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## Maintaining the California Environmental Quality Act's Informational Goals Under the Use of Design-Build

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# MAINTAINING THE CALIFORNIA ENVIRONMENTAL QUALITY ACT'S INFORMATIONAL GOALS UNDER THE USE OF DESIGN-BUILD

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## I. INTRODUCTION

Today's environmentally conscious world demands that those who undertake construction projects consider their effects on air and water quality, the flora and fauna, and where people will live, among other public concerns.<sup>1</sup> Chief in ensuring that these impacts are considered before construction in the Golden State is the California Environmental Quality Act (CEQA).<sup>2</sup> CEQA is "the cornerstone of California's environmental laws," requiring mitigation, public comment, and controls approval of construction projects that may potentially have a significant effect on the environment.<sup>3</sup> At its core, CEQA is a comprehensive environmental protection and informational statute designed to ensure that the developer of a proposed project adequately disclose its plans

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<sup>1</sup> ELIZABETH DEAKIN, UC BERKELEY CTR. FOR ENVTL. PUB. POLICY, ENVIRONMENTAL AND OTHER CO-BENEFITS OF DEVELOPING A HIGH SPEED RAIL SYSTEM IN CALIFORNIA: A PROSPECTIVE VISION 2010-2050, at 6 (Working Paper No. CEPP001, 2010), *available at* [gspp.berkeley.edu/assets/uploads/page/HSR10\\_Deakin.pdf](http://gspp.berkeley.edu/assets/uploads/page/HSR10_Deakin.pdf).

<sup>2</sup> CAL. PUB. RES. CODE § 21000 et seq. (Westlaw 2014).

<sup>3</sup> 1 KENNETH A. MANASTER & DANIEL P. SELMI, CALIFORNIA ENVIRONMENTAL LAW & LAND USE PRACTICE, ch. 20 § 20.02[1] (2014).

before permanently altering the environment.<sup>4</sup> CEQA further ensures that both the public and governmental decisionmakers are made aware of a project's potentially significant environmental impacts.<sup>5</sup> However, CEQA's goals are threatened by the use of the design-build (DB) project delivery method.

"Project delivery method" is a term of art commonly used in the construction industry. It refers to how design and construction services are assigned to companies working on a project.<sup>6</sup> The defining aspect of a DB project is that one entity is responsible for both designing and building the project under a single contract,<sup>7</sup> as opposed to the traditional design-bid-build (DBB) project delivery method, which divides the process into three separate contracts.<sup>8</sup> DB's consolidation of the traditionally separate design and build phases allows construction to begin before finalizing a project's design.<sup>9</sup> This presents a significant problem, because overlapping design and construction can prevent a full and thorough assessment of a project's environmental impact.

The DB delivery method encourages vague and incomplete plans, allowing for post-CEQA-approval design changes, which can fail to account for all significant environmental impacts. For example, if planning of a railroad calls for traversing a ravine, the designs might vaguely describe an aerial structure without more detail, thus allowing for design changes after the project's approval. In such a situation there would be no further environmental review unless the project's builder deemed the changes to be a substantial deviation from the original designs. This jeopardizes CEQA's core goal of ensuring that the public and governmental decisionmakers are aware of a proposed project's significant environmental impacts.<sup>10</sup>

The key component to assuring that there is an adequate assessment of any significant environmental impact is CEQA's Environmental Impact Report (EIR), which must contain a "project description."<sup>11</sup> The project description must list a number of specifics about the proposed

<sup>4</sup> See CAL. PUB. RES. CODE § 21100(b).

<sup>5</sup> *Id.* § 21092.

<sup>6</sup> THE AM. INST. OF ARCHITECTS & THE ASSOCIATED GEN. CONTRACTORS OF AM., PRIMER ON PROJECT DELIVERY 2 (2d ed. 2011), available at [www.aia.org/aiaucmp/groups/aia/documents/pdf/aiab093116.pdf](http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aiab093116.pdf).

<sup>7</sup> *Design-Build*, OFFICE INT'L PROGRAMS, U.S. DEP'T TRANSP., international.fhwa.dot.gov/contractadmin/04.cfm (last modified Apr. 22, 2014).

<sup>8</sup> THE AM. INST. OF ARCHITECTS & THE ASSOCIATED GEN. CONTRACTORS OF AM., *supra* note 6, at 4.

<sup>9</sup> *Design-Build*, *supra* note 7.

<sup>10</sup> CAL. PUB. RES. CODE § 21092.

<sup>11</sup> See CAL. CODE REGS. tit. 14, § 15124 (Westlaw 2013).

project at the level of detail that is needed “for evaluation and review of the environmental impact.”<sup>12</sup> The problem is that a builder is not required to report changes to a project once it receives approval, unless the changes are substantial or based on new information that was not known at the time of approval.<sup>13</sup> Incomplete designs under DB allow for a greater amount of change than a fully designed project, giving the builder more leeway, but also the potential to miss any significant environmental impacts that the project may have.

This Comment proposes that CEQA should be amended in two ways to settle the discrepancies between CEQA’s goals and the vague, incomplete project descriptions that arise from the use of the DB method. First, CEQA should be amended to require the builder of every DB project to publish notification of design and construction changes after the project’s final EIR. Second, every DB project should be subject to an oversight and review committee if the potential environmental damage is greater than that described in the final EIR. These proposed amendments would ensure that the public and governmental decisionmakers are consistently informed about changes to DB projects.

To arrive at these proposals, this Comment considers the application of the proposed amendments to the California High-Speed Rail (HSR or “California HSR”), which uses the DB method. The California HSR’s choice of DB caused litigation asserting that the method’s use made adequate CEQA review impossible.<sup>14</sup> Although there is ongoing litigation over whether the California HSR is subject to CEQA, the proposed amendments would apply to all DB projects in California.<sup>15</sup>

Part II of this Comment focuses on the background of both HSR in America and CEQA to understand how they intersect with the construction of California’s HSR. Part II further examines the current legal battles involving whether the HSR has complied with CEQA’s guidelines, and the importance of the proposed amendments. Part III explains the DB method, why the agency charged with approving the California HSR chose this method. Part III then presents in detail the

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<sup>12</sup> *Id.*

<sup>13</sup> CAL. PUB. RES. CODE § 21166.

<sup>14</sup> See *Cnty. of Madera v. Cal. High-Speed Rail Auth.*, No. 34-2012-80001165-CU-WM-GDS, 2013 WL 2297160 (Cal. Super. Ct. Sacramento Cnty. Apr. 18, 2013).

<sup>15</sup> A determination of whether CEQA or federal law controls the environmental review process for the California HSR project is pending before the California Court of Appeal, Third Appellate District. See *Town of Atherton v. Cal. High Speed Rail Auth.*, No. C070877 (Cal. Ct. App., 3d Dist.), *docket available at* [appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=3&doc\\_id=2011965&doc\\_no=C070877](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=3&doc_id=2011965&doc_no=C070877).

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proposed amendments and how they would affect projects such as the California HSR. Part IV concludes by bringing this Comment's various elements together and demonstrating the benefits of the proposed amendments.

## II. BACKGROUND

## A. THE HISTORY OF HIGH-SPEED RAIL IN AMERICA

The history of HSR in the United States is marked by a cycle of promising starts and disappointing setbacks. America first dabbled with HSR with the passage of the High Speed Ground Transportation Act of 1965 (HSGTA).<sup>16</sup> The HSGTA tasked the Secretary of Transportation with leading the research and development of high-speed ground transportation in order to encourage the use of HSR as an alternative to existing transportation.<sup>17</sup> Out of this came America's first high-speed trains: the Metroliner and TurboTrain, both of which served the Northeast Corridor, running from Boston to the District of Columbia.<sup>18</sup>

The Metroliner was capable of reaching speeds of 125 mph, but only for short distances.<sup>19</sup> It would have a lengthy career, operating from 1969 to 2006.<sup>20</sup> The TurboTrain, on the other hand, was never used extensively.<sup>21</sup> Despite being able to reach speeds of 160 mph, the TurboTrain required frequent and expensive maintenance, limiting its operation from 1968 until 1972.<sup>22</sup>

The 1970s marked a lull in the development of HSR, as funding under the HSGTA ended. During that time, Congress focused on improving traditional rail service within the Northeast Corridor.<sup>23</sup> However, the United States would begin another push for HSR,

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<sup>16</sup> High-Speed Ground Transportation Act, Pub. L. No. 89-220, 79 Stat. 893 (1965).

<sup>17</sup> *Id.*

<sup>18</sup> *High-Speed Rail Timeline*, U.S. DEP'T TRANSP., FED. RAILROAD ADMIN., [www.fra.dot.gov/Page/P0140](http://www.fra.dot.gov/Page/P0140) (last visited Apr. 21, 2014).

