The Circuit Court Reversed*

In September 2000, Regional Council of Rural Counties (RCRC), a nonprofit corporation representing approximately thirty rural counties, the Central Delta Water Agency, the South Delta Water Agency, and three Delta landowners filed a petition alleging that the CALFED PEIS/R did not comply with CEQA requirements.⁹⁹ In December 2000, the California Farm Bureau Federation (Farm Bureau) and three San Joaquin County landowners filed a similar petition in Fresno County.¹⁰⁰ In both filings, the petitioners claimed that the PEIS/R failed to include an alternative that would reduce the amount of water exported to Southern California.¹⁰¹ Although at first glance it may seem that the desire to reduce water exported to Southern California is tied to ecosystem concerns, petitioners were more concerned with the impact the program would have on their business and land interests. The proposed PEIS/R required a certain amount of land be set aside for ecosystem restoration to compensate for degradation caused by water exports.¹⁰² Were the proposal to be implemented, petitioners would have lost a large amount of land because 87 percent of the land that was to be converted for ecosystem restoration was privately owned agricultural land.¹⁰³ Presumably, were less water exported to Southern California, not only would the farmers in Northern California have access to more water, but also less land would need to be reserved for restoration purposes.

97. *Id.* at 13.

98. *Id.* at 12–13.

99. *In re Bay-Delta Programmatic Evtl. Impact Report Coordinated Proceedings*, 184 P.3d 709, 720 (Cal. 2008).

100. *Id.*

101. *See In re Bay-Delta Programmatic Evtl. Impact Report Coordinated Proceedings*, 34 Cal. Rptr. 3d 696, 705 (Cal. Ct. App. 2005). The original filings included additional, non-CEQA claims that the trial Judge dismissed because they were either not properly stated or premature. *Id.*

102. *See id.* at 720–21. The PEIS/R noted in its “Ecosystem Restoration Program” section that the restoration of the Bay-Delta could require up to 112,000 acres of “important farmland” to be converted, and that although some of it could be shifted to the Central Valley, the restoration was a “potentially significant unavoidable adverse impact on agricultural land use.” CALFED BAY-DELTA PROGRAM, *supra* note 79, at 7.1-16. Furthermore, up to 278,000 acre-feet per year of water could be required for restoration, some of which would necessarily be diverted from farmland. *See id.* at 7.1-16–7.1-17.

103. *See In re Bay-Delta*, 34 Cal. Rptr. 3d at 731.

The actions were consolidated and heard in Sacramento County in 2001 under the title of *Bay-Delta Programmatic EIR Cases*.¹⁰⁴ The trial court ruled that the CALFED PEIS/R satisfied the CEQA requirements.¹⁰⁵ The California Court of Appeal reversed and found against CALFED.¹⁰⁶ The state appellate court stated that the PEIS/R: (1) should have discussed alternatives that required less water to be exported from the Bay-Delta, (2) failed to discuss the environmental impact of the programs, and (3) failed to include information about the environmental water account (EWA).¹⁰⁷ In its discussion of CALFED's alternatives analysis, the court stated that an alternative should be considered feasible even if it would not meet *all* the program's goals.¹⁰⁸ Despite the fact that an alternative of reduced water exported from the Bay-Delta would not meet the water supply stability goal, the court stated that CALFED should have included the alternative in its PEIS/R.¹⁰⁹

B. The California Supreme Court Reversed: CALFED Must Consider Only Alternatives that Satisfy the Fundamental Purpose of the Program

The California Supreme Court, reversing the appellate court, held that the PEIS/R met CEQA's requirements for an EIR.¹¹⁰ In response to the petitioners' claim that CALFED violated CEQA by not considering a reduction in the amount of water exported south, the court stated that an EIR need only consider alternatives that will satisfy the project's fundamental purpose.¹¹¹ The court stated that, after looking at CALFED's unique situation, all four program objectives had to be met in order to achieve the fundamental purpose of the program.¹¹² Because water supply stability was one of the objectives, CALFED did not need to consider reducing the amount of water exported to Southern California because it would have resulted in water supply *instability*.¹¹³

The Supreme Court also stated that the Court of Appeals missed the mark when it considered the Bay-Delta's pre-existing environmental problems in its analysis of the sufficiency of the program alternatives.¹¹⁴ Under CEQA, an EIR must include project alternatives that reduce the project's environmental effects as compared against the existing baseline condition of the site.¹¹⁵ While a

104. *Id.* at 727.

