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

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By

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Abstract

1 Jonathan Wood is a Staff Attorney at Pacific Legal Foundation. He was one of the attorneys that represented the California Association for Recreational Fishing in their California APA challenge to the mitigation measures at issue in Center for Biological Diversity v. Department of Fish & Wildlife. Thanks to my co-counsels Damien M. Schiff and Joshua P. Thompson for helpful insight, comments, and edits.
What happens when an agency adopts a regulation under the California Environmental Quality Act as mitigation for a program’s environmental impact, without complying with the procedural requirements of the California Administrative Procedure Act? According to a recent California Court of Appeal decision – Center for Biological Diversity v. Department of Fish and Wildlife – these mitigation measures, which this article refers to as underground environmental regulations, are invalid. This article defends that interpretation and addresses its consequences for agencies and the regulated public. Although these additional procedural protections benefit regulated parties in a variety of ways, they can also burden them by introducing additional delay and uncertainty into the regulatory process. In addition to identifying some of those burdens, this article suggests ways that agencies can reduce them in appropriate circumstances.
Introduction

The California Environmental Quality Act (CEQA) generally forbids any governmental entity in the state from proceeding with any project unless it first discloses all of the project’s significant environmental impacts and either mitigates those impacts, if feasible, or makes a finding that other considerations justify going forward with the project despite them. When the project is a statewide program rather than an isolated decision, this creates a potential problem. Simply complying with CEQA will not be enough. Any mitigation measure that adopts general
standards to govern that program will likely also be a regulation subject to the California Administrative Procedure Act (California APA).²

Recently, the California Court of Appeal held that mitigation measures that meet the California APA’s definition of regulation are subject to that statute’s requirements, in addition to CEQA. That case – *Center for Biological Diversity v. Department of Fish & Wildlife* – struck down mitigation measures purporting to regulate the private fish stocking industry as illegal “underground regulations.”³ An “underground regulation” is any rule that meets the statute’s broad definition of regulation but has not been promulgated according to its procedures.⁴ Such regulations are categorically unenforceable.⁵ Consequently, any agency imposing a mitigation measure under CEQA that would constitute a regulation will also have to formally adopt the measure as a regulation before enforcing it.

What will recognition of what I will call “underground environmental regulations” mean for the regulated public? It will probably lead to a net reduction in regulatory burdens, but not without some cost. The public will benefit from the California APA’s requirement that agencies consider all impacts of their regulations, rather than just environmental ones. And it will benefit from having

⁵ Cal. Gov’t Code § 11340.5(a).
the Office of Administrative Law, an outside agency, review the regulation for consistency, clarity, and necessity. Finally, it’ll benefit from broader judicial review of the regulation.

However, compliance with the California APA’s procedural requirements may also introduce additional uncertainty and delay. CEQA generally forbids agencies from proceeding with a project unless they comply with the mitigation measures contained in the environmental impact report. This may mean that the program will be stalled until a final regulation can be formally adopted. Where delay would impose substantial costs, the agency has several options. It could frame the mitigation measure so that it merely requires the agency to pursue rulemaking, it could adopt an emergency regulation to allow the program to proceed while it pursues formal adoption, or it could adopt a statement of overriding consideration, citing the costs and burdens of delay, to allow the program to continue in the interim. This last approach is the most sensible and least likely to invite unnecessary litigation.

This article will proceed as follows: Part I will give a brief summary of CEQA. Part II will introduce the California APA and its prohibition against underground regulations. Part III will explain why underground environmental regulations run afoul of the California APA and are invalid. Part IV will address what impacts this will have on the regulated public and agencies’ options to reduce adverse impacts.
I. CEQA

CEQA, like its federal counterpart the National Environmental Policy Act, requires state and local agencies to publicly disclose all significant environmental impacts from any projects that they approve or carry out and either mitigate those impacts or explain why other considerations warrant allowing the project to proceed despite them. Its reach is as sweeping as its purposes, which include to “[d]evelop and maintain a high-quality environment now and in the future, and take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.” This includes consideration of impacts to air, water, wildlife, noise, and aesthetic, scenic, and historical values. Although CEQA requires consideration of


all significant environmental impacts, it does not forbid agencies from approving projects that have such impacts.\textsuperscript{9} Rather, its core purpose is to promote informed public decision-making, at least with regard to environmental impacts.\textsuperscript{10}

Ordinarily, an agency proceeds through three steps in the CEQA process.\textsuperscript{11} First, it determines whether the project is subject to CEQA at all.\textsuperscript{12} A project can be exempt if it is obvious that it will have no significant effect on the environment or if subject to a statutory exemption.\textsuperscript{13} Unless the project is exempt, the agency prepares an initial study to determine whether the project may have a significant effect on the environment.\textsuperscript{14} If the initial study results in no substantial evidence of

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\textsuperscript{9} An agency may allow a project to go forward notwithstanding significant environmental impacts by finding mitigation infeasible and adopting a statement of overriding considerations to explain why other factors outweigh those impacts. Cal. Pub. Res. Code § 15093; Cal. Code Regs. tit. 14, § 15002(h).
\end{footnote}

\begin{footnote}
\textsuperscript{10} See In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings, 43 Cal. 4th 1143, 1162 (2008). Although CEQA permits agencies to allow environmental impacts where there are significant social, economic, or recreational benefits to offset them, it does not directly require an agency to analyze these non-environmental impacts. See Laurel Heights Improvement Assoc. v. Regents of U.C., 6 Cal. 4th 1112 (1993); Citizens of Goleta Valley v. Board of Supervisors, 52 Cal. 3d 553 (1990); Cal. Code Regs. tit 14, § 15003(j).
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\textsuperscript{11} Cal. Code Regs. tit 14, § 15002(k).
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\textsuperscript{12} Cal. Code Regs. tit 14, §§ 15061, 15062.
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\textsuperscript{13} Cal. Code Regs. tit. 14, §§ 15061, 15261-15333.
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\textsuperscript{14} Cal. Code Regs. tit 14, § 15063. Due to uncertainty, it can often be difficult to determine whether a potential environmental impact is significant. John Watts, \textit{Reconciling Environmental Protections with the Need for Certainty: Significance}.
\end{footnote}
any significant environmental impact, the agency prepares a “negative declaration” and the project can proceed without further review.\(^\text{15}\) The project proponent or the government may also modify the project to avoid the significant environmental effect and adopt a “mitigated negative declaration.”\(^\text{16}\)