<sup>19</sup> William K. Stevens, *Metroliner Not Yet As Fast As a Speeding Bullet Train, But It's Getting There*, N.Y. TIMES, Nov. 3, 1985, available at [www.nytimes.com/1985/11/03/us/metroliner-not-yet-as-fast-as-a-speeding-bullet-train-but-it-s-getting-there.html](http://www.nytimes.com/1985/11/03/us/metroliner-not-yet-as-fast-as-a-speeding-bullet-train-but-it-s-getting-there.html).

<sup>20</sup> *Metroliner's Amazing Career: Pivotal Moments in the Life of America's First High-Speed Train*, TRAINS (June 30, 2006), available at [trn.trains.com/Railroad%20Reference/Passenger%20Trains/2006/06/Metroliners%20amazing%20career.aspx](http://trn.trains.com/Railroad%20Reference/Passenger%20Trains/2006/06/Metroliners%20amazing%20career.aspx).

<sup>21</sup> *The United Aircraft Corporation's TurboTrain*, AMERICAN-RAILS.COM, available at [www.american-rails.com/turbo.html](http://www.american-rails.com/turbo.html) (last visited on Apr. 21, 2014).

<sup>22</sup> *Id.*

<sup>23</sup> *High-Speed Rail Timeline*, *supra* note 18.

particularly in California, during the 1980s. Congress approved the Passenger Railroad Rebuilding Act of 1980, allowing states to use federal grants to study possible HSR corridors across the country.<sup>24</sup> In 1982, California Governor Jerry Brown signed Assembly Bill 3647, which sought to issue more than one billion dollars in bonds to begin the construction of a HSR system in the state.<sup>25</sup> However, the plan fell by the wayside as the result of governmental infighting and a lack of accurate ridership projections.<sup>26</sup>

The 1990s began a new chapter in American HSR history. The Intermodal Surface Transportation Efficiency Act of 1991 approved funds for determining possible HSR development in up to five corridors across the nation,<sup>27</sup> with California being considered as a possible location.<sup>28</sup> In 1993, California Governor Pete Wilson called for a study of the feasibility of a statewide HSR network.<sup>29</sup> That same year, California adopted Senate Concurrent Resolution Number Six, establishing the Intercity High-Speed Rail Commission.<sup>30</sup> Tasked with preparing a statewide HSR plan, the commission sought a comprehensive network of lines between urban areas, with a goal of beginning construction by 2000 and completion by 2020.<sup>31</sup>

The Intercity High-Speed Rail Commission operated from 1993 through 1996, until the newly minted California High-Speed Rail Authority (Authority) assumed HSR development in the state. The Authority had the continuing goal of completing the network by 2020,<sup>32</sup> and “recommended a phased-project approach, beginning with initial environmental studies, and proceeding through preservation of needed rights-of-way as well as additional studies to determine train technology, to finalize corridors and station locations, and to sharpen cost estimates.”<sup>33</sup> By 1999, the Authority issued its Corridor Evaluation Final

<sup>24</sup> *Id.*; see also Passenger Railroad Rebuilding Act of 1980, Pub. L. 96-254 (Feb. 4, 1980).

<sup>25</sup> *High Speed Rail*, GOV'T TECH., [www.govtech.com/photos/High-Speed-Rail.html](http://www.govtech.com/photos/High-Speed-Rail.html) (last visited Apr. 21, 2014).

<sup>26</sup> *Id.*

<sup>27</sup> Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1036(c), 105 Stat. 1914 (codified at 49 U.S.C. § 309).

<sup>28</sup> *High-Speed Rail Timeline*, *supra* note 18.

<sup>29</sup> CAL. DEP'T OF TRANSP., 1993 CALIFORNIA TRANSPORTATION PLAN (Mar. 20, 1994), available at [ntl.bts.gov/DOCS/ctp.html](http://ntl.bts.gov/DOCS/ctp.html).

<sup>30</sup> Cal. S. Con. Res. 6, 1993 S. (1993), available at [www.leginfo.ca.gov/pub/93-94/bill/sen/sb\\_0001-0050/scr\\_6\\_bill\\_930720\\_chaptered](http://www.leginfo.ca.gov/pub/93-94/bill/sen/sb_0001-0050/scr_6_bill_930720_chaptered).

<sup>31</sup> CAL. PUB. UTIL. CODE § 185000 et seq. (Westlaw 2014).

<sup>32</sup> *Id.* § 185010(h).

<sup>33</sup> California High Speed Rail Authority, Op. Cal. Att'y Gen. No. 07-1002, at 2 (Feb. 27, 2009), available at [oag.ca.gov/system/files/opinions/pdfs/07-1002.pdf](http://oag.ca.gov/system/files/opinions/pdfs/07-1002.pdf).

Report for the proposed network, evidencing a continual push for HSR in California.<sup>34</sup>

The 2000s showed progress for HSR nationwide. In December 2000, the National Railroad Passenger Corporation, otherwise known as “Amtrak,” debuted the Acela Express.<sup>35</sup> The Acela Express is a high-speed train operating between Boston and Washington D.C. with a top speed of 150 mph.<sup>36</sup> But the Acela reaches that speed for a total of only twenty-eight miles.<sup>37</sup> Amtrak declared that the Acela Express would “enable Amtrak to carry its customers into the 21st century aboard 21st-century trains.”<sup>38</sup>

In California, the Authority issued its year 2000 Business Plan.<sup>39</sup> In 2005, the Authority released the Final Programmatic Environmental Impact Report (PEIR).<sup>40</sup> In November 2008, California voters approved \$8 billion in bonds through Proposition 1A, The Safe, Reliable High-Speed Train Bond Act for the 21st Century, to further fund the project.<sup>41</sup>

Also in 2008, Congress passed the Passenger Rail Investment and Improvement Act in order to establish “the initial framework for the development of [HSR] corridors.”<sup>42</sup> The 2009 American Recovery and Reinvestment Act (ARRA) supplemented these efforts by allocating \$8 billion dollars “to states for intercity rail projects, giving priority to projects that support the development of high-speed intercity rail.”<sup>43</sup> With this money, “[m]ore than 150 proposals related to the creation of a

<sup>34</sup> PARSONS BRINCKERHOFF, FINAL REPORT CALIFORNIA HIGH-SPEED RAIL CORRIDOR EVALUATION (Dec. 30, 1999), available at [cdm15025.contentdm.oclc.org/cdm/singleitem/collection/p266401coll4/id/810/rec/1](http://cdm15025.contentdm.oclc.org/cdm/singleitem/collection/p266401coll4/id/810/rec/1).

<sup>35</sup> *History of the Acela Express*, N.Y. TIMES, Apr. 24, 2005, available at [www.nytimes.com/imagepages/2005/04/24/national/20050424acela\\_graphic2.html](http://www.nytimes.com/imagepages/2005/04/24/national/20050424acela_graphic2.html).

<sup>36</sup> James Dao, *Acela, Built To Be Rail's Savior, Bedevils Amtrak at Every Turn*, N.Y. TIMES, Apr. 24, 2005, available at [www.nytimes.com/2005/04/24/national/24acela.html?pagewanted=1](http://www.nytimes.com/2005/04/24/national/24acela.html?pagewanted=1).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See CAL. HIGH-SPEED RAIL AUTH., CALIFORNIA HIGH-SPEED RAIL PROGRAM 2000 BUSINESS PLAN, available at [www.hsr.ca.gov/docs/about/business\\_plans/BPlan\\_2000\\_FullRpt.pdf](http://www.hsr.ca.gov/docs/about/business_plans/BPlan_2000_FullRpt.pdf).

<sup>40</sup> CAL. HIGH-SPEED RAIL AUTH., U.S. DEP'T OF TRANSP., FED. R.R. ADMIN., FINAL PROGRAM ENVIRONMENT IMPACT REPORT/ENVIRONMENTAL IMPACT STATEMENT (EIR/EIS) FOR THE PROPOSED CALIFORNIA HIGH-SPEED TRAIN SYSTEM (Aug. 2005), available at [www.hsr.ca.gov/docs/programs/eir-eis/statewide\\_final\\_EIR\\_vol1summary.pdf](http://www.hsr.ca.gov/docs/programs/eir-eis/statewide_final_EIR_vol1summary.pdf).

<sup>41</sup> Melody Gutierrez, *California High-Speed Rail Plans Stopped in Tracks*, SFGATE (Nov. 26, 2013), available at [www.sfgate.com/news/article/California-high-speed-rail-plans-stopped-in-tracks-5011046.php](http://www.sfgate.com/news/article/California-high-speed-rail-plans-stopped-in-tracks-5011046.php); *High Speed Passenger Train Bond Program (Proposition 1A)*, CAL. TRANSP. COMMISSION, [www.ctc.ca.gov/programs/hsptbp.htm](http://www.ctc.ca.gov/programs/hsptbp.htm) (last visited May 14, 2014).

