Every August, as the California legislative session comes to a head, lobbyists attempt to gain support for dramatically scaling back California's landmark environmental law, CEQA (the California Environmental Quality Act). This year was no exception. Last month, the law firm Holland and Knight, which has been a leading force on this issue, issued a new report designed to gain support for dramatic changes to the law. The report assembles a nearly-complete census of virtually all CEQA cases filed in California trial courts during the three-year period 2010 through 2012, and concludes—in heavy-handed rhetoric—that CEQA is typically not used to protect the environment, but actually harms the environment (and the economy). But despite the impressive quantity of data amassed for the report, my major takeaway is that the report's own dataset (in Appendix A of the document) does not support its conclusions. This report should not be used to inform future policy.

CEQA requires local governments and state agencies to study, understand, and consider the environmental impacts of projects before they approve them. It also requires government agencies to mitigate significant environmental impacts to the extent feasible. CEQA has done a lot of good over the years, increasing dramatically our knowledge of environmental challenges and requiring mitigation for most of the significant impacts caused by new development and industry over the past 40 years. On the other hand, application of the law sometimes has negative unintended consequences, such as providing a way for businesses to attack competitors to gain advantage. But those cases shouldn't be used to take the heart out of the law, which is exactly what many of the legislative proposals floated in the last several years would do. While no major changes to the law were approved this year, we can expect the same issue to come back again and again.

Holland and Knight partner Jennifer Hernandez, the primary author of the report, has devoted much of her recent career to advocating major changes in CEQA to make it easier to build new projects. She has argued forcefully that CEQA does far more harm than good, and her advocacy has been influential over the past several years. I largely disagree with Jennifer about CEQA's merits, but I enjoy engaging with her about it. Unfortunately, this report, which has been widely covered uncritically in the media, makes claims that are not supported by the data. (I'll note also that my colleague Ethan Elkind has criticized the validity some of Holland and Knight's prior CEQA-related claims.)

Below, I review a central claim of the new report: that the evidence demonstrates that CEQA is disproportionately used to attack projects that have environmental

benefits. This claim relies on three specific assertions: (1) CEQA lawsuits disproportionately are aimed at infill development projects that contribute to higher-density communities that achieve environmental benefits and relieve housing demand, reducing our ability to provide infill housing. (2) CEQA lawsuits often target transit systems that likewise contribute to environmental quality and reduce carbon emissions, reducing our ability to develop mass transit. And (3) CEQA lawsuits often target renewable energy projects, especially solar energy, that is needed to replace fossil fuels to meet our state's energy needs, reducing our ability to develop renewable energy capacity.

The report's claim that it provides empirical evidence to support these three assertions underpins its ultimate conclusion that CEQA is bad for the state. These assertions have also provided a central theme to media coverage of the report. The report's credibility thus stands or falls in large measure on the report's ability to support these claims with specific empirical evidence. Upon close review, the report does not succeed.

- Infill:

The report concludes that "CEQA litigation overwhelmingly targets 'infill' development that accommodates population and economic growth that would otherwise spill into undeveloped exurban areas." [p.12] But that conclusion is the product of an absurdly overinclusive definition of "infill." The report defines infill projects as "private and public sector projects located entirely within one of California's 482 cities, or located immediately adjacent to existing developed areas in an unincorporated county." The report's analysis of CEQA's impact on infill development is thus so flawed as to be useless.

Yes, you read that correctly: **this report considers any project, of any type, located within the boundaries of any California city, or next to development outside a city, to be an "infill project."** Under this definition, it is unsurprising that most CEQA cases would involve "infill." In fact, it would be surprising if any significant number did not!

Importantly, the definition is not tethered to any metric that would correlate it with transit-oriented development, higher-density development, lower energy and lower water-consuming projects, or any other proxy for "helping the environment." Because every municipal entity in California is, by definition, an incorporated "city" to the limit of its geographic boundary, the definition includes no filter that would

link it to environmentally-friendly attributes (or to anything else).

Unsurprisingly, the definition includes projects that virtually no one would recognize as "infill" under any common definition. For example, this Wal-Mart in Milpitas appears to be classified as "infill," along with several other Wal-Mart projects. So is Chandler Ranch, a new development in suburban Rolling Hills Estates that includes 114 single-family luxury homes plus a new golf course and clubhouse for the Rolling Hills Country Club. Moreover, some "infill" projects clearly do not provide benefits to their communities. The Bradley Landfill site, the subject of Comunidad en Accion v. Los Angeles City Council, is a waste management site in the middle of a poor Latino community. And another "infill" case, City of Irvine v. County of Orange, involved the expansion of a jail, partially on agricultural land, from 1200 inmates to 7,584 inmates. Many of the "infill" projects are industrial facilities, including asphalt and cement plants. The data presented just don't support the idea that CEQA cases mostly target projects that support environmentally-sound development that is good for communities. The fact that projects challenged under CEQA are mostly located within the geographical boundaries of cities simply doesn't prove anything.