But if the initial study concludes that the project \textit{may} have some significant environmental impact, the agency generally must prepare an “environmental impact report” or “EIR.”\(^\text{17}\) This report is the heart of CEQA.\(^\text{18}\) It must “identify the significant effects on the environment of a project, … identify alternatives to the project, and … indicate the manner in which those significant effects can be mitigated or avoided.”\(^\text{19}\) The result is an often voluminous report spanning several thousand pages.

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\textit{Thresholds for CEQA, 22 Ecology} L.Q. 213 (1995); see Laurel Heights Improvement Assn. v. Regents of University of California, 47 Cal. 3d 376, 395 (1988). These determinations also often end up the subject of litigation. See Varner, supra note 6, at 1457-66.
\end{flushright}

\(^{15}\) Cal. Code Regs. tit 14, §§ 15070-79.


\(^{18}\) See County of Inyo v. Yorty, 32 Cal. App. 3d 795, 810 (1973); see also Laurel Heights, 47 Cal. 3d at 392.

The process begins with a draft environmental impact report. This draft must identify a project’s basic objectives, so that the agency and the public can assess its benefits, alternatives, and potential mitigation options. The draft report must “describe a range of reasonable alternatives to the project ... which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.” This must include a “no project” alternative to compare the impacts of the project to the world without the project. The draft report must identify the environmental impacts of each alternative and mitigation measures to reduce impacts to insignificance.

Once the draft report is prepared, the agency must make it available for public comment. It must “consider” and “evaluate” every comment submitted on the draft, and prepare a written response to each significant environmental issue.


21 Cal. Code Regs. tit. 14, § 15126.6(a); see Laurel Heights Improvement Assn. v. Regents of University of California, 47 Cal. 3d 376, 399-403 (1988).


raised by a commenter.\textsuperscript{25} The draft, public comments, and agency responses are then all included in a final environmental impact report for the agency’s final review.\textsuperscript{26}

A project that will have a significant effect on the environment cannot be approved unless (1) the final environmental impact report includes feasible and enforceable mitigation measures that reduce the effect to insignificance, (2) the effect is avoided through the adoption of an alternative, or (3) mitigation is infeasible and the project’s overriding benefits outweigh the significant effect.\textsuperscript{27}

To streamline the CEQA process for ongoing government programs or where many similar projects would otherwise have to go through review,\textsuperscript{28} an agency can “tier” the environmental review process by addressing environmental impacts and mitigation requirements common to the program as a whole in a program environmental impact report and addressing site- or case-specific issues in a


\textsuperscript{28} Examples of such programs include the adoption of a general land use plan and the implementation of a statewide regulatory program or policy. Cal. Code Regs. tit. 14, § 15152(a).
supplemental report. Where the mitigation measures imposed under the program-wide environmental impact report render any remaining impacts of the specific project insignificant, the project may proceed under a negative declaration.

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


II. **The California APA forbids underground regulations**

California has one of the most broadly applicable administrative procedure acts of any state or the federal government.\(^{32}\) The purpose behind this broad statute is to ensure that “persons or entities affected by a regulation [] be heard on the merits in its creation, and [] have notice of the law’s requirements so they can conform their conduct accordingly.”\(^{33}\) It was founded on the perception that there were too many regulations imposing unnecessary burdens on the state and its people.\(^{34}\) The legislature also believed that too many regulations were imposed in secret, therefore the California APA’s procedural protections were intended to “insure that due process concerns are satisfied.”\(^{35}\) Increased public participation in the process also improves the quality of regulations. As the California Supreme Court explained, “[t]he Legislature wisely perceived that the party subject to

\(^{32}\) See Armistead v. State Pers. Bd., 22 Cal. 3d 198, 201-02 (1978) (the Legislature desired “to achieve in the California APA a much greater coverage of rules than Congress sought in the federal APA.”)


\(^{34}\) See Voss v. Superior Court, 46 Cal. App. 4th 900, 908-09 (1996) (“The APA was born out of the Legislature’s perception there existed too many regulations imposing greater than necessary burdens on the state and particularly upon small businesses.”).

\(^{35}\) See Dyna-Med, Inc. v. Fair Employment & Hous. Com., 43 Cal. 3d 1379, 1420 (1987); see also Horn v. Cnty. Of Ventura, 24 Cal. 3d 605, 621 (1979) (“[W]e should not encourage legislators and rulemakers who conceivably yearn for a more comfortable past when often they did proceed without notice, without hearing, in protective secrecy.”).
regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny.\textsuperscript{36} Because of the importance of these purposes, the courts resolve any doubts about the statute’s applicability in its favor.\textsuperscript{37}

The California APA’s requirements include: public notice of proposed and final regulations;\textsuperscript{38} an opportunity for public comment;\textsuperscript{39} a public hearing if anyone requests one;\textsuperscript{40} responses to public comments;\textsuperscript{41} and submission of all regulations to

\textsuperscript{36} Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal. 4th 557, 568-69 (1996).