<sup>42</sup> *High-Speed Rail Timeline*, *supra* note 18; see also Passenger Rail Investment and Improvement Act of 2008, Pub. L. 110-432, 112 Stat. 4847, H.R. 2095, div. B (Oct. 16, 2008).

<sup>43</sup> *High-Speed Rail Timeline*, *supra* note 18; see also American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115, H.R. 1 (Feb. 17, 2009).



high-speed rail system have been funded.”<sup>44</sup> Further, most of these proposals would “link major population areas on the two coasts and in the Midwest.”<sup>45</sup> Despite the influx of funding from the ARRA, no HSR plan has begun construction to date.<sup>46</sup> Concerns about overspending in several states, and lawsuits in California, have resulted in little progress since 2008.

HSR has suffered additional setbacks in several states in recent years. For example, Florida’s governor rejected billions in federal HSR funding, as he cited concerns about potential cost overruns.<sup>47</sup> In 2010, the governors-elect of Ohio and Wisconsin partnered to reject more than \$1 billion in federal HSR funding over fears that taxpayers would have to subsidize operating costs.<sup>48</sup> The 2012 national budget lacked any federal funding for HSR.<sup>49</sup> Private HSR has also had equal difficulty. For example, in 2013, a planned route between the desert outside of Los Angeles and Las Vegas was placed on hold after the enterprise formed to build the project was unable to secure government loans.<sup>50</sup>

In addition to litigation, California faces other challenges to its HSR plans. Opposition to the State’s plan is steadily growing, with seventy percent of California voters in favor of a revote on the project’s funding.<sup>51</sup> For example, opposition in the Central Valley has continually grown, as optimism that the project would make the region more appealing to business has changed to fear of the project’s impact on farmers.<sup>52</sup> Despite this, several Central Valley cities, such as Fresno and

<sup>44</sup> Ashley Halsey III, *Obama Pushes Ahead with High-Speed Rail Plan*, WASH. POST, Dec. 6, 2012, available at [articles.washingtonpost.com/2012-12-06/local/35673787\\_1\\_high-speed-rail-public-money-first-project](http://articles.washingtonpost.com/2012-12-06/local/35673787_1_high-speed-rail-public-money-first-project).

<sup>45</sup> *Id.*

<sup>46</sup> Mitchell Schnurman, *For High-Speed Rail’s Future in Texas, the Private Sector Dares To Go Where Government Won’t*, DALLAS NEWS, Apr. 7, 2014, available at [www.dallasnews.com/business/columnists/mitchell-schnurman/20140405-in-texas-even-high-speed-rail-may-work.ece](http://www.dallasnews.com/business/columnists/mitchell-schnurman/20140405-in-texas-even-high-speed-rail-may-work.ece).

<sup>47</sup> *Update 1—Florida Governor Rejects US High-Speed Rail Funds*, REUTERS, Feb. 16, 2011, available at [www.reuters.com/article/2011/02/16/florida-rail-idUSN1629082420110216](http://www.reuters.com/article/2011/02/16/florida-rail-idUSN1629082420110216).

<sup>48</sup> See David Schaper, *Not So Fast: Future for High-Speed Rail Uncertain*, NPR (Nov. 12, 2010), available at [www.npr.org/2010/11/10/131223230/not-so-fast-future-for-high-speed-rail-uncertain](http://www.npr.org/2010/11/10/131223230/not-so-fast-future-for-high-speed-rail-uncertain).

<sup>49</sup> Brian Tumulty, *Budget Deal Eliminates Funds for High-Speed Rail*, USA TODAY, Nov. 15, 2011, available at [usatoday30.usatoday.com/news/washington/story/2011-11-15/budget-agreement-high-speed-rail/51223698/1](http://usatoday30.usatoday.com/news/washington/story/2011-11-15/budget-agreement-high-speed-rail/51223698/1).

<sup>50</sup> Michael R. Blood, *Buy-America Snag Stalls Vegas High-Speed Rail Plan*, L.A. DAILY NEWS, July 16, 2013, available at [www.dailynews.com/general-news/20130717/buy-america-snap-stalls-vegas-high-speed-rail-plan](http://www.dailynews.com/general-news/20130717/buy-america-snap-stalls-vegas-high-speed-rail-plan).

<sup>51</sup> *Vidak Calls for High-Speed Rail Revote*, BUS. J. NOW (Jan. 17, 2014), available at [www.thebusinessjournal.com/news/construction/10414-vidak-calls-for-high-speed-rail-revote](http://www.thebusinessjournal.com/news/construction/10414-vidak-calls-for-high-speed-rail-revote).

<sup>52</sup> Michael Cabanatuan, *Central Valley Farmers Protest High-Speed Rail*, SFGATE (July 5,



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Merced, have shown strong support for HSR due to the potential economic benefits of gaining HSR facilities.<sup>53</sup> In the shadow of these uncertainties, the California government “has committed itself to leadership in [HSR] development.”<sup>54</sup>

## B. HIGH-SPEED RAIL IN CALIFORNIA

California’s planned HSR network will traverse more than eight hundred miles, connecting the major metropolitan cities of San Diego, Los Angeles, Sacramento, and the San Francisco Bay Area (Bay Area) via the Central Valley, with trains capable of reaching speeds of 220 mph.<sup>55</sup> Completion of the principal route from Los Angeles to San Francisco is expected by 2029.<sup>56</sup> As described earlier, the Authority is responsible for regulating the project’s construction. Since the project requires a public agency’s approval, it is required to undergo an environmental review as prescribed by CEQA.<sup>57</sup>

Today, HSR refers to electrified, steel-wheel-on-steel-track trains operating at speeds above 200 mph on independent tracks.<sup>58</sup> In contrast, most traditional passenger trains travel at slower speeds and share tracks with freight trains, which often have the right of way. By improving travel efficiency, electrified HSR trains have the potential to reduce the need to build and expand highways and airports. At the same time, HSR is expected to help to reduce air pollution.<sup>59</sup> When completed, California’s proposed HSR network is expected to eliminate nearly ten million miles of vehicle travel per day in the state.<sup>60</sup>

2012), *available at* [www.sfgate.com/news/article/Central-Valley-farmers-protest-high-speed-rail-3684819.php](http://www.sfgate.com/news/article/Central-Valley-farmers-protest-high-speed-rail-3684819.php).

<sup>53</sup> *Id.*

<sup>54</sup> Joshua D. Prok, *High Speed Rail: Planning and Financing the Next Fifty Years of American Mobility*, 36 TRANSP. L.J. 47, 56 (2009).

<sup>55</sup> See CAL. HIGH-SPEED RAIL AUTH., CALIFORNIA HIGH-SPEED RAIL PROGRAM REVISED 2012 BUSINESS PLAN (Apr. 2012), *available at* [californiastaterailplan.dot.ca.gov/docs/1a6251d7-36ab-4fec-ba8c-00e266dadec7.pdf](http://californiastaterailplan.dot.ca.gov/docs/1a6251d7-36ab-4fec-ba8c-00e266dadec7.pdf).

<sup>56</sup> CAL. HIGH-SPEED RAIL AUTH., PROJECT UPDATE REPORT TO THE CALIFORNIA STATE LEGISLATURE (Mar. 1, 2013), *available at* [www.hsr.ca.gov/docs/about/legislative\\_affairs/Project\\_Update\\_Report\\_March\\_1\\_2013.pdf](http://www.hsr.ca.gov/docs/about/legislative_affairs/Project_Update_Report_March_1_2013.pdf).

<sup>57</sup> See CAL. PUB. RES. CODE § 21080 (Westlaw 2014).

<sup>58</sup> ETHAN N. ELKIND, A HIGH SPEED FOUNDATION: HOW TO BUILD A BETTER CALIFORNIA AROUND HIGH SPEED RAIL 6 (Aug. 2013), *available at* [www.law.berkeley.edu/files/ccelp/A\\_High\\_Speed\\_Foundation.pdf](http://www.law.berkeley.edu/files/ccelp/A_High_Speed_Foundation.pdf).

<sup>59</sup> *Id.*

<sup>60</sup> CAL. HIGH-SPEED RAIL AUTH., GOOD FOR THE STATE, GOOD FOR THE ENVIRONMENT 2 (Oct. 2013), *available at* [www.hsr.ca.gov/docs/newsroom/fact%20sheets/Good%20for%20the%20State,%20Good%20for%20the%20Environment.pdf](http://www.hsr.ca.gov/docs/newsroom/fact%20sheets/Good%20for%20the%20State,%20Good%20for%20the%20Environment.pdf).