105. *Id.*

106. *Id.* at 706.

107. *Id.*

108. *Id.* at 773.

109. *In re Bay-Delta*, 34 Cal. Rptr. 3d at 774–75.

110. *In re Bay-Delta Programmatic Env'tl. Impact Report Coordinated Proceedings*, 184 P.3d 709, 714–715 (Cal. 2008).

111. *Id.* at 724.

112. *Id.* at 723.

113. *Id.* at 724.

114. *Id.* at 725.

115. *Id.*

reduction in water exported from the Bay-Delta may have been “environmentally superior” to maintaining the level of water exported at the time of the decision, the Supreme Court stated that CEQA did not require the EIR to consider reducing the water exported because the current water exportation levels were part of the baseline conditions.¹¹⁶

Addressing the petitioners’ claims that the PEIS/R failed to identify concrete water sources and that the EWA was overly vague, the California Supreme Court stated that CALFED’s proposals were consistent with the requirements of first-tier and second-tier proposals.¹¹⁷

C. The California Supreme Court Got It Right: CALFED’s PEIS/R Is Consistent with CEQA

Under California administrative law, a court will overturn an agency decision only if the agency acted with a “prejudicial abuse of discretion.”¹¹⁸ A prejudicial abuse of discretion is established if it can be shown that the agency did not act in accordance with applicable law or if the “decision [was] not supported by substantial evidence.”¹¹⁹ As discussed above, CALFED needed to consider only alternatives that would satisfy the fundamental purpose of the program. Therefore, applying the prejudicial abuse of discretion standard, the California Supreme Court had to determine whether CALFED’s decision to define the fundamental purpose of the program as the achievement of all four objectives was supported by substantial evidence.

1. The Supreme Court Correctly Held that CALFED’s Decision Was Supported by Substantial Evidence

CALFED’s Record of Decision (ROD) and PEIS/R contained substantial evidence that reducing the amount of water exported from the Bay-Delta, although supported by many agriculturalists and environmentalists, would not have satisfied the water supply objective. Some public comments expressed a desire to see CALFED cap or reduce exports from the Bay-Delta in order to reduce the required amount of farmland to be converted for ecosystem restoration.¹²⁰ CALFED, in its public responses to those comments, stated that reducing or capping exports would not achieve the water supply stability goal

116. *Id.* at 725–26.

117. *Id.* at 726, 730. *See infra* Part II.B.3.

118. CAL. PUB. RES. CODE § 21,168.5 (West 2009); *see also* Laurel Heights Improvement Ass’n of San Francisco, Inc. v. Regents of Univ. of Cal., 764 P.2d 278, 283 (Cal. 1988).

119. CAL. PUB. RES. CODE § 21,168.5; *see also* Laurel Heights, 764 P.2d at 283.

120. *See* CALFED BAY-DELTA PROGRAM, FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT/ENVIRONMENTAL IMPACT REPORT, RESPONSE TO COMMENTS VOLUME I: IMPACT ANALYSIS CR-30 (2000), available at http://calwater.ca.gov/content/Documents/library/July2000_EIS_EIR/313/313-common.pdf. *See also supra* Part III.D.1.

because it would reduce the amount of water available to farmers and urban water users throughout the state.¹²¹ Given the fact that the Bay-Delta supplies water to two-thirds of California's households, many of which are in Southern California, it seems reasonable to expect that a reduction in water exported to Southern California would result in water supply problems for many Californians.