\textsuperscript{38} Cal. Gov. Code §§ 11346.4, 11346.5, 11346.2. The required notice is significant. In addition to providing the complete text of the proposed regulation, the notice must contain a statement of reasons for it and identify the studies and other evidence supporting it. Cal. Gov. Code § 11346.2.

\textsuperscript{39} Cal. Gov. Code § 11346.8.

\textsuperscript{40} Cal. Gov. Code § 11346.8(a).

\textsuperscript{41} Cal. Gov. Code §§ 11346.8, 11346.9.
an independent agency – the Office of Administrative Law. Any person may challenge any regulation as contrary to law or improperly promulgated.

Every regulation – unless within a narrow list of enumerated exceptions – must be formally adopted through the California APA’s procedures. The statute defines “regulation” very broadly, to include “every rule, regulation, order, or standard of general application, or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.” The California Supreme Court has interpreted this to include any rule that is “generally applicable” and implements, interprets, or makes specific the

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42 Cal. Gov. Code § 11347.3; Code Regs. tit. 1, § 250(a). The Office of Administrative Law reviews every proposed regulation to ensure that it is consistent with the law, clear, and necessary. Cal. Gov. Code §§ 11349.1, 11349.3.


45 Cal. Gov’t Code § 11342.600.

46 See Tidewater Marine W., Inc. v. Bradshaw, 14 Cal. 4th 557, 570-71 (1996). “Generally applicable” refers to any rule that applies to all members of any identifiable class, kind, or order, or declares how a certain class of cases will be decided. See id.; Morning Star Co. v. State Bd. of Equalization, 38 Cal. 4th 324, 333-34 (2006). This includes essentially anything but the application of a procedurally valid rule to a particular instance or individual.
law enforced or administered by the agency, or governing its procedures.\textsuperscript{47} This
definition is broader than the statute’s federal counterpart because it applies to any
rule, not just “legislative” rules.\textsuperscript{48}

The California APA contains a narrow list of regulations that are exempt
from its notice and public comment requirements. These are (a) a regulation
adopted by an agency in the judicial or legislative branch;\textsuperscript{49} (b) a legal ruling issued
by the Franchise Tax Board’s counsel or State Board of Equalization’s counsel;\textsuperscript{50} (c)
a form or instructions relating to the use of a form;\textsuperscript{51} (d) a regulation that relates
only to the internal management of the state agency;\textsuperscript{52} (e) a regulation that

\textsuperscript{47} See Tidewater, 14 Cal. 4th at 570-77; see also Morning Star Co., 38 Cal. 4th at
333-34.

\textsuperscript{48} See Michael Asimow, California Underground Regulations, 44 ADMIN. L. REV. 43,
44 (1992). Asimow criticizes California’s approach on the grounds that it does more
harm than good, by increasing costs on agencies’ efforts to convey their
interpretations of the statutes they administer to the public subject to them. See id.
at 55-62. He argues that interpretive rules do not affect the legal rights and
obligations of those subject to them, and thus don’t raise the same concerns that
legislative rules do. See id. at 44. However, because courts defer to interpretive
rules, Asimow’s premise is false. See Tidewater, 14 Cal. 4th at 574-75 (criticizing
Asimow’s argument on this basis).

\textsuperscript{49} Cal. Gov’t Code § 11340.9(a).

\textsuperscript{50} Cal. Gov’t Code § 11340.9(b).

\textsuperscript{51} Cal. Gov’t Code § 11340.9(c).

\textsuperscript{52} Cal. Gov’t Code § 11340.9(d). This exemption is referred to as the “internal
management” exemption and is exceedingly narrow. In Armistead, the California
Supreme Court held that it cannot exempt any rule that significantly affects people
outside the agency, even if the regulation is only directly addressed to agency
establishes criteria or guidelines for agency staff to perform an audit, investigation, examination, or inspection, settle a commercial dispute, negotiate a commercial arrangement;\(^53\) (f) a regulation that embodies the only legally tenable interpretation of a provision of law;\(^54\) (g) a regulation that establishes or fixes rates, prices, or tariffs;\(^55\) (h) a regulation that relates to the use of public works;\(^56\) and (i) a regulation that is directed to a specific person or group and does not apply generally throughout the state.\(^57\)

employees. See 22 Cal. 3d 198, 203-04 (1978) (“That [the regulation] is not readily accessible to affected employees and the public does not persuade us that [it] relates to internal management only. The section obviously was intended to be generally applied ... In fact, the insistence on restricted access does indeed increase our concern.”); see also Morning Star Co. v. State Bd. Of Equalization, 38 Cal. 4th 324, 336 (2006) (“We decline to endorse an approach that would allow an agency to avoid APA requirements simply by driving its regulations further underground.”); City of San Marcos v. California Highway Com., 60 Cal. App. 3d 383, 408 (1976).

\(^{53}\) Cal. Gov’t Code § 11340.9(e).

\(^{54}\) Cal. Gov’t Code § 11340.9(f). This exemption is referred to as the “lone legally tenable interpretation” exemption. It too is exceedingly narrow. If the interpretation “depart[s] from, or embellish[es] upon, express statutory authorization and language, the [agency] will need to promulgate regulations.” Engelmann v. State Bd. Of Education, 2 Cal. App. 4th 47, 62 (1991). This is true even if the interpretation is the most reasonable one. Morning Star, 38 Cal. 4th at 336 (“Were this the case, the exception would swallow the rule.”). The exemption only applies if the law can be interpreted only one way, such that the interpretation is “essentially rote, ministerial, or otherwise potentialy compelled by, or repetitive of, the statute’s plain language.” Id.