## C. THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

“The [Environmental Impact Report] is the heart of the environmental control process.”<sup>61</sup>

In 1970, the California legislature enacted CEQA as a comprehensive environmental protection and informational statute.<sup>62</sup> The California legislature declared that CEQA’s purpose was to “[c]reate and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations.”<sup>63</sup> CEQA is considered “one of the state’s most important environmental laws.”<sup>64</sup> The statute was enacted during an era of heightened concern over the need for environmental protection. In *Friends of Mammoth v. Board of Supervisors*, the California Supreme Court recognized that the legislature intended CEQA “to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”<sup>65</sup>

CEQA requires both public agencies and private builders to submit a number of informational documents regarding their proposed projects.<sup>66</sup> An EIR “inform[s] public agency decisionmakers and the public generally of the significant environmental effect of a project, identify possible ways to minimize the significant effects, and describe reasonable alternatives to the project.”<sup>67</sup> EIRs require multiple elements, including a project description.<sup>68</sup> A project description must list a number of specifics on the proposed project at a level of detail that is needed “for evaluation and review of the environmental impact.”<sup>69</sup> However, the project description is not required to “supply extensive detail.”<sup>70</sup>

A legally sufficient project description requires four elements: 1)

<sup>61</sup> Cnty. of Inyo v. City of L.A., 139 Cal. Rptr. 396, 401 (Ct. App. 1977).

<sup>62</sup> See CAL. PUB. RES. CODE § 21000.

<sup>63</sup> *Id.* § 21001(e).

<sup>64</sup> *California Environmental Quality Act (CEQA)*, CAL. DEP’T JUST., OFFICE ATT’Y GEN., [oag.ca.gov/environment/ceqa](http://oag.ca.gov/environment/ceqa) (last visited Apr. 22, 2014).

<sup>65</sup> *Friends of Mammoth v. Bd. of Supervisors*, 502 P.2d 1049, 1056 (Cal. 1972); see also *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 764 P.2d 278, 281 (Cal. 1988) (quoting *Friends of Mammoth*, 592 P.2d at 1056).

<sup>66</sup> CAL. CODE REGS. tit. 14, § 15120 (Westlaw 2013).

<sup>67</sup> *Id.* § 15121(a).

<sup>68</sup> See *id.* §§ 15122-15132.

<sup>69</sup> *Id.* § 15124.

<sup>70</sup> *Id.*

the precise location and boundaries of the project; 2) a statement of objectives sought by the project; 3) a general description of the technical, economic, and environmental characteristics; and 4) the intended use of the EIR.<sup>71</sup> In delivering this information, a project description must be “accurate, stable and finite.”<sup>72</sup> “The project must be described accurately to allow reviewers and decisionmakers to balance the project’s benefits against its environmental costs.”<sup>73</sup>

To determine the adequacy of a project description, a court considers whether the document included a sufficient amount of information as required by CEQA. California courts often determine the sufficiency of a project description on whether small amounts of information were included. For example, in *Communities for a Better Environment v. City of Richmond*, an EIR for a refinery was held insufficient, partly because the project description was inconsistent and vague as to whether heavy crude oil might be refined at the site.<sup>74</sup> On the other hand, the project description for a proposed mine in *Western Placer Citizens for an Agricultural & Rural Environment v. County of Placer* was held to be sufficient despite Placer County’s failure to analyze a marginally revised project description.<sup>75</sup> In that case, it was determined that the additional information was not significant enough to require a further environmental study.<sup>76</sup> Thus, a court’s decision will turn on the facts of the case.

The legal sufficiency of a project description further depends on what level or “tier” the EIR belongs to.

“Tiering” . . . means the coverage of general matters and environmental effects in an [EIR] prepared for a policy, plan, program or ordinance followed by narrower or site-specific [EIR]s which incorporate by reference the discussion in any prior [EIR] and which concentrate on the environmental effects which (a) are capable of being mitigated, or (b) were not analyzed as significant effects on the

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<sup>71</sup> *Id.*

<sup>72</sup> 1 KENNETH A. MANASTER & DANIEL P. SELMI, CALIFORNIA ENVIRONMENTAL LAW & LAND USE PRACTICE, ch. 22 § 22.04[4][b] (2014) (citing *Cnty. of Inyo v. City of L.A.*, 139 Cal. Rptr. 396, 401 (Ct. App. 1977)).

<sup>73</sup> *Id.*

<sup>74</sup> *Communities for a Better Env’t v. City of Richmond*, 108 Cal. Rptr. 3d 478, 491 (Ct. App. 2010).

<sup>75</sup> *Western Placer Citizens for an Agric. & Rural Env’t v. Cnty. of Placer*, 50 Cal. Rptr. 3d 799, 805 (Ct. App. 2006).

<sup>76</sup> *Id.* at 896.

environment in the prior [EIR].<sup>77</sup>

Therefore, a project using tiering will have multiple EIRs, beginning with a broad Programmatic EIR, which is followed by narrower and more detailed project-specific EIRs. Tiering promotes streamlined regulatory procedures, avoids repetition, and ensures that later projects are consistent with previous plans and account for impacts not discussed in earlier EIRs.<sup>78</sup> The California legislature determined tiering to be “appropriate when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review.”<sup>79</sup> Tiering is often used for large-scale and phased projects. Therefore, phased projects, such as the California HSR, must address the impact of the overall project and individual segments.<sup>80</sup>

CEQA requires notice to the public and decisionmakers at every tier of an EIR—from preparation of the draft EIR to its final version.<sup>81</sup> When an agency receives public comments or recommendations regarding its proposed project, the agency must evaluate these comments in the next EIR.<sup>82</sup> The final EIR must incorporate those comments and include responses “to significant environmental points raised in the review and consultation process.”<sup>83</sup> The agency must avoid or mitigate the environmental concerns raised in the report or, if the agency cannot overcome those concerns, the project’s benefits must override the concerns.<sup>84</sup> Upon completion of the final EIR, an agency or private builder certifies the EIR is complete and complies with CEQA before receiving project approval.<sup>85</sup>

Under CEQA’s regulations, individuals claiming a current or future injury resulting from a project have the burden of bringing claims. CEQA does not have a self-enforcement mechanism. As the California State Parks explains, it is ultimately “the judicial system that ensures public agencies are fulfilling their obligations under CEQA. . . . [and] it is any individual or organization’s right to pursue litigation against a

<sup>77</sup> CAL. PUB. RES. CODE § 21068.5 (Westlaw 2014).

<sup>78</sup> *Id.* § 21093(a).

<sup>79</sup> *Id.*

<sup>80</sup> *See* CAL. CODE REGS. tit. 14, § 15165 (Westlaw 2013).

<sup>81</sup> *See id.* § 15087.

<sup>82</sup> *See also* CAL. PUB. RES. CODE §§ 21092, 21092.1; CAL. CODE REGS. tit. 14, §§ 15087, 15088; *Cal. Oak Found. v. Regents of Univ. of Cal.*, 115 Cal. Rptr. 3d 631, 655-56 (Ct. App. 2010).

<sup>83</sup> CAL. CODE REGS. tit. 14, §§ 15090, 15132.

<sup>84</sup> *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 764 P.2d 278, 282 (Cal. 1988).

<sup>85</sup> CAL. CODE REGS. tit. 14, § 15090.

public agency that is believed to have violated its CEQA responsibilities.”<sup>86</sup> California’s courts look to CEQA’s Guidelines, in addition to CEQA’s statutes, to decide any such litigation.<sup>87</sup> A court’s leeway in deciding a challenged project’s adequacy “shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.”<sup>88</sup>

“The CEQA Guidelines further provide that the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. The courts have [therefore] looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.”<sup>89</sup> As a government agency, the Authority is required to conform to all CEQA regulations, including the production of a legally sufficient project description.

#### D. CEQA AND CALIFORNIA’S HIGH-SPEED RAIL

California’s HSR project has become a focal point of litigation. Individuals, cities, and municipal agencies statewide are engaging in legal battles over many aspects of the project. Concerned Californians are contesting the Authority’s funding.<sup>90</sup> At the same time, the Authority itself sued all interested Californians in an effort to prevent future challenges to its funding.<sup>91</sup> While the threats to the project’s funding are not to be overlooked, the most prevalent allegation is CEQA violations. The common thread among these CEQA-based suits is the Authority’s inadequate description of what the completed HSR project will look like.