The ROD also contained substantial evidence to support its decision that all four objectives had to be met in order to achieve the fundamental purpose of the CALFED program. The program was designed to consider all Bay-Delta problems because they were seen to be "interrelated and interdependent."¹²² Not only was this CALFED's initial goal, but the 11,000-plus individual comments received¹²³ illustrated the diversity of concerns and reinforced the wisdom of CALFED's decision to approach the Bay-Delta problems in a manner that would satisfy all interested parties. Additionally, given the history of the struggle to address the Bay-Delta's problems while appeasing interested parties, CALFED reasonably decided that all objectives had to be met in order for CALFED to succeed and not fall apart as a result of a piecemeal approach.¹²⁴

CALFED's PEIS/R and ROD contain detailed information about the decision-making process. Although mere process alone will not always satisfy the substantial evidence requirement, a complete record, such as the one CALFED prepared, often gives enough justification for the court to uphold an agency decision.¹²⁵

2. *The Decision Does Not Create a New Rule to Apply to Future Challenges to EIRs, but Must Be Limited to Similar Factual Situations*

Because reduced pumping would have prevented the achievement of CALFED's goals, the California Supreme Court correctly ruled that the alternative of reduced pumping from the Bay-Delta did not need to be considered. This decision, however, should be limited to the unique facts of this case. It should *not* create a new presumption that, in future disputes over the adequacy of a PEIS/R, alternatives need only be included if they satisfy *every* program objective. First, pursuant to CEQA rules, an alternative usually does not need to satisfy every objective in order to be considered.¹²⁶ In this case,

121. *See id.*

122. CALFED BAY-DELTA PROGRAM, *supra* note 81, at 4.

123. CALFED BAY-DELTA PROGRAM, PROGRAMMATIC RECORD OF DECISION 13 (2000), available at <http://www.calwater.ca.gov/content/Documents/ROD8-28-00.pdf>.

124. *See id.* at 1-5.

125. *See Laurel Heights*, 764 P.2d at 283 (stating that a court will set aside an agency decision under CEQA if there has been a prejudicial abuse of discretion, which can be established if the decision is not supported by substantial evidence).

126. CAL. CODE REGS. tit. 14, § 15,126.6(a) (2009).

however, because each of the objectives was linked to the fundamental purpose, every objective needed to be met, despite the usual CEQA rule. Second, a programmatic EIR typically requires a broad scope of alternatives be considered.¹²⁷ The Supreme Court in this case allowed the exclusion of an alternative, reducing water exports from the Bay-Delta,¹²⁸ seemingly going against CEQA's general policy. However, the Supreme Court only allowed the alternative to be excluded because reduced pumping to Southern California was infeasible. When considering future cases dealing with the consideration of alternatives under CEQA, courts looking to *In re Bay-Delta* as precedent must be careful to look to its facts in order to understand why the Supreme Court decided the case in favor of CALFED.

This decision, despite its narrow holding, is an important example of an agency meeting the requirements of CEQA and the court correctly interpreting CEQA. In this case, the PEIS/R served the purpose of informing the government and the public of the proposed action, any alternatives, and the environmental impacts involved.¹²⁹ The PEIS/R listed and responded to many of the public comments received, showing that the agency fulfilled its mandate to involve the public in the review process.¹³⁰ Although CALFED may have been overly optimistic in believing that it could achieve every objective at once, because the agencies followed the proper CEQA procedures the court was correct to defer to CALFED and give it a chance to implement its PEIS/R.¹³¹

III. GIVE SUBSTANCE A CHANCE: FOLLOW CEQA'S PROCEDURAL REQUIREMENTS AS A MEANS TO ACHIEVE A SUBSTANTIVE EFFECT

CEQA, unlike its federal counterpart NEPA, has substantive effect—it requires that the least environmentally harmful alternative be chosen unless the preparing party publishes a statement of overriding concern. However, CEQA's procedural requirements may be more important than its substantive requirements, because without proper procedure there is little chance for CEQA to affect the substance of an EIR and, accordingly, the impact of the project on the environment.