\(^{55}\) Cal. Gov’t Code § 11340.9(g).

\(^{56}\) Cal. Gov’t Code § 11340.9(h).

\(^{57}\) Cal. Gov’t Code § 11340.9(i).
Any non-exempt regulation that has not been formally adopted through the California APA’s procedures is an “underground regulation.” There are two significant consequences for agencies that adopt underground regulations. First, they are categorically prohibited from enforcing the underground regulation. This is so no matter the purpose of the regulation, because the Legislature has made clear that the California APA’s purposes are such that no implied exceptions can be permitted.

Second, the courts accord no deference to an agency’s interpretation of a statute contained in an underground regulation. The California Supreme Court has explained that “[t]o hold otherwise would help to perpetuate the problem of avoidance by administrative agencies of the mandatory requirements of the [APA] of public notice, opportunity to be heard by the public, filing with the Secretary of

59 Cal. Gov’t Code § 11340.5(a). The statute requires any a regulation to be struck down if there is any substantial noncompliance. Cal. Gov. Code § 11350. This may mean that the prohibition will not be triggered if an agency attempts to comply in good faith but makes some minor error. But there has never been a case in which a court found that happened. Rather, whenever the courts have found that the California APA was violated, the regulation could not be enforced. See, e.g., Reilly v. Superior Court, 57 Cal. 4th 641, 649 (2013).
State, and publication in the [California Code of Regulations]." Consequentially, and regardless of the agency’s expertise in interpreting and administering the statute, “courts in effect ignore the agency’s illegal regulation.” This significantly distinguishes the California APA from its federal counterpart, under which interpretive regulations are exempt from notice-and-comment, but nonetheless receive substantial deference.

III. The California APA applies to regulations adopted through CEQA

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

62 Armistead, 22 Cal. 3d at 205.

63 Yamaha Corp. of Am. 19 Cal. 4th at 20.

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

A. The California APA and CEQA contain different procedural requirements

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


67 See Cal. Gov’t Code § 11346(a) (California APA’s procedural requirements “shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.”); Tidewater, 14 Cal. 4th at 568-69 (Industrial Welfare Commission regulations are subject to analogous procedural requirements and expressly exempted from the California APA); Mountain Lion Found. v. Fish & Game Com.; 16 Cal. 4th 105, 133-34 (1997) (compliance with California APA’s procedures does not imply compliance with CEQA).
California, the only lawful way to adopt regulations is through the California APA’s procedures.

Because of the vastly different purposes underlying the two statutes, their procedural requirements differ in significant ways. The California APA requires more detailed notice about the content of the proposed regulation, its purposes, and the evidence supporting it than does CEQA.\(^68\) It also requires agencies to go to greater efforts to publicize proposed regulations.\(^69\)

The California APA also requires agencies to analyze a broader array of issues than CEQA. Under the California APA, an agency has an affirmative obligation to consider “the [regulation’s] potential for adverse economic impact on California business enterprises and individuals,”\(^70\) and impacts on the “creation or elimination of jobs” and “creation of new businesses or the elimination of existing

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\(^68\) Compare Cal. Gov’t Code § 11346.2 (requiring the notice to contain the express terms of the regulation and studies supporting it) with Cal. Pub. Res. Code § 21092(b)(1) (requiring only a brief description of the proposal); see Cal. Gov’t Code § 11346.5 (requiring agencies to identify the statutory authorization for any proposed regulation and the types of businesses likely affected by the regulation’s significant adverse economic impacts).

\(^69\) Compare Cal. Gov’t Code § 11346.4(a) (requiring notice to a representative number of small businesses, publication in the California Regulatory Notice Register, and publication on the agency’s Web site) with Cal. Pub. Res. Code §21092(b)(3) (requiring either publication in a newspaper, posting of notice at affected sites, or direct mailing to affected property owners).

\(^70\) Cal. Gov’t Code § 11346.3(a).
businesses” within the state.\textsuperscript{71} CEQA, by contrast, does not require any consideration of economic impacts.\textsuperscript{72}

These substantive differences carry over into the agency’s obligation to respond to public comments. Under the California APA, an agency must summarize every objection or recommendation made during the public comment period “together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change,” regardless of the subject of the public comment.\textsuperscript{73} CEQA, on the other hand, is myopically focused on environmental impacts. The only public comments that an agency must respond to under CEQA are those addressing environmental issues.\textsuperscript{74}

Finally, the California APA contains a unique requirement that regulations be submitted to the Office of Administrative Law for its review of their “necessity, authority, clarity, consistency, reference, and nonduplication.”\textsuperscript{75} If a proposed regulation fails any of these criteria, it will be returned to the agency and, if any

\textsuperscript{71} Cal. Gov’t Code §11346.3(b)(1).

\textsuperscript{72} Cal. Code Regs. tit. 14, § 15358 (“Effects analyzed under CEQA must be related to a physical change.”).

\textsuperscript{73} Cal. Gov’t Code § 11346.9(a)(3).