The first series of cases alleged CEQA violations in the Authority’s Central Valley to Bay Area connection. Planning identified two possible routes for this section: the Altamont Pass and Pacheco Pass along State

<sup>86</sup> *Who Ensures CEQA Is Being Followed Properly?* CAL. STATE PARKS, OFFICE OF HISTORIC PRESERVATION, [www.ohp.parks.ca.gov/?page\\_id=21730](http://www.ohp.parks.ca.gov/?page_id=21730) (last visited Apr. 22, 2014).

<sup>87</sup> See CAL. PUB. RES. CODE §§ 21082, 21083.

<sup>88</sup> *Id.* § 21168.5.

<sup>89</sup> *In re Bay-Delta Programmatic Env’tl. Impact Report Coordinated Proceedings*, 184 P.3d 709, 730 (Cal. 2008) (internal quotation marks and ellipsis omitted).

<sup>90</sup> See Ruling on Submitted Matter: Remedies on Petition for Writ of Mandate, *Tos v. Cal. High Speed Rail Auth.*, No. 34-2011-00113919-CU-MC-GDS (Cal. Super. Ct. Sacramento Cnty. Nov. 25, 2013), available at [www.saccourt.ca.gov/general/media/docs/tos-v-ca-high-speed-rail-authority-ruling2-112513.pdf](http://www.saccourt.ca.gov/general/media/docs/tos-v-ca-high-speed-rail-authority-ruling2-112513.pdf).

<sup>91</sup> *Cal. High-Speed Rail Auth. v. All Pers. Interested in the Matter of the Validity of the Authorization and Issuance of Gen. Obligation Bonds*, No. 2013-001140689, 2013 WL 6184441 (Cal. Super. Ct. Sacramento Cnty. Nov. 25, 2013).

Route 152.<sup>92</sup> In its July 2008 PEIR for this section, the Authority selected the Pacheco Pass as the preferred route.<sup>93</sup> One month later, a coalition of Bay Area cities and concerned citizen groups filed a complaint against the Authority, seeking injunctive and declaratory relief from the PEIR's approval.<sup>94</sup> In *Town of Atherton v. California High-Speed Rail Authority (Atherton I)*, the plaintiffs alleged CEQA violations such as an "inadequate project description, failure to fully disclose and adequately analyze the project's significant environmental impacts, failure to adequately mitigate the project's significant impacts, and failure to include an adequate analysis of project alternatives."<sup>95</sup>

The case reached trial on the merits, with the court ruling partially in favor of the plaintiffs.<sup>96</sup> The court specifically recognized that the section's project description was inadequate due the PEIR's assumptions about the acquisition of land and the corresponding alignment of tracks between San Jose and Gilroy.<sup>97</sup> Primarily as a result of the project description's inadequacies, the court ordered the Authority to rescind and revise the PEIR.<sup>98</sup> Under the ruling, the Authority was also required to recirculate the revised PEIR.<sup>99</sup>

On October 4, 2010, shortly after the Authority approved a Revised PEIR for the Central Valley to Bay Area connection, a group composed largely of the same plaintiffs as in *Atherton I* filed a petition challenging the revised document (*Atherton II*).<sup>100</sup> The petitioners in *Atherton II* alleged a number of complaints similar to those raised in *Atherton I*, including allegations of an inadequate project description premised on "inaccurate ridership and revenue figures that were derived using a defective and previously-undisclosed ridership/revenue model."<sup>101</sup> The Sacramento Superior Court consolidated *Atherton I* and *II* and required the Authority to amend its EIRs. But ultimately, the court allowed the Authority to continue with the project.

As development of the project moved forward, the Authority

<sup>92</sup> C. Aylin Bilir, *Stopping the Runaway Train of CEQA Litigation: Proposals for Non-Judicial Substantive Review*, 35 ENVIRONS ENVTL. L. & POL'Y J. 145, 155 (2012).

<sup>93</sup> *Town of Atherton v. Cal. High Speed Rail Auth.*, No. 34-2010-80000679-CU-WM-GDS, 2011 WL 10677730, at \*1 (Cal. Super. Ct. Sacramento Cnty. Nov. 10, 2011).

<sup>94</sup> *Id.*

<sup>95</sup> Bilir, *supra* note 92.

<sup>96</sup> *Town of Atherton*, 2011 WL 10677730, at \*2.

<sup>97</sup> *Id.* at \*4.

<sup>98</sup> See *Town of Atherton v. Cal. High Speed Rail Auth.*, No. 34-2008-80000022, 2009 WL 6754051 (Cal. Super. Ct. Nov. 3, 2009) (ruling on submitted matter).

<sup>99</sup> *Id.*

<sup>100</sup> *Town of Atherton*, 2011 WL 10677730, at \*1.

<sup>101</sup> *Id.* at \*4.

designated the sixty-five-mile section between Fresno and Merced in the Central Valley as the Initial Construction Segment (ICS).<sup>102</sup> The Authority's May 3, 2012, certification of the Final EIR (FEIR) for the section prompted Valley cities, municipal agencies, and citizen groups to file suit on June 1, 2012, alleging eleven CEQA violations.<sup>103</sup> The suits were consolidated as *County of Madera v. California High-Speed Rail Authority*.

The chief allegation in *Madera* was that the FEIR was legally insufficient because the project description was based on inconsistent and inaccurate construction information.<sup>104</sup> The plaintiffs asserted that "the [Draft] EIR and FEIR did not include a complete, sufficiently detailed and consistent description of the project so that the public and decision makers could understand its effects."<sup>105</sup> It was alleged that key components of a bridge over the San Joaquin River, electrical infrastructure, and track design were incomplete, vague, and inaccurate.<sup>106</sup> The plaintiffs further alleged the EIR was inadequate because the Authority relied on a design that was just fifteen percent complete.<sup>107</sup> Most importantly, the plaintiffs asserted that the Authority's use of a DB project delivery system violated CEQA's informational goals.<sup>108</sup> The plaintiffs alleged that "[w]hat the Authority calls as 'design-build' is really 'approve now/design later.'"<sup>109</sup>

In its defense, the Authority contended the EIR was sufficient, and the Authority made no reference to whether its use of DB violated CEQA. The Authority argued "[a] higher level of design is not necessary because 15% design provides enough information for a conservative environmental analysis. . . . A higher level of design provides refinement, but does not yield more information needed for adequate CEQA review."<sup>110</sup> It further contended that "it is common practice with larger

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<sup>102</sup> Cnty. of Madera v. Cal. High-Speed Rail Auth., No. 34-2012-80001165-CU-WM-GDS, 2013 WL 2297160 at \*2 (Cal. Super. Ct. Sacramento Cnty. Apr. 18, 2013) (stipulated judgment).

<sup>103</sup> *Id.*

<sup>104</sup> Petitioners' Opening Brief in Support of Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief at 24-25, Cnty. of Madera v. Cal. High-Speed Rail Auth., No. 34-2012-80001165-CU-WM-GDS (Cal. Super. Ct. Sacramento Cnty. Jan. 14, 2013), 2013 WL 2246784.

<sup>105</sup> *Id.* at 25.

<sup>106</sup> *Id.* at 24-25.

<sup>107</sup> *Id.* at 25-26.

<sup>108</sup> Petitioners' Reply Brief in Support of Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief at 8, Cnty. of Madera v. Cal. High-Speed Rail Auth., No. 34-2012-80001165-CU-WM-GDS (Cal. Super. Ct. Sacramento Cnty. Apr. 18, 2013).

<sup>109</sup> *Id.*

<sup>110</sup> Respondent's Memorandum of Points of Authorities in Opposition to Motion for



transportation infrastructure projects to prepare environmental analysis before completion of final design.”<sup>111</sup>

*Madera* settled during the briefing stage, without the court ruling on the merits of the case. The settlement agreement focused on mitigating many of the plaintiffs’ concerns, without discussing the implications of using DB under CEQA.<sup>112</sup> *Madera* thus left open the question whether a project description can or should be legally sufficient when used in a DB method. *Madera* further highlights the complex nature of the HSR project and its litigation. Producing an EIR sufficient to please the project’s detractors is within the Authority’s ability, but doing so takes time and pushes deadlines back. Such delays threaten California’s ability to receive billions of dollars in federal funding. The Authority itself stated that the

ICS is completely dependent on \$2.3 billion in federal stimulus (ARRA) funding and nearly \$1 billion in non-stimulus funding. The ARRA-funded work . . . must be completed by March 31, 2017, or lost. Moreover, at any time it appears that deadline cannot be met, the federal government can withdraw the funding. Meeting the current deadline requires a construction pace unprecedented in U.S. history—at least 50% faster than any other project in history.<sup>113</sup>

The Authority could also face having to repay “\$397 million in federal [already] money spent on planning, engineering and administrative costs.”<sup>114</sup> With these dynamics at work, the Authority had to find a way to build the HSR network without losing its funding. Thus, it is unsurprising that speed was a key factor in the Authority’s choice of the DB method.