127. See *id.* § 15,168(b)(1).

128. See *In re Bay-Delta*, 184 P.3d at 725.

129. See *No Oil, Inc. v. City of Los Angeles*, 529 P.2d 66, 74 (Cal. 1974).

130. See tit. 14, § 15,088.

131. See *In re Bay-Delta Programmatic Env'tl. Impact Report Coordinated Proceedings*, 184 P.3d 709, 725–26 (Cal. 2008).

A. *CEQA Has the Possibility of Effecting Greater Substantive Change Because of Its Procedural Requirements*

1. *NEPA Has No Substantive Effect, and Is Effective Mainly Through its Procedural Requirements*

Although CEQA and NEPA appear similar on the surface, CEQA is a more powerful tool for substantive environmental change because NEPA does not dictate that the least environmentally harmful alternative be implemented.¹³² The U.S. Supreme Court has interpreted NEPA to have very little, if any, substantive bite.¹³³ Under NEPA, agencies may define a “preferred alternative”¹³⁴ and an “environmentally preferable alternative,”¹³⁵ but are not required to adopt either.¹³⁶ Alternatives in NEPA are not meant to force an agency into making the choice that would be best for the environment, but they are meant to provide “a clear basis for choice” among the alternatives.¹³⁷

In *City of Carmel*,¹³⁸ the Ninth Circuit considered both procedural and substantive NEPA claims. The City of Carmel sued the Department of Transportation, claiming that the Department’s goals in the proposed EIS were unreasonably narrow, and that the agency could therefore not consider a proper range of “environmentally superior alternatives.”¹³⁹ Addressing this procedural claim, the court held that the EIS met the statutory requirements under NEPA because the goal was reasonable and thus the agency had considered a sufficient range of reasonable alternatives.¹⁴⁰ As a substantive matter, the City claimed that the Department of Transportation should have chosen an alternative with less environmental impact.¹⁴¹ The court acknowledged that this was a substantive disagreement, and that although “th[e] environmental concerns may be strong,” it was beyond the court’s scope of review.¹⁴² The

132. See Council on Env’tl. Quality, Environmental Impact Statement, 40 C.F.R. § 1502.14(e) (1979); see also *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980).

133. *Strycker’s Bay*, 444 U.S. at 227.

134. The “preferred alternative” is that which the agency thinks would fulfill the statutory mission of the EIS, while giving consideration to economic, technical, and other factors. See 40 C.F.R. § 1502.14(e).

135. The “environmentally preferable alternative” is that which would promote the environmental policy of NEPA. See Council on Env’tl. Quality, NEPA and Agency Decisionmaking, 40 C.F.R. § 1505.2(b) (1979).

136. Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,027–28 (Mar. 23, 1981).

137. Council on Env’tl. Quality, Environmental Impact Statement, 40 C.F.R. § 1502.14 (1979).

138. *City of Carmel-By-The-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142 (9th Cir. 1997).

139. *Id.* at 1155.

140. *Id.*

141. *Id.* at 1159.

142. *Id.*

court stated that NEPA did not allow it to decide when environmental costs outweighed benefits.¹⁴³

2. *CEQA Has Both Procedural and Substantive Requirements*

CEQA, on the other hand, is effective for procedural claims while also offering room for substantive causes of action. This is because CEQA generally requires the least harmful alternative be adopted *unless* the proposing party publishes a statement of overriding concern.¹⁴⁴ The statement must show that the adverse environmental effects of the project are acceptable because certain factors outweigh the possible environmental harm, such as excessive cost or delay.¹⁴⁵ To determine if the overriding concern standard has been met, a balancing test will be applied, comparing the “economic, legal, social, technological, or other benefits” of the project against the “adverse environmental effects.”¹⁴⁶

As a statute created in part to “prevent significant, avoidable damage to the environment,” CEQA lives up to its goals by requiring the preparation of an EIR while also scrutinizing the substance of the EIR to determine what the least environmentally damaging course of action may be.¹⁴⁷ Although NEPA has a similar goal of improving the environment, it does not give its alternatives requirement a substantive twist, but merely imposes procedural requirements.¹⁴⁸