\textsuperscript{75} Cal. Gov’t Code § 11349.1(a).
significant changes are required, the promulgation process may have to begin anew.76

**B. Program EIRs are particularly likely to contain underground environmental regulations**

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

In March 2012, the Department of Fish and Wildlife77 approved a supplemental environmental impact report for its suction dredge permitting program.78 This report found that suction dredge mining79 can increase noise

76 Cal. Gov’t Code § 11349.4(a).

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


79 Suction dredge mining involves the use of a motorized pump and hose to suck up streambed materials, which is then run through a sluice box to trap gold and other dense materials, after which the water and remaining sediment is dumped back
pollution, destabilize streambeds, stir up mercury and other materials contained in streambeds, interfere with fish and other protected wildlife, and disturb cultural resources.\textsuperscript{80} To address these concerns – to the extent of the Department’s statutory authority to\textsuperscript{81} – the environmental impact report proposed several regulations governing the number of permits, reporting requirements, and time, place, and manner restrictions.\textsuperscript{82}

The State Water Resources Control Board has prepared a program environmental report addressing the environmental impacts of land application of biosolids as fertilizers.\textsuperscript{83} That report found that uncontrolled land application of biosolids could have several significant adverse environmental impacts, including

\begin{footnotesize}
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\item Suction Dredge EIR at 15-61.
\item The Department only has statutory authority to regulate suction dredge mining to ensure that it is not deleterious to fish. Cal. Fish & Game Code § 5653(b). Since the Department has no current statutory authority to adopt regulations to address the other significant environmental impacts, the state legislature has enacted a moratorium on suction dredge mining until legislation is enacted giving the Department sufficient authority to regulate this mining’s impacts. Id. §§ 5653, 5653.1; see People v. Rinehart, 230 Cal. App. 4th 419 (2014), review granted (Cal. Jan. 21, 2015) (federal preemption challenge to the moratorium).
\item Suction Dredge EIR at 4.
\end{itemize}
\end{footnotesize}
polluting groundwater, toxicity to fish, depletion of protected wildlife, contamination of food, and exposure of residents and agricultural workers to radionuclides.\textsuperscript{84} To mitigate these impacts, the report established screening and reporting requirements, grazing restrictions, and restrictions on the buildup of chemicals in the soil.\textsuperscript{85}

The Department of Conservation has prepared a programmatic environmental impact report addressing the environmental impacts of oil and gas well stimulation treatments, \textit{i.e.} fracking.\textsuperscript{86} The report found that fracking could have significant adverse impacts on air quality, fish, wildlife, vegetation, greenhouse gas emissions, and water quality, in addition to the risks associated with spills.\textsuperscript{87} To address these impacts, the report adopted several mitigation measures, including restrictions on what water sources may be used, how wells can be designed, how close they can be to various areas, and requirements to install protective devices to reduce impacts to biological or water resources.\textsuperscript{88}

\textsuperscript{84} See id. at Table ES-1.

\textsuperscript{85} See id.

\textsuperscript{86} California Department of Conservation, Analysis of Oil and Gas Well Stimulation Treatments in California: Final Environmental Impact Report (June 2015) (hereinafter Fracking EIR), available at \url{http://www.conservation.ca.gov/dog/Pages/SB4_Final_EIR_TOC.aspx}.

\textsuperscript{87} See id. ES-8 to ES-21.

\textsuperscript{88} See id. The Department has since identified these measures as underground environmental regulations and acknowledged they must be formally promulgated.
Another example is the Department of Fish and Wildlife’s program environmental impact report governing state and private fish stocking in waters throughout the state. The report identified impacts on several amphibian and fish species from predation and competition for food; increased risk of invasive species; and potential impacts to water quality. To address these concerns, the fish stocking report proposed several mitigation measures, including new requirements for two programs administered by the department. It modified the “Fishing in the City” program – through which the Department encouraged fishing opportunities for urban residents, particularly children – by imposing a new evaluation protocol to determine which water bodies would be stocked with fish. It also required participating businesses to adopt monitoring and reporting programs to ensure that their facilities are free of invasive species. The mitigation measures also included


90 See id. at ES-6.

91 See Center for Biological Diversity v. Dept. of Fish & Wildlife, 234 Cal. App. 4th 214, 258-59 (2015); see also Fish Stocking EIR, supra note 89.

92 See Center for Biological Diversity, 234 Cal. App. 4th at 258-259, see also California Department of Fish and Wildlife, Fishing in the City Program Overview, https://www.wildlife.ca.gov/Fishing-in-the-City/Overview (last visited X).
new requirements for obtaining a private stocking permit – without which you can’t stock fish in any water, including private ponds or lakes – by mandating that a Department biologist apply an evaluation protocol to determine whether the stocking would have any impacts on dozens of “decision species.”\textsuperscript{93}

Since each of these program environmental impact reports adopt mitigation measures that will apply to all of the decisions made under the program, they would appear to implicate the California APA. This implication isn’t likely due to anything specific to those programs, but instead the nature of a program environmental impact report.

\textbf{C. The California APA applies to underground environmental regulations}

No mitigation measures had ever been challenged as underground environmental regulations, until recently. In \textit{Center for Biological Diversity v. Department of Fish and Wildlife}, a nonprofit organization representing recreational fishermen and associated businesses challenged the mitigation measures adopted in the fish stocking environmental impact report discussed above.\textsuperscript{94} In adopting these mitigation measures, the Department of Fish and Wildlife did not follow the

\textsuperscript{93} See Center for Biological Diversity, 234 Cal. App. 4th at 259; see also Cal. Fish & Game Code § 6401 (requiring a permit to stock fish); Cal. Code Regs., tit. 14, § 285 (regulation governing fish stocking permits).

\textsuperscript{94} 234 Cal. App. 4th at 225.
California APA's procedures. During the litigation, the Department did not deny that they met the statute’s definition of regulations, but argued that they were exempt.