#### E. DELIVERY OF THE CALIFORNIA HIGH-SPEED RAIL NETWORK

The California HSR network is a massive statewide infrastructure

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Preliminary Injunction and Alternative Application for Administrative Stay at 10, *Cnty. of Madera v. Cal. High-Speed Rail Auth.*, No. 34-2012-80001165-CU-WM-GDS (Cal. Super. Ct. Sacramento Cnty. Nov. 2, 2012), 2012 WL 5846403.

<sup>111</sup> *Id.* at 11.

<sup>112</sup> *Cnty. of Madera v. Cal. High-Speed Rail Auth.*, No. 34-2012-80001165-CU-WM-GDS, 2013 WL 2297160 (Cal. Super. Ct. Sacramento Cnty. Apr. 18, 2013) (stipulated judgment).

<sup>113</sup> Respondent’s Memorandum of Points of Authorities in Opposition to Motion for Preliminary Injunction and Alternative Application for Administrative Stay, *supra* note 110, at 9, 2012 WL 5846403, at \*11 (citations omitted).

<sup>114</sup> Jessica Calefati, *High-Speed Rail: Judge’s Decision Also Endangers \$3.3 Billion in Federal Funds*, SAN JOSE MERCURY NEWS, Nov. 28, 2013, [www.mercurynews.com/politics-government/ci\\_24620446/high-speed-rail-judges-decision-also-endangers-3](http://www.mercurynews.com/politics-government/ci_24620446/high-speed-rail-judges-decision-also-endangers-3).

project that promises to change both the landscape of California and how people traverse the state. Building the network requires the Authority to select a project delivery method. The HSR project is statutorily authorized to choose between two differing delivery methods, design-bid-build (DBB) and design-build (DB).<sup>115</sup>

DB is the new trend in project delivery.<sup>116</sup> The defining aspect of DB is that one entity, under one contract, is responsible for both designing and building a project.<sup>117</sup> This allows for construction to begin before finalization of the design.<sup>118</sup> A DB project typically involves the award of a contract with less than thirty percent of the design work complete.<sup>119</sup> The primary reason for choosing DB is “the potential for [a] shortened project duration.”<sup>120</sup> Starting construction before design completion is both a time- and money-saving feature of DB, because the earlier the project is transferred from the originator (in this case the Authority) to the contractor, the greater the savings.<sup>121</sup>

The other option for project delivery is DBB. DBB is the traditional method for California’s public works projects.<sup>122</sup> DBB “involves three roles in the project delivery process—[an agency], architect, and contractor—in traditionally separate contracts.”<sup>123</sup> For the design phase, an agency contracts with a company “to provide ‘complete’ design documents.”<sup>124</sup> The contract is then awarded to the lowest bidder “based on the completed design documents [; the agency then] finances the work with public funds and thereafter operates the completed project with public employees.”<sup>125</sup> Completion of the designs is a prerequisite to

<sup>115</sup> CAL. PUB. UTIL. CODE § 185036(a) (Westlaw 2014).

<sup>116</sup> Logan Broyles, *Design/Build vs. Architecture Firms*, CONSTRUCTION DIGITAL (June 8, 2011), [www.constructiondigital.com/architectural\\_design/designbuild-vs-architecture-firms](http://www.constructiondigital.com/architectural_design/designbuild-vs-architecture-firms).

<sup>117</sup> *Design-Build*, *supra* note 7.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Michael Estrada & Debbie Cho, *Using Design-Build Can Save Money on Public Construction*, W. CITY (May 2009), [www.westerncity.com/Western-City/May-2009/Using-Design-Build-Can-Save-Money-on-Public-Construction/](http://www.westerncity.com/Western-City/May-2009/Using-Design-Build-Can-Save-Money-on-Public-Construction/).

<sup>122</sup> Brian G. Papernik & Nancy C. Smith, *By Design*, 22 L.A. LAW. 32 (July/Aug. 1999).

<sup>123</sup> THE AM. INST. OF ARCHITECTS & THE ASSOCIATED GEN. CONTRACTORS OF AM., *supra* note 6, at 2.

<sup>124</sup> STEVEN R. THOMAS ET AL., NAT’L INST. OF STANDARDS & TECH., MEASURING THE IMPACTS OF THE DELIVERY SYSTEM ON PROJECT PERFORMANCE—DESIGN-BUILD AND DESIGN-BID-BUILD iii (Nov. 2002), [available at fire.nist.gov/bfrlpubs/build02/PDF/b02150.pdf](http://fire.nist.gov/bfrlpubs/build02/PDF/b02150.pdf).

<sup>125</sup> COMM. ON CONSTR. LAW, ASS’N OF THE BAR OF THE CITY OF N.Y., REPORT ON ALTERNATE METHODS OF PUBLIC WORKS PROCUREMENT 1 (May 2003), [available at www.nycbar.org/pdf/report/Construction%20-%20AlternateMethodsOfPublicWorksProcurement.pdf](http://www.nycbar.org/pdf/report/Construction%20-%20AlternateMethodsOfPublicWorksProcurement.pdf).

awarding a contractor the project.<sup>126</sup>

A number of California's governmental agencies are authorized to choose either DB or DBB.<sup>127</sup> This includes the Authority, which has chosen to use DB.<sup>128</sup> Agencies choosing DB need only adhere to the same review procedures as those who choose DBB.<sup>129</sup> This is a problem because CEQA's informational goals are not met when projects use DB.

DB focuses on overlapping as much of the design and construction phases as possible, but CEQA was not written with this overlap in mind. Instead, CEQA seeks to keep the public informed on slower-moving projects with clear boundaries between the design, bid, and build phases. DB's acceleration of the process threatens CEQA's informational goals by making project descriptions less stable and finite, because designs do not have to be completed to the same level of specificity as under the traditional method. For example, in *Madera*, the plaintiffs alleged the Authority was considering changing a track section from a viaduct to an earthen berm, without subsequent environmental review.<sup>130</sup>

CEQA does not currently differentiate between the two different project delivery methods. This results from CEQA becoming law in 1970—forty-four years ago—at a time when DBB was the only project delivery method for California's public works projects.<sup>131</sup> California began allowing the use of DB in the 1990s with a series of bills authorizing several cities and counties to use the method for some public works projects.<sup>132</sup>

Only in 2007 did California allow every county to use DB, albeit on a very limited basis, for specific projects exceeding set costs.<sup>133</sup> With nearly forty years between the passage of CEQA and DB's expanded use, it is not surprising that the statute is not adequately equipped for a project delivery method with a fundamentally different process from DBB. Such a statutory scheme did not consider a system that today is

<sup>126</sup> *Id.*

<sup>127</sup> CAL. PUB. UTIL. CODE § 185036(a) (Westlaw 2014).

<sup>128</sup> CAL. HIGH-SPEED RAIL AUTH., CAL. HIGH-SPEED RAIL PROGRAM DRAFT 2012 BUSINESS PLAN 2-10 (Nov. 1, 2011), available at [www.hsr.ca.gov/docs/about/business\\_plans/BPlan\\_2012Draft\\_web.pdf](http://www.hsr.ca.gov/docs/about/business_plans/BPlan_2012Draft_web.pdf).

<sup>129</sup> See PUB. UTIL. § 185036(a).

<sup>130</sup> Petitioners' Opening Brief in Support of Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, *supra* note 104, at 18.

<sup>131</sup> See *DBIA Milestone: California Begins Using Design-Build*, DESIGN-BUILD INST. AM., [www.dbia.org/about/Pages/DBIA-Milestone-California-begins-using-design-build.aspx](http://www.dbia.org/about/Pages/DBIA-Milestone-California-begins-using-design-build.aspx) (last visited Apr. 22, 2014).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

“still termed experimental in transportation [projects].”<sup>134</sup>

The centerpiece of CEQA is the EIR. The EIR informs both the public and decisionmakers of a project’s potential environmental impact. Having “[a]n accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR.”<sup>135</sup> Thus, these requirements are absolutely indispensable for an EIR. Because DB allows “fast-track[ing of] the project by overlapping the design and construction phases of the schedule,” DB makes having a legally sufficient EIR more difficult.<sup>136</sup> In other words, the project’s design is literally in progress as construction begins or continues.