3. *Despite the Substantive Force of CEQA, Procedural Requirements Must Be Enforced Just as in NEPA Cases*

Although CEQA is in some ways more effective than NEPA because it has substantive power to enforce environmental regulations, the procedural aspects of CEQA must be followed just as closely as NEPA’s. Federal courts must scrutinize agency decisions to ensure that NEPA procedural requirements are followed, as NEPA is ineffectual without its procedure.¹⁴⁹ While CEQA has more substantive merit, that does not lessen the importance of the

143. *Id.*

144. CAL. PUB. RES. CODE § 21,002 (West 2009); CAL. CODE REGS. tit. 14, § 15,093 (2009).

145. *See* tit. 14, § 15,092(b)(2)(B); CAL. PUB. RES. CODE § 21,083.

146. Tit. 14, § 15,093(a); CAL. PUB. RES. CODE § 21,083.

147. *See* CAL. PUB. RES. CODE § 21,081.

148. Dave Owen, *Climate Change and Environmental Assessment Law*, 33 COLUM. J. ENVTL. L. 57, 82 (2008).

149. *See* *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980). However, Justice Marshall in dissent stated that NEPA does have some substantive effect in that agency decisions can be set aside if arbitrary or capricious. *Id.* at 229 (Marshall, J., dissenting). Distinguishing his interpretation of *Vermont Yankee* from that of the majority, Justice Marshall stated that NEPA is only “*essentially* procedural,” and therefore has some substantive merit. *Id.* at 227 (emphasis added) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978)).

procedural requirements of the statute. Rather, lax enforcement of CEQA's procedural requirements would undermine the statute's powerful substantive bite.

CEQA's procedural requirements must be followed for two important reasons. First, because program and project EIRs address different ranges of alternatives, defining something as a program as opposed to a project will have a substantive effect on the alternatives considered. Second, the definition of the objectives and underlying purpose for the project or program will constrain alternatives considered, leading to another possible substantive effect.

B. EIRs Must Properly Be Labeled as a "Project" or a "Program" EIR in Order to Adequately Constrain the Alternatives Considered

EIRs vary depending on the situation and their intended use,¹⁵⁰ and each is labeled either as a project EIR or a program (or programmatic) EIR. Although an EIR's label will not necessarily dictate what final EIR the agency implements, it is important to keep in mind the distinction between project and program EIRs because of the impact this distinction has on the range of alternatives considered.

Pursuant to CEQA regulations, program EIRs require a more expansive discussion of alternatives.¹⁵¹ Also, only program EIRs may properly engage in tiering, the process whereby an agency may specify details later in the process.¹⁵²

1. Whether an Agency Must Prepare a Program or a Project EIR Depends on the Breadth of the Activity Considered

A project EIR is one that is prepared for "a specific development project" and discusses all phases of the project.¹⁵³ For example, the California Supreme Court characterized an expansive logging plan for an area of old-growth redwood as a project.¹⁵⁴ Although the EIR was expansive and included a 120-year projection of the impacts of the logging, it was considered a project EIR because it only involved one specific logging project. On the other hand, a program EIR is prepared for a series of related actions or for a series of smaller projects that form one large program.¹⁵⁵ To be considered part of a program,

150. CAL. CODE REGS. tit. 14, § 15,160 (2009).

151. *Id.* § 15,168(b)(1).

152. *See* CAL. PUB. RES. CODE §§ 21,068.5, 21,093, 21,094 (West 2009); *see also* tit. 14, § 15,385.

153. *Id.* § 15,161.

154. *See* *Envtl. Prot. & Info. Ctr. v. Cal. Dep't of Forestry & Fire Prot.*, 187 P.3d 888, 895 (Cal. 2008).