It would have been futile to argue that the mitigation measures were not regulations under the California APA. These mitigation measures established an evaluation protocol that would dictate whether and how waters across the state would be stocked by the state or private entities. And they imposed an ongoing monitoring and reporting requirement on all private aquaculture facilities. They easily met Tidewater’s two-part test. They are generally applicable because the protocol would apply to every stocking decision and the monitoring requirement would be imposed on every facility. And, by imposing requirements on stocking decisions and aquaculture facilities, they implement, interpret, or make specific the law being enforced. Consequently, the Court held that the California APA applies to regulations adopted as mitigation measures under CEQA.

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95 See id. at 225-31; Fish Stocking EIR, supra note89.


97 Fish Stocking EIR at 4-210 to 4-211, 4-214 to 4-215.

98 See id. at 4-211 to 4-212.


100 See id. at 570-71.

101 See id. 570-77.
The court also rejected the exemption defenses on grounds that indicate that these exemptions will rarely, if ever, insulate mitigation measures from attack under the California APA. The Department argued that the internal management exemption applied to the evaluation protocol for government stocking because it was directed to the Department’s own biologists. The Department acknowledged that stocking decisions affect third parties, like vendors and urban residents who rely on the state-stocked waters for recreation. But it argued that these impacts were incidental and thus should not forbid application of the internal management exemption. For this argument, the Department relied on Californians for Pesticide Reform v. California Department of Pesticide Regulation, which construed the exemption to apply to an “agency’s rule [that] does not require the individuals or entities affected to do anything they are not already required to do.”

102 Center for Biological Diversity, 234 Cal. App. 4th at 225.
103 See id. at 260.
104 See id.
105 See id.
106 See Center for Biological Diversity v. Dept. of Fish & Wildlife, 234 Cal. App. 4th 214, 260 (2015); see also Californians for Pesticide Reform, 184 Cal. App. 4th 887, 909 (2010). Californians for Pesticide Reform upheld an agency’s policy to prioritize certain pesticides for toxicity reviews under a statute that mandated the review of all pesticides. See 184 Cal. App. 4th at 893-94. According to that decision, this policy falls within the internal management exception because it “will not determine if the pesticides will undergo review, but merely prioritize when the pesticides will undergo review.” See id. at 909. Consequently, the policy did not impose any new duties on the agency or any member of the public, but merely
The application of this exemption is an important question because most agencies could argue that their mitigation measures – provided they crafted them properly – regulate their own employees and affect third parties only incidentally. Most any mitigation measure could be framed as a requirement that an agency official consider certain factors when exercising her discretionary authority to grant a permit or permission for private action. Under the Department’s argument, such mitigation measures would categorically escape review under the California APA.

Perhaps unsurprisingly, the Court of Appeal did not find this giant loophole in the California APA. It narrowly interpreted *Californians for Pesticide Reform* to only apply to internal agency policies that do not impose any new duties on the agency or any member of the public that would substantively affect a public program.\(^{107}\) The evaluation protocol “significantly affects numerous citizens, both those who run established fish stocking businesses and those, especially children, who enjoy participating in the program.”\(^{108}\) In light of these significant external impacts, the California APA’s aim to provide those affected an opportunity to be heard would be frustrated if the mitigation measure was allowed to be enforced without going through the statute’s procedures.\(^{109}\)

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\(^{107}\) See Center for Biological Diversity, 234 Cal. App. 4th at 261.


\(^{109}\) See Center for Biological Diversity, 234 Cal. App. 4th. at 262.
This reasoning should generally foreclose agency reliance on the internal management exception when defending underground environmental regulations. Any such regulation would likely have some significant impact on a third party, either the person subject to the regulation or someone else related to the program. After all, if the regulation didn’t have effects external to the agency, it wouldn’t mitigate any significant environmental impacts.

The Department also argued that the mitigation measures were exempt from the California APA as the only legally tenable interpretation of existing law.\textsuperscript{110} It pointed to several statutes and regulations related to the environmental impacts of fish stocking and argued that the mitigation measures were the only way to reconcile all of these obligations.\textsuperscript{111} The Department’s argument was not a traditional argument for the exemption. It did not, for instance, argue that any of the mitigation measures were expressly compelled by any statute or regulation.\textsuperscript{112} Instead, it made a practical argument; the mitigation measures were required for

\textsuperscript{110} See id. at 262.

\textsuperscript{111} See id. at 262-63; see also 16 U.S.C. § 1531 et seq. (Endangered Species Act); Cal. Fish & Game Code § 2301(a); Cal. Code Regs., tit. 14, § 671; Cal. Code Regs., tit. 14, § 238.5.

the Department to satisfy its obligations under CEQA and a web of other statutes and regulations.\textsuperscript{113}

This argument too, if successful, would have exempted many, if not all, underground regulations from the California APA. An agency would only have to point to CEQA’s obligation to mitigate environmental impacts and any other relevant statutory or regulatory restrictions then assert that the mitigation measures are the only means the agency has found to navigate that thicket.

One potential consequence of this argument would be to shift the burden of persuasion from the agency to the plaintiff challenging the underground environmental regulation. The Department’s argument implies that the challenger must articulate some alternative regulation that would comply with existing laws.\textsuperscript{114}

The Court of Appeal was not persuaded, however. Instead, it reaffirmed that the exemption only applies to regulations that are patently compelled by existing law or regulation, such that the interpretation is essentially rote or ministerial.\textsuperscript{115} The mitigation measure imposing monitoring and reporting requirements for invasive species was not compelled by a statute forbidding the possession or

\textsuperscript{113} See id.

\textsuperscript{114} See id.

transfer of those species and requiring any species found to be reported to the Department. Though the mitigation measure might be the most practical means of enforcing this requirement, it is not the only legally tenable way to do so. The court similarly rejected the application of the exemption to an evaluation protocol for private fish stocking permits. Though several laws restricted private stocking and the Department’s permitting decisions, the particular protocol contained in the underground regulation was not set out in any of them.