The California HSR network’s initial construction segment will be built using DB.<sup>137</sup> The use of DB allows the Authority to transfer responsibility for design completion and construction to the private sector.<sup>138</sup> Thus, all the risks in “design, construction, schedule, and cost” will be placed on the private sector, rather than the State.<sup>139</sup> The Authority’s plan calls for a transfer of these responsibilities with thirty percent or less of the design complete.<sup>140</sup> Transferring the project at this level of completion allows a “level of design [that] will provide a buildable design concept to the design-builder. The design builder will be required to take responsibility for the entire design. This process fosters the integration of design with the design builder’s construction means, methods, sequences and techniques.”<sup>141</sup>

DB’s drawback is that it promotes less-comprehensive designs, because an agency realizes greater cost savings by handing off the project at the earliest possible design stage.<sup>142</sup> The earlier the handoff, the less stable and finite the design will be, because it has not had been subject to the same level of review that finalized plans undergo. Incomplete designs are likely to be more vague than finalized plans because not every decision necessary for the project has been made.

Such a process allows for the design builder to make greater changes to a project after its approval than in a system in which a

<sup>134</sup> *Design-Build*, *supra* note 7.

<sup>135</sup> *Cnty. of Inyo v. City of L.A.*, 139 Cal. Rptr. 396, 401 (Ct. App. 1977).

<sup>136</sup> Everett L. Herndon, Jr., *Why Do Owners Choose Design-Build?*, CONSTR. DIGITAL, June 2011, at 54, available at [www.constructiondigital.com/magazines/4474](http://www.constructiondigital.com/magazines/4474).

<sup>137</sup> CAL. HIGH-SPEED RAIL AUTH., *supra* note 128, at 2-10.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> PARSONS BRINCKERHOFF, ARRA DESIGN-BUILD PROGRAM PLAN (DBPP): DRAFT 7 (July 6, 2011), available at [www.hsr.ca.gov/docs/brdmeetings/2011/July/brdmtg0711\\_design4.pdf](http://www.hsr.ca.gov/docs/brdmeetings/2011/July/brdmtg0711_design4.pdf).

<sup>141</sup> *Id.*

<sup>142</sup> Estrada & Cho, *supra* note 121.

contractor builds only on the basis of completed designs. Although CEQA does not require an EIR to supply extensive detail, it does require a level that allows “for evaluation and review of the environmental impact.”<sup>143</sup> Less informative descriptions are the byproduct of DB, and hinder CEQA’s informational goals.

DB also raises concerns over the subsequent reporting of changes and review of a project. CEQA states that no subsequent EIRs are required from the responsible agency once a legally sufficient EIR has been prepared.<sup>144</sup> However, this is a qualified rule, not an absolute one.<sup>145</sup> CEQA requires an agency to produce a subsequent or supplemental EIR in three situations: (1) when “[s]ubstantial changes are proposed in the project which will require major revisions of the [EIR],” (2) when “[s]ubstantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the [EIR],” and (3) when “[n]ew information, which was not known and could not have been known at the time the [EIR] was certified as complete, becomes available.”<sup>146</sup> Limiting supplemental EIRs to these situations is a counterweight to the burdens of creating an EIR.<sup>147</sup> These situational limitations establish a high threshold that must be met before new environmental studies are required, thus according a measure of finality to the environmental review process.<sup>148</sup>

This threshold creates a potential problem for the public and governmental decisionmakers, because it makes the probability of further environmental review—even if there are substantial changes—less likely. By its very nature, a vague project description is *less* likely to have substantial changes from the project description to a final design. If a project is designed at a low level of specificity, then more leeway is allowed in completing the design, thereby making it more difficult to argue that the changes require future environmental review.

In recent years the California legislature has increasingly approved the use of DB for public works projects.<sup>149</sup> While DB’s use is still relatively limited, the number of agencies authorized to use it is likely to increase as California becomes more comfortable with the method. However, authorization to use DB currently depends on the type of

<sup>143</sup> CAL. CODE REGS. tit. 14 § 15124 (Westlaw 2013).

<sup>144</sup> CAL. PUB. RES. CODE § 21166 (Westlaw 2014).

<sup>145</sup> *Id.* § 21166.

<sup>146</sup> *Id.*

<sup>147</sup> *See* Bowman v. City of Petaluma, 230 Cal. Rptr. 413, 417 (Ct. App. 1986).

<sup>148</sup> *Id.*

<sup>149</sup> DBIA Milestone: California Begins Using Design-Build, *supra* note 131.

proposed project. For example, “much broader authority exists for public buildings or ‘vertical’ projects than for transportation or ‘horizontal’ projects.”<sup>150</sup> As a result, DB’s use in transit projects has been limited to specific projects and transit system operators. Despite its limited authorization, the use of DB has expanded. For the foreseeable future, California’s use of DB is likely to continue.<sup>151</sup>

With DB becoming more prevalent, it is likely that litigation involving it will become just as commonplace. The Authority has already encountered litigation over the permissibility of DB under CEQA. In *Madera*, the plaintiffs argued that the DB approach to project-level review was inadequate under CEQA.<sup>152</sup> The plaintiffs further asserted that “[w]ithout specific descriptions of these project components, detailed impact analysis was impossible.”<sup>153</sup> While *Madera* settled without any ruling on the merits, the case illustrates how DB-related arguments could be a new way to attack CEQA-approved projects.<sup>154</sup>

### III. RECOMMENDATIONS

As the frequency of projects using DB increases, so does the likelihood of litigation alleging CEQA violations. Therefore, California must take a proactive approach in resolving the discrepancy between CEQA’s informational goals and the vague project descriptions that DB both encourages and produces as a byproduct. To remedy this conflict, CEQA should be amended in two ways.

First, to facilitate awareness of potential environmental impacts, all DB projects should be required to publish notifications of post-CEQA-approval design and construction changes. Second, all DB projects should be subject to an oversight and review committee. These changes would ensure that the public and governmental decisionmakers are consistently informed about DB projects. Furthermore, they will ensure the identification of substantial changes to a project so supplemental review may occur when appropriate.

DB should be recognized for benefiting California, but those

<sup>150</sup> NANCY C. SMITH & ISIDRO A. JIMÉNEZ, CALIFORNIA PUBLIC CONTRACTING LAWS: DESIGN-BUILD AUTHORITY FOR TRANSPORTATION PROJECTS (2011), available at [www.infrainsightblog.com/uploads/file/CA%20DB%20for%20Transportation%20Projects.pdf](http://www.infrainsightblog.com/uploads/file/CA%20DB%20for%20Transportation%20Projects.pdf).

<sup>151</sup> *DBIA Milestone: California Begins Using Design-Build*, *supra* note 131.

<sup>152</sup> Petitioners’ Reply Brief in Support of Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, *supra* note 108, at 8.

<sup>153</sup> *Id.*

<sup>154</sup> See *Cnty. of Madera v. Cal. High-Speed Rail Auth.*, No. 34-2012-80001165-CU-WM-GDS, 2013 WL 2297160 (Cal. Super. Ct. Sacramento Cnty. Apr. 18, 2013) (stipulated judgment).

benefits should not override CEQA's protections. These two proposed amendments would ensure that CEQA's protections are not lost in the name of saving time and money.

#### A. THE DESIGN-BUILD NOTIFICATION SYSTEM

To meet its informational goals, CEQA should be amended to require all projects using the DB method to publish information about post-CEQA-approval design and construction changes. Specifically, an agency or private builder would be required to publish information on completed or anticipated designs that differ from those in the final EIR. Publication of this information would be set by predetermined statewide benchmarks, and the information would be published in several, easily accessible forms.

California's Secretary of Resources already publishes a bulletin entitled "California EIR Monitor," which serves to notify the public of draft EIRs; the proposed DB notifications could easily be added to or bundled with this existing publication.<sup>155</sup> Aside from traditional publications, a state agency or private builder could use its own website or social media platform to offer an easy-to-use, cost-efficient means of keeping the public informed. Providing documents already in existence to the public would not represent a heavy burden for an agency or private builder.

CEQA currently requires an agency or private builder to provide a comment period while preparing a draft EIR so the public may voice its opinion on a project.<sup>156</sup> Currently under CEQA, the problem is that once a project has been approved, there is no requirement to keep the public informed unless an agency makes substantial changes that require major revisions.<sup>157</sup> Only after such major changes is there any requirement to provide further information to the public.<sup>158</sup> Thus, the current version of CEQA erects a de facto barrier to public information unless a project's changes are deemed substantial. The proposed publication amendment would keep the public informed of a DB project's progress, allowing information to flow to the public even when there have not been substantial changes to a project.

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<sup>155</sup> CAL. CODE REGS. tit. 14 § 15240 (Westlaw 2014).

<sup>156</sup> CAL. PUB. RES. CODE § 21092(a)-(b) (Westlaw 2014).

<sup>157</sup> *Id.* § 21166.