155. Tit. 14, § 15,168(a).

the projects must be related geographically, logically, or by the governing rules or the issuing regulations.¹⁵⁶

CALFED's PEIS/R was correctly labeled a programmatic EIR. As the final PEIS/R stated, the CALFED program consisted of "multiple actions that [were] diverse, geographically dispersed, and to be carried out over many years."¹⁵⁷ Because it had a very large scope and involved problems of a "conceptual nature," the agency prepared a broad program EIR.¹⁵⁸

2. *Program EIRs Require Broad Discussion of Alternatives*

The breadth of alternatives discussed in an EIR depends on whether the EIR is for a project or a program. Listed in the Guidelines for Implementation of CEQA are a variety of benefits to program EIRs, including the ability for "more exhaustive consideration of effects and alternatives than would be practical in an EIR on an individual action."¹⁵⁹ Because the scope of a program is larger than that of a project, the scope of the alternatives considered must likewise be broadened. In other words, "[w]hen the proposed action is an integral part of a coordinated plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened."¹⁶⁰

Despite the fact that CALFED's programmatic PEIS/R required a wide range of alternatives, CALFED was justified in excluding reduced water exports from the Bay-Delta because that alternative would not have satisfied the fundamental purpose of the program.¹⁶¹ Although the fact that CALFED prepared a program EIR indicates that a wide variety of alternatives should have been considered, this does not trump the basic requirement that each alternative must satisfy the fundamental purpose of the program. Therefore, the fact that CALFED's PEIS/R was for a program does not mean that *every* alternative needed to be included; only those that met the other CEQA requirements needed to be included.

CALFED's programmatic EIR illustrates the importance of not defining a program as a project, and vice versa. If a program encompassing a wide variety of goals, like the CALFED Bay-Delta program, were titled a "project," a reviewing court would review the EIR differently. Because fewer alternatives are required for a project, the preparing party would consider fewer alternatives to reduce environmental impact. With a shrunken range of alternatives, an agency may choose an alternative that, if compared against a broader set of

156. *Id.*

157. CALFED BAY-DELTA PROGRAM, *supra* note 79, at iii.

158. *Id.*

159. CAL. CODE REGS. tit. 14, § 15,168(b)(1) (2009).

160. *Natural Res. Def. Council v. Morton*, 458 F.2d 827, 835 (D.C. Cir. 1972).

161. *See In re Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings*, 184 P.3d 709, 721–22 (Cal. 2008).

alternatives, would perhaps never be approved because of its environmental impact.

3. *Tiering Is Appropriate Only in Program EIRs and Must Not Be Used to Delay Procurement of Information*

Program EIRs are often associated with the process of tiering. Using tiering, the program EIR will cover the general impacts of a proposed program and will later be followed by a narrow or site-specific project EIR.¹⁶² This gives the agencies preparing the EIRs some flexibility, allowing discussion of specifics of a long-term program to be deferred until its later phases.¹⁶³ Because a program EIR may encompass many smaller projects, tiering the program EIR allows the agency to avoid considering an issue that would be better addressed in a project-specific EIR.¹⁶⁴ Courts must be careful not to simply allow agencies to claim that they are engaged in tiering when the agency is really just looking for an excuse to avoid discussion of a significant environmental effect.¹⁶⁵ A program EIR should not be used as a tool to “cho[p] a large project into many little ones—each with a minimal potential impact on the environment which cumulatively may have disastrous consequences.”¹⁶⁶ Rather, the correct use of tiering is to allow an agency to defer analysis of undetermined parts of a smaller project until a more suitable time.

In *Environmental Protection and Information Center v. California*, the California Supreme Court held that a logging company had violated CEQA by inappropriately deferring analysis of part of a project until a later date.¹⁶⁷ Pacific Lumber admitted that it tiered its project EIR because it did not have enough information to prepare the entire EIR and because it wanted to avoid disclosing harmful information about its logging practice until after a statutory deadline had passed.¹⁶⁸ The court noted the virtues of tiering, saying that it would be impracticable to require a party to engage in “sheer speculation as to future environmental consequences.”¹⁶⁹ However, because Pacific Lumber could have accessed the information it needed to complete the EIR without

162. See CAL. PUB. RES. CODE §§ 21,068.5, 21,093, 21,094 (West 2009); see also tit. 14, § 15,385.

163. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 150 P.3d 709, 720 (Cal. 2007).