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

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116 See Center for Biological Diversity, 234 Cal. App. 4th at 262; see also Cal. Fish & Game Code § 2301(a); Cal. Code Regs., tit. 14, § 671.


118 See Center for Biological Diversity, 234 Cal. App. 4th at 264.

119 See id.; see also Cal. Code Regs., tit. 14, § 238.5.
IV. What are the consequences of prohibiting underground environmental regulations?

The prohibition against underground environmental regulations is likely to be deregulatory over all, consistent with the California APA’s purpose. Three changes will be responsible for most of this deregulatory effect. First, the California APA, unlike CEQA, requires agencies to address all consequences of their regulations, not just environmental ones. The public will have an opportunity to raise more issues in the promulgation process, including the costs and burdens associated with mitigation measures. And the agency will be forced to grapple with these impacts.

Under CEQA, agencies give little consideration to the costs of mitigation. So long as mitigation measures are “feasible,” they can be imposed. Under this

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120 See Cal. Gov’t Code § 11340 (legislative findings of “an unprecedented growth in the number of administrative regulations” which are “frequently unclear and unnecessarily complex” and “confusing to the persons who must comply,” resulting in an “unnecessary burden on California citizens,” “discourage[ing] innovation, research, and development of improved means of achieving desirable social goals.”).

121 See notes 68-74 and accompanying text.

122 Cal. Gov’t Code § 11346.9(a)(3).


feasibility standard, however, agencies do not carefully weigh the costs and benefits of regulation. A mitigation measure is “feasible” if it is capable of being accomplished in a reasonable time. A mitigation measure that costs $10 for every $1 of environmental benefit is feasible, but not advisable. In fact, agencies have little incentive to consider efficiency, since CEQA imposes no obligation to respond to comments criticizing compliance costs.

The obligation to consider and respond to public concerns about the costs and other burdens of underground environmental regulations is likely to lead agencies to behave more rationally, by reducing the risk that regulations will be imposed that impose substantial costs with meager benefits. This is also likely to change how mitigation measures are expressed, by encouraging performance standards over prescriptive standards.

Second, the California APA will require regulatory mitigation measures to be reviewed by the Office of Administrative Law. According to Asimow, this is a

125 See id.
128 Cf. Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015) (“One would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.”).
129 Cal. Gov’t Code § 11340(d).
130 Cal. Gov’t Code §§ 11349.1, 11349.3.
significant check, and may explain why so many agencies have adopted underground regulations.\textsuperscript{131} This review requires agencies to demonstrate that mitigation measures are necessary, statutorily authorized, clear, and not duplicative.\textsuperscript{132} Under CEQA, no independent agency reviews the data and policy arguments to determine whether the new regulation is necessary. Instead, only the agency that will exercise this authority – which has little incentive to keep its own power in check – considers that question.\textsuperscript{133}

Finally, if appeals to the agency and Office of Administrative Law fall on deaf ears, anyone can obtain judicial review of the rationale behind the regulation. Although judicial review in a challenge to an agency’s weighing of a regulation’s costs and benefits is deferential, something is better than nothing. Under CEQA, one cannot challenge a mitigation measure on the grounds that it does not satisfy cost-benefit analysis.\textsuperscript{134}

\textit{Center for Biological Diversity} may be a somewhat unique case. The private stocking permit program is ministerial – if the permit is consistent with the valid

\textsuperscript{131} Asimow, supra note 48, at 55-62.

\textsuperscript{132} See Cal. Gov’t Code § 11349.1(a).


regulations governing the program, the Department must grant it.\footnote{Cal. Code Regs. tit. 14, § 238.5.} As a consequence, the invalidation of the underground regulations allows the program to continue as it had before their illegal adoption. Thus judicial recognition of underground environmental regulations was clearly deregulatory in that case.

However, judicial recognition of underground environmental regulations can also come with some costs, particularly where the program is not ministerial. Failure to implement mitigation imposed under CEQA can result in an injunction against further implementation of the program.\footnote{See Laurel Heights Improvement Assn. v. Regents of University of California, 47 Cal. 3d 376, 423 (1988) (traditional equitable principles guide the decision whether to enjoin a project while an agency corrects CEQA errors).} By requiring agencies to jump through additional procedural hoops before implementing mitigation measures, those affected by a program may experience additional uncertainty and delay, and associated costs.\footnote{CEQA’s procedures alone already impose substantial delay and costs on participants. See Varner, supra note 6, at 1483-85.} Depending on the program, this may be extremely important. If the program is the permitting of a time-sensitive activity, a delay of a few months may set the program back much longer. For instance, farmers who must plant and fertilize their crops at a particular time of year may lose out on an entire crop if the state cannot permit the use of fertilizers while it formally promulgates
Similarly, uncertainty can be quite taxing on program participants. Industries that must make investments in anticipation of future regulation, for instance, face the prospect of wasting investment in safeguards if the formally promulgated regulation differs substantially from what was anticipated in the environmental impact report.\textsuperscript{139}

At first blush then, prohibiting underground environmental regulations may increase the risk that a program will have to be suspended during the period between the recognition of significant environmental impacts and the promulgation of a regulation under the California APA. In the recent environmental impact report analyzing fracking throughout the state, for instance, the Department of Conservation concluded that it could not finalize and implement several mitigation measures because they would constitute underground environmental regulations.\textsuperscript{140}


\textsuperscript{139} \textit{N.b.} that this is true regardless of whether the regulation ultimately adopted is more burdensome or less than what was expected. Any change that would make past investments inefficient would have these impacts. Industries that stand to lose significant amount from such changes are likely to delay making these investments, exacerbating the delay problem.