<sup>158</sup> *Id.*



## B. THE DESIGN-BUILD OVERSIGHT AND REVIEW COMMITTEE

CEQA should be further amended to create a DB oversight and review committee (the committee) that would have statewide authority to monitor all DB projects. The committee would ensure that DB projects comply with CEQA's informational goals, and it would also facilitate public inquiries and complaints. Furthermore, it would consider whether a project's post-CEQA approved changes necessitate supplemental review. In reaching its decision, the committee would review all published documents and conduct independent research, if necessary. Should the committee determine that supplemental review is necessary, it would have the authority to trigger such review under CEQA.

California already has a number of oversight and review committees at both the state and local level that have powers similar to those of the proposed committee. For example, at the state level there is the Law Revision Commission, the Bureau of State Audits, and the Little Hoover Commission.<sup>159</sup> At the local level, there is the Orange County Transit Authority's Environmental Oversight Committee.<sup>160</sup>

Furthermore, in the past year California has created more oversight by allowing administering agencies to establish peer review groups for public works projects.<sup>161</sup> The Public Works Project Peer Review Act of 2013 allows any "public agency principally tasked with administering, planning, developing, and operating a public works project" to establish a peer review group,<sup>162</sup> which is composed of qualified experts to give scientific and technical advice on aspects of a public works project.<sup>163</sup>

A chief constraint on the DB oversight and review committee will be the level of funding and resources it receives, a pressure all government agencies face. To best utilize its resources, the committee would categorize DB projects based on expected environmental impact, and apply differing levels of oversight as appropriate. Guidelines would divide projects into low-, intermediate-, and high-level impact categories. Projects with low and intermediate impacts would only be required to publish notification of design and construction changes and to accept

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<sup>159</sup> *Oversight and Review*, CAL. STATE LEGISLATURE, [www.legislature.ca.gov/the\\_state\\_legislature/oversight\\_and\\_review/oversight\\_and\\_review.html](http://www.legislature.ca.gov/the_state_legislature/oversight_and_review/oversight_and_review.html) (last visited Mar. 1, 2014).

<sup>160</sup> *Environmental Oversight Committee*, ORANGE COUNTY TRANSP. AUTHORITY, [www.octa.net/Measure-M/Environmental/Freeway-Mitigation/Environmental-Oversight-Committee](http://www.octa.net/Measure-M/Environmental/Freeway-Mitigation/Environmental-Oversight-Committee) (last visited Apr. 22, 2014).

<sup>161</sup> See CAL. GOV. CODE § 8848 (Westlaw 2014).

<sup>162</sup> CAL. GOV. CODE § 8847.1(a) (Westlaw 2014).

<sup>163</sup> CAL. GOV. CODE § 8847.1(b) (Westlaw 2014).

comments from the committee. High-impact projects would be subject to automatic oversight, in addition to the notification requirements.

High-impact projects could be defined by a number of factors, such as the scale of the construction. For example, a large project such as the California HSR network, which will traverse multiple regions, is likely to have a greater impact than the localized construction of a school. The greater environmental impact necessitates the need for more public awareness and input, thereby justifying automatic committee oversight.

On the other hand, low- and intermediate-impact projects would come under the committee's oversight through a public petition process by which individuals could request the committee's supervision of a project. An individual or group could trigger the oversight of a designated low- or intermediate-impact project by demonstrating to the committee that the actual environmental impact to the environment would be greater than expected. If the public were able to make such a showing, the project would be subject to the committee's oversight.

Upon a finding that a DB project has undergone sufficient changes to require supplemental environmental review, the committee would have the power to force an agency to conduct the necessary review. The committee's enforcement would be a multi-step process. First, the committee would inform the agency of its determination and allow for the development of a mitigation strategy, much like what the initial EIR process currently requires.<sup>164</sup> This strategy could include a voluntarily supplemental EIR.

An agency's refusal to comply with these guidelines would result in the imposition of fines or possible court action by the committee to enforce its decision. Any further refusals from an agency or private builder that receives state funding would result in the committee recommending removal of that funding and any benefits the project may have received. Throughout the process, the agency would be able to contest the committee's decision but would be responsible for all attorneys' fees if a court determines that supplemental review was appropriate. The committee would further be responsible for listening to the public's concerns.

The committee would also be tasked with facilitating public inquiries and concerns about DB projects. First, the committee would accept public comments on all DB projects, allowing the public to voice any concerns it may have. This function would be especially important in allowing members of the public who are unable to attain legal representation to have their concerns about a project heard. Based on

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<sup>164</sup> CAL. CODE REGS. tit. 14 § 15083(f) (Westlaw 2013).

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these public comments, and all available information, the committee would be authorized to publish reports recommending legislative changes.

Lastly, the committee would have the power to recommend changes to CEQA legislation. California's Little Hoover Commission on Government Organization and Economy is an example of a commission with such ability. Based on its reports, the Little Hoover Commission not only makes recommendations on legislation, but also testifies at hearings and provides support to policymakers.<sup>165</sup>

The DB oversight and review committee would have similar tasks. As the preeminent governmental body on DB in California, the committee would be best suited to recommend changes on DB regulation to the state legislature. Not requiring the committee to do so may waste a valuable source of information and authority on the subject.

To ensure that the commission is able to effectively and legitimately oversee all of the state's DB projects, its membership would be bipartisan and consist of appointed and elected individuals. The committee's members should be experts from the fields of construction, environmental protection, business management, and governmental efficiency. The board would consist of nine members, four appointed by the governor, one appointed by each house of the state legislature, and three elected by the voters. California's Little Hoover Commission's members are selected in a similar fashion: the governor appoints five members, and the legislature appoints four members.<sup>166</sup>

To foster the committee's independence, its positions would be for non-renewable terms, thus eliminating the constant need for the members to seek reelection through time-consuming campaigns. Finally, committee members who have had current or prior involvement in a project subject to oversight would be required to recuse themselves from any say in that decision. These guidelines and restrictions should foster the legitimacy of the commission and its decisions.

C. THE PROPOSALS AS APPLIED TO THE CALIFORNIA HIGH-SPEED RAIL

Amending CEQA to create both the notification system and an oversight and review committee would allow the public and governmental decisionmakers to stay abreast of the ever-changing

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<sup>165</sup> *About the Commission*, LITTLE HOOVER COMMISSION, [www.lhc.ca.gov/about/about.html](http://www.lhc.ca.gov/about/about.html) (last visited Apr. 22, 2014).

<sup>166</sup> *Id.*

designs of DB projects. Thus, these amendments would help to fulfill CEQA's core informational goals. The proposed amendments would directly impact the HSR project.

First, the Authority would be required to publish design and construction changes that differ from those approved in a section's EIR. For example, if—as the plaintiffs alleged in *Madera*—the Authority changed a section of track from a viaduct to an earthen berm, the public would have to be made aware of the change. Under the current version of CEQA, if the Authority did not consider this revision to constitute a substantial change, the public might not become aware of the decision.

Second, the Authority would be subject to automatic committee oversight. With the HSR project stretching more than eight hundred miles, it would be deemed to have a high-level environmental impact, thus necessitating oversight. Because of the number of lawsuits filed against the Authority, the committee would likely conduct investigations into the project to ensure that substantial changes were not occurring without the appropriate level of review. Thus, the project would be subject to oversight not only by concerned citizens, but also by an independent governmental review committee.

#### IV. CONCLUSION

California has been a leader in environmental protection for the better part of four decades. California should remain proactive by ensuring that all projects using a DB delivery method adhere to CEQA's informational goals. Being proactive requires that CEQA be amended. CEQA became law decades before the use of DB started and was not drafted with its hastened design and construction method in mind. A DB project's speed is both its greatest benefit and its greatest drawback. DB's problem is that a project can receive CEQA approval with a minimal level of the design completed. These incomplete designs open the door to major changes in already-approved projects, creating the possibility that previously unanticipated environmental impacts could escape CEQA review.

Solving this problem requires amending CEQA. First, all DB projects should be made subject to a publication requirement for post-CEQA-approval design and construction changes through the DB notification system. This would keep all Californians abreast of the latest changes to a project. Second, if appropriate, DB projects should proceed under the watchful eye of an oversight and review committee. Depending on the expected environmental impact, a project may be subject to automatic oversight or to review that is triggered by public concern. The

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committee would make recommendations for supplemental environmental review and, if necessary, begin legal action to ensure the appropriate review occurs. The system would thereby keep the public informed, meet CEQA's goals, and provide a meaningful "watchdog" function.

California should strike a balance between DB's benefits and drawbacks. Therefore, DB should be allowed, but agencies and private builders that choose to use it should be required to provide additional public notification and be subject to review. Ideally, the proposed CEQA amendments would lessen the need for citizen-driven suits against future DB projects, by ensuring the appropriate amount of review occurs. Although requiring agencies and private builders to publish information and be subject to an oversight committee might cost California money now, the enhanced level of protection would benefit the people in the long run.