164. See tit. 14, § 15,385(b).

165. CAL. CODE REGS. tit. 14, §15,152(b) (2009).

166. *Rio Vista Farm Bureau Ctr. v. County of Solano*, 7 Cal. Rptr. 2d 307, 314 (Cal. Ct. App. 1992) (quoting *Bozung v. Local Agency Formation Comm’n*, 529 P.2d 1017, 1031 (Cal. 1975)).

167. *Env’tl. Prot. & Info. Ctr. v. Cal. Dep’t of Forestry & Fire Prot.*, 187 P.3d 888, 895 (Cal. 2008).

168. *Id.* at 918.

169. *Id.*

169. *Rio Vista Farm Bureau Ctr.*, 7 Cal. Rptr. 2d. at 316 (quoting *Kings County Farm Bureau v. City of Hanford*, 270 Cal. Rptr. 650, 673 (Cal. Ct. App. 1990)).

tiering and because the EIR was prepared only for a project and not a program, the court stated that the EIR did not meet CEQA requirements.¹⁷⁰

C. *The Goals of Projects and Programs Should Not Be Narrowed in an Attempt to Skirt CEQA Procedural Requirements*

While CEQA mandates that agencies must consider alternatives that meet most objectives and the fundamental purpose of the program, CEQA does not give much guidance as to how the agency should define its goals. Because of this lack of guidance, agencies may have incentives to define their goals narrowly in order to limit the alternatives they must consider. As mentioned above, the most environmentally benign alternative must be implemented unless a statement of overriding concern is published.¹⁷¹ Faced with possibly having to constrain their program because of environmental effects, agencies would likely be tempted to artificially constrain the goals or purpose of their programs.

Unfortunately, California courts have consistently upheld EIRs with narrow sets of purposes as being reasonable, thereby allowing the parties preparing the EIRs to skirt CEQA's procedural requirements and limit the alternatives considered. In *Citizens of Goleta Valley et al. v. Board of Supervisors*, the California Supreme Court stated that Santa Barbara County was justified in limiting the alternatives considered based on location because the location was essential to the project.¹⁷² The project was a coastal resort, and the county excluded alternatives that did not offer coast access.¹⁷³ In another case involving a project that required a specific location as part of the project's goal, a court also held that the agency did not need to include alternatives that did not satisfy the location goal.¹⁷⁴ In *Sequoyah Hills Homeowners Association v. City of Oakland*, the court held that the city housing agency did not need to consider alternatives that would not meet the affordable housing goal of the program.¹⁷⁵ The EIR had not considered alternatives that would have resulted in less-affordable and lower-density housing, despite the fact that it would have reduced environmental impact.¹⁷⁶ In *In re Bay-Delta*, the court followed the

170. See *Env'tl. Prot. & Info. Ctr.*, 187 P.3d at 918.

171. See *supra* Part III.A.2.

172. *Citizens of Goleta Valley v. Bd. of Supervisors*, 801 P.2d 1161, 1173 (Cal. 1990).

173. *Id.* at 570.

174. *Save San Francisco Bay Ass'n v. San Francisco Bay Conservation & Dev. Comm'n*, 13 Cal. Rptr. 2d 117, 126 (Cal. Ct. App. 1992) (stating that agency did not need to consider additional inland locations because the goal of the program was to create a waterfront exhibit).

175. *Sequoyah Hills Homeowners Ass'n v. City of Oakland*, 29 Cal. Rptr. 2d 182, 187-88 (Cal. Ct. App. 1993).