Moreover, the claim that CEQA is responsible for insufficient infill housing is at odds with serious studies of our economy, as well as the views of many land-use planners. A recent study by the Governor's Office of Planning and Research revealed that very few local government planners consider CEQA the primary barrier to infill development, and even fewer cited "lawsuits." (See p. 24 at the link). Lack of adequate infrastructure and other factors were far more significant. And although there are many factors that have limited our housing supply over time, it isn't clear that there is a particular crisis today in infill housing. The 2015 Allen Matkins/UCLA Anderson Forecast California Commercial Real Estate Survey, a leading annual publication issued just last month, says that "multi-family construction will achieve a 25-year high during the next three years" and notes that "[t]hough overall residential construction has remained at depressed levels in the state, multi-family construction has rebounded sharply." California's housing supply and demand, as well as financing, are affected by many factors, and CEQA is just one.

Bottom line: the Holland and Knight report doesn't shed any light on whether CEQA discourages infill development, and if so, how much of a problem that is. I have heard anecdotally from infill developers that CEQA has been a problem for them (albeit one challenge among many they face). That might be so, but this report doesn't add helpfully to the conversation about it.

- Transit:

The report also concludes that "[t]he most commonly targeted type of public infrastructure project was transit systems." [p.6] According to the report, "[t]ransit projects attracted the highest number of CEQA lawsuits during the study period. Transit systems in the Los Angeles region were particularly targeted, notwithstanding legal mandates to establish and improve transit services to reduce traffic congestion, improve ambient air quality, and reduce greenhouse gas emissions." [p.43] The report implies that transit development has been hampered by CEQA.

I am skeptical of the value of looking at sheer numbers of lawsuits in evaluating the role of CEQA here. But since the report does that, it's worth a response. Based on the published data contained in the report (in Appendix A), just twelve transit project approvals – at most – were challenged over the three-year period. (It is likely that the total number of challenged projects is somewhat less than that, in reality. The dataset is confusing and possibly incorrect in its coding of these projects; one of the lawsuits coded as "transit" actually involved a paint and body industrial facility serving transit lines, rather than a transit project. The use of CEQA to ensure that an industrial facility in an urban neighborhood doesn't harm public health seems quite reasonable, and not truly a challenge to a "transit" project. At least one other, Los Angeles County Regional Park and Open Space District, et al. v. City of Whittier (2011), seems based on the context likely to not actually have been a transit-related lawsuit at all; the case name is the same as other cases challenging an oil drilling project in Whittier.)

Legal challenges to three or four transit projects per year in a state the size of California does not constitute a crisis in litigation. And more importantly, mass transit is going forward. Where I live in Los Angeles, the impediments to rail transit have been mostly political (as documented by my colleague Ethan Elkind in his recent book), not legal. And even so, the city has dramatically increased rail transit over the past 25 years and will continue to do so into the future, including expansion of the Purple Line and the completion of the Expo Line. CEQA has not stopped our transit system from growing. And whatever the impact of CEQA may be on transit, this report's conclusions do not shed light on the issue.

- Renewable Energy

Finally, the report emphasizes the idea that solar and wind energy projects were

disproportionately targeted by lawsuits. For example, it says that "[t]he second-largest category of greenfield development lawsuits targeted new renewable energy facilities, such as solar plants" [p.17], and refers to the "high percentage of renewable projects in the Southern California desert that were threatened or sued under CEQA." It also asserts that "CEQA, which in its heyday was used to challenge nuclear plants, coal-fired plants and plants burning hazardous waste or garbage, is now used most frequently to challenge solar and wind renewable energy projects—precisely the 'green' projects that are most critical to meeting California's climate change reduction mandates." [p.52] But the report's published data do not support the conclusion that CEQA litigation is frequently filed against renewable energy projects, nor that it is preventing the state from meeting its renewable energy goals.

Holland and Knight's published dataset in Appendix A of its report indicates that over the three-year study period, just five solar projects and two wind projects were challenged under CEQA. And one of the two wind projects was approved originally based on a categorical exemption, so no CEQA documentation was prepared at all. It is unsurprising that such an exemption would be the basis of a lawsuit. (A settlement on that project required withdrawal of the approval based on the categorical exemption, with the lead agency agreeing to "vacate its determinations that the permits are categorically exempt from CEQA." Approving a wind energy project under a CEQA exemption seems to me a rather audacious move.)

Overall, renewable energy generation is growing rapidly in the state. Prominent California energy policymakers recently noted that "California leads the pack with the share of electricity from renewable sources, more than doubling from 12% in 2008 to 25% today." There is no question that we are on track to meet our renewable energy mandates. Renewable energy projects, including massive ones such as the massive Ivanpah solar thermal project near the Nevada border, are moving forward – some with improvements as a result of the CEQA process. To be sure, there are legal impediments and regulatory hurdles that affect the development of renewable energy projects. But CEQA is not the only such impediment, nor the most serious one. And scrutiny of the the environmental tradeoffs involved in placing large facilities in environmentally-sensitive areas is generally warranted. Regardless, as with the other issues discussed above, this report does not provide insight into the relationship between CEQA and renewable energy siting and development.

CEQA is a bogeyman. While the law is not perfect and sometimes doesn't work as

well as it might, the evidence in this report doesn’t appear to support claims that it is seriously hampering our attainment of environmental goals. Attempts to change the law shouldn’t be based on incorrect or misleading empirical claims.