Consequently, only those mitigation measures that do not constitute regulations will be implemented until formal regulations can be adopted. 141 Fortunately, that environmental impact report was prepared pursuant to a specific piece of legislation and, it appears, that delay will not translate into a moratorium. 142 If not, it’s likely the state’s economy would have been substantially effected, as fracking – which is responsible for 20% of the oil produced in the state 143 – would have stopped until those regulations could be adopted. This translates into about 40 million barrels, 144 worth approximately $160 million. 145

141 See id.


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

One potential option to reduce this risk is to frame the mitigation measure as a requirement that the agency adopt a particular regulation on an emergency basis, while it pursues formal adoption of permanent regulations. The California APA allows state agencies to impose emergency regulations immediately, for up to 180 days, if necessary to avoid serious harm to the public peace, health, safety, or general welfare. Such regulations can be readopted for up to two additional 90-day periods. This approach could give an agency up to six months to formally promulgate the regulation. Although this procedure is designed to allow agencies to

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148 Cal. Gov’t Code § 11346.1(h).
proceed while complying with California APA’s procedures, this time may be insufficient for the agency to complete that process if the regulation is complex or significantly affects stakeholders. The agency might also be challenged under CEQA on the grounds that, because the emergency regulation is only temporary, the mitigation is not “fully enforceable.” It might also be challenged under the California APA if the mitigation measure effectively pre-commits the agency to adopting a particular regulation.

A better approach would be to acknowledge in the environmental impact report that the agency cannot impose requirements absent formal regulations – which prevents the agency from fully mitigating the impacts of the program – and adopting a statement of overriding consideration to allow the program to continue while the agency separately promulgates regulations. If delaying or temporarily suspending implementation of the program would result in substantial adverse impacts to the state, its industries, or program participants, CEQA does not require the agency to accept those consequences.\(^{149}\) Rather, the agency may allow the program to proceed if economic, legal, social, technological, or other considerations make mitigation unfeasible and “specific overriding economic, legal, social,

technological, or other benefits of the project outweigh the significant effects on the environment.”\textsuperscript{150}

In the suction dredge mining environmental impact report, for instance, the Department of Fish & Wildlife concluded that it did not have statutory authority to impose some measures required to fully mitigate the impacts of this mining.\textsuperscript{151} By statute, the agency is limited to regulating suction dredge mining to ensure that it is not deleterious to fish.\textsuperscript{152} Consequently, it forthrightly acknowledged that there were some environmental impacts that it could not feasibly mitigate, in light of its limited statutory authority.\textsuperscript{153} Having regulated all of the impacts that it could, the Department found that overriding economic, legal, social, and other benefits outweigh the remaining impacts.\textsuperscript{154} Suction dredge mining is something of a unique case, however, because the state legislature has imposed a permanent moratorium on the use of suction dredges until regulations fully mitigating their impacts can be finalized, which will require additional legislation.\textsuperscript{155}

\begin{itemize}
\item \textsuperscript{150} Cal. Pub. Res. Code § 21081.
\item \textsuperscript{151} See Suction Dredge EIR, supra note 78.
\item \textsuperscript{152} Cal. Fish & Game Code § 5653(b).
\item \textsuperscript{153} See supra note 81 and accompanying text.
\item \textsuperscript{155} See supra note 81 and accompanying text.
\end{itemize}
In the lion’s share of cases where delay in implementing a program would unduly burden the state or program participants, an agency should easily be able to satisfy the standard for adopting a statement of overriding consideration under CEQA. First, the agency must show that full mitigation is infeasible. The agency could find that the California APA’s prohibition against underground environmental regulation is a “specific … legal … consideration” that makes imposition of such mitigation measures infeasible. This legal consideration is not that different from the Department of Fish and Wildlife’s conclusion that the suction dredge mining mitigation measures were infeasible because it lacked statutory authority to enforce them. In either case, the law forbids the agency from imposing the identified mitigation measure, rendering enforcement infeasible.

Next, the agency would have to determine whether “specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment.” Such decisions are reviewed deferentially because balancing these policy considerations “lies at the core of the lead agency’s

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discretionary responsibility under CEQA and is, for that reason, not lightly to be overturned.”

So long as the agency demonstrates that it considered all of the benefits of the program and its impacts, and the decision is supported by substantial evidence, it will be upheld. The agency's decision could be based on a statutory duty to implement the program, if there is one, the economic consequences of delay, the distributional consequences of delay, particularly if the program affects poor or underserved communities, or any other legitimate policy grounds that counsel in favor of continuing to implement the program while the agency separately pursues the adoption of new regulations.

One of the chief benefits of this approach is that it would not prejudice the agency's ability to separately adopt emergency regulations or formally promulgate permanent regulations. Nor would it bind the agency's hand if, during the process of promulgating those regulations, the agency discovered that the regulation was ill advised or there were unforeseen alternatives that more efficiently mitigate the program's impacts. This is precisely why the California APA mandates the procedures it does. Regulated parties have access to greater information about the


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consequences of regulations and every incentive to bring those to light. Government bureaucrats, on the other hand, may only be able to speculate about the consequences of their regulations, particularly if those consequences are outside their area of expertise.

**Conclusion**

Judicial recognition of the California APA’s application to regulations adopted in CEQA documents should be a welcome result for individuals and businesses regulated by or participating in state programs. The prohibition against underground environmental regulations means that agencies cannot impose burdensome new requirements without first opening them up to full notice and comment and review by the Office of Administrative Law. At a minimum, this will ensure that agencies must acknowledge and address the broader impacts of such mitigation measures, rather than only considering their environmental impacts.

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