176. *Id.* at 184.

trend of allowing an agency to limit its alternatives by accepting CALFED's decision to tie each objective to the fundamental purpose of the program.¹⁷⁷

Although the *In re Bay-Delta* decision should be limited to its facts,¹⁷⁸ the decision is troubling in that it affirms the long line of cases in California that allow agencies to define project goals and purposes narrowly and limit alternatives. The alternatives analysis is the "linchpin" of CEQA, as it provides a chance for a court to require an agency to adopt a less environmentally harmful alternative.¹⁷⁹ However, if courts continue to let agencies craft such specific sets of goals so that few alternatives will truly be considered, the substantive power of CEQA will be eliminated.

CONCLUSION

In the fourteen years since CALFED was founded, the Bay-Delta has seen little improvement.¹⁸⁰ As was the case when the program began, aquatic life in the Bay-Delta is declining, invasive species are increasing, the levees become more fragile by the day, and water supply and quality is unreliable.¹⁸¹ In 2005, the Little Hoover Report stated, "CALFED was forged from a crisis, and to a crisis CALFED has returned." Despite the seeming victory of the *In re Bay-Delta* case, where the court upheld CALFED's PEIS/R, the Bay-Delta is still in crisis. Looking at the CALFED program website, it appears that the PEIS/R has been abandoned, and with it has been abandoned the hope of achieving all of CALFED's goals at once.¹⁸² Instead, CALFED now addresses each issue with a separate "Program Plan."¹⁸³

It seems that part of what led to the demise of CALFED's PEIS/R is the same thing that seemed so promising at the program's outset—the number of parties with a stake in the program. In her article about the Bay-Delta, Elizabeth Rieke stated that the CALFED program had great promise at the start because it featured a "favorable interest-group configuration" that brought interested parties who were "ready to deal" into communication to find a mutually beneficial solution.¹⁸⁴ The desire to craft a solution that would satisfy everyone is evident in the PEIS/R, which required every goal to be met to satisfy the purpose of the program. Despite the good intentions of the CALFED program, however, *In re Bay-Delta* illustrates that the interest group

177. *In re Bay-Delta* Programmatic Env'tl. Impact Report Coordinated Proceedings, 184 P.3d 709, 721 (Cal. 2008).

178. See *supra* Part I.D.3.

179. *Monroe County Conservation Council, Inc. v. Volpe*, 472 F. 2d 693, 697 (2d Cir. 1972).

180. CALFED was founded in 1994. CALFED Bay-Delta Program, *supra* note 68.

181. CALFED Bay-Delta Program, About the Delta Today, http://www.calwater.ca.gov/calfed/about/Delta_Today.html (last visited Feb. 13, 2009).

182. See CALFED Bay-Delta Program, Program Plans, <http://calwater.ca.gov/calfed/plans/index.html> (last visited Feb. 13, 2009).

183. *Id.*

184. Rieke, *supra* note 22, at 350.

communication broke down when groups of farmers and landowners became dissatisfied with the effect that the program would have on their land and economic concerns.

Although *In re Bay-Delta* was rightly decided, it raises red flags for what courts should look for in future cases to ensure that CEQA's procedural requirements are followed. First, courts must require that program EIRs consider a more inclusive range of alternatives than project EIRs. Second, agencies must not craft unreasonably narrow sets of goals and purposes for their programs as a way to constrain the alternatives included in the EIR.

To the extent that the standard of review will allow, courts reviewing an EIR should require that an agency justify why it listed the goals as it did and why it did or did not include certain alternatives. Although agencies are already required to develop a record to support their actions, courts should ensure that agency records are complete and do not leave out any underlying motives for decisions. As *In re Bay-Delta* illustrates, interest groups may influence agency decisions, whether they force the agency to consider the views of many groups of people, as was the case with CALFED, or whether they persuade the agency to focus on only one party's goals, as was the case in *Citizens of Goleta Valley*. Consideration of the role these interest groups have played in the development of an EIR may help a court focus on what the "real" goal of a program is and whether the agency has attempted to skirt CEQA procedures to appease a certain interest group.