

2020

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Repository Citation

Caleb Tomaszewski, *Stadium Development: Special Treatment From Special Legislation*, 30 Marq. Sports L. Rev. 415 (2020)

Available at: <https://scholarship.law.marquette.edu/sportslaw/vol30/iss2/7>

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STADIUM DEVELOPMENT: SPECIAL TREATMENT FROM SPECIAL LEGISLATION

CALEB TOMASZEWSKI*

INTRODUCTION

At the time this comment was written, one was able to watch a twenty-four-hour live-stream broadcast of the construction of the home for the soon-to-be relocated Oakland Raiders of the National Football League.¹ As the \$1.8 billion dollar Las Vegas stadium quickly rose into the desert sky, sports fans and especially local residents were possibly reminded of the special privileges stadium developers often receive from local and state governments.² While tax credits and the special funding a new stadium may receive are well documented and discussed,³ there is another recent trend that the public may not know as much about. This trend revolves around the use of special legislation to allow stadium developers to bypass or expedite a state's environmental review process for a specific development.

Nowhere is this more apparent than in the future Las Vegas Raiders neighboring state of California in which the California Environmental Quality Act (CEQA) is frequently discussed in special legislation for stadium developments. What started as a one-time special legislation in 2009 for a potential stadium development that hoped to bring the National Football League back to Los Angeles, the California State Legislature has since enacted

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1. *Live Stadium Cam*, LAS VEGAS RAIDERS, <https://www.raiders.com/lasvegas/live-stadium-camera> (last visited Apr. 24, 2020).

2. Bryan Horwath, *\$1.8 billion Raiders Stadium Draws Praise From Las Vegas to Indianapolis*, LAS VEGAS SUN, Feb. 28, 2019, <https://lasvegassun.com/news/2019/feb/28/18-billion-raiders-stadium-draws-praise-from-las-v/>.

3. See Frank A. Mayer III, *Stadium Financing: Where We Are, How We Got Here, and Where We Are Going*, 12 VILL. SPORTS & ENT. L. J. 195 (2005).

numerous special legislations for stadium development. These special legislations are not exclusive to the development of football stadiums but have been implemented for other professional sports arenas as well.⁴ In September of 2018, the Los Angeles Clippers of the National Basketball Association received special legislation for the development of their proposed arena in Inglewood, California.⁵ Further up the California coast, the Oakland Athletics of Major League Baseball are rumored to follow the recent trend and seek special legislation that will help hasten the permit process required for a proposed new ballpark to replace the Oakland Coliseum.⁶ These special legislations by the California State Legislature will allow developers to bypass or expedite the required environmental review process established in the state's environmental quality act.

While California is in the headlines for special legislation and stadium development, they are not alone in passing these special legislations for stadium developments to expedite the environmental process faced when developing. This comment intends to analyze these special legislations that bypass a state's State Environmental Protection Act (SEPA), which is called the CEQA in California, and examine what the potential risks associated with these special legislations are. It is the duty of the stadium developer to consider the complexities associated with stadium developments and what potential harms can arise if special legislation alters the required environmental impact statement process.

This comment is broken down into three parts. Part I will examine the background material necessary understanding why stadium developers seek these special legislations in the first place. This part will examine the National Environmental Policy Act (NEPA) and its general implications and impacts it has had on developments. Next, this part will examine the more local State Environmental Protection Act or SEPA. While a SEPA, the CEQA will be examined specifically due to its groundbreaking importance and connection to contemporary special legislations. Lastly, this part will then examine the Environmental Impact Statement (EIS), a report in which each of these previous

4. See Doug Smith and Dillon, *Fast Break for Clippers arena: Bill putting time limit on environmental challenges sails through*, L.A. TIMES Sep. 1, 2018, <https://www.latimes.com/local/lanow/la-me-ln-clippers-ceqa-bill-20180901-story.html>; See generally Nathan Fenno, *Fight Intensifies Over Proposed Arena for Clippers in Inglewood*, L.A. TIMES Dec. 8, 2018, <https://www.latimes.com/sports/sportsnow/la-sp-clippers-arena-inglewood-20181207-story.html>; see also Phil Matier, *A's Ballpark Proposal Encounters Choppy Waters*, S.F. CHRONICLE, Feb. 17, 2019, <https://www.sfchronicle.com/bayarea/philmatier/article/A-s-ballpark-proposal-encounters-choppy-waters-13621540.php>

5. Fenno, *supra* note 4.

6. Matier, *supra* note 4.

acts require and a lightning rod for legal challenges. An EIS may also be called an Environmental Impact Report (EIR) but EIS will be used in this comment.

Part II will examine past special legislation incidents as well as current special legislations that have been passed or expected to be proposed. By examining the past incidents in comparison to the modern proposed special legislations, one can see the development in the implication of such special legislations. This part will be California heavy in examination due to the amount of stadium development California has experienced in recent decades. This development, coupled with the one of the nation's strictest SEPAs, has led to these special legislations taking center stage. Throughout this part, the liability associated with these special legislations and development will be examined along with the environmental complexities that arise in such developments. Lastly, Part III will look towards the future and the efforts being made in stadium developments to work within environmental requirements instead of through expedited processes such as special legislation.

PART I: THE TECHNICAL BACKGROUND INFORMATION

Why do stadium developers seek special legislation? This part will answer this question by providing a general background of some of the environmental processes involved in stadium development. In this comment, special legislation refers to bills enacted by a state's legislative body to generally help a stadium development in addressing environmental challenges it will face in its construction. Special legislation can include permission for an expedited permit system as the new Oakland Athletics ballpark may seek.⁷ Predominantly though in this comment, special legislation will be used to help expedite the challenges a development may face in regards to an environmental impact report or EIS. This can be seen in the special legislation passed for the proposed Inglewood, California arena for the Los Angeles Clippers.⁸

The number of recent stadium developments are directly related to the ever-increasing popularity of the sports industry. Over the last fifty years, professional sports have grown in popularity to become a \$435 billion a year industry.⁹ This growing popularity in professional sports has called for the need for even larger and ambitious stadiums, arenas and ballparks. In that same time span, the three largest professional sports leagues in North America, National Football League (NFL), Major League Baseball (MLB) and the National Basketball Association (NBA) have accounted for the construction of over sixty

7. *Id.*

8. Fenno, *supra* note 4.

9. Thomas J. Grant, Jr., Comment, *Green Monsters: Examining the Environmental Impact of Sports Stadiums*, 25 VILL. ENVTL. L.J. 149, 149 (2014).

new developments,¹⁰ such as the Las Vegas stadium for the relocated Las Vegas Raiders. These numbers demonstrate the growth in the professional sports industry and the call for newer, more modern stadiums. To provide the background information needed for this comment, this next part will progress from the national level down to the local, state level.

A. *The National Environmental Policy Act*

The National Environmental Policy Act (NEPA) was signed into law by President Nixon in 1970.¹¹ At the heart of NEPA is the requirement that federal agencies must conduct an environmental impact statement (EIS) for the development of any project they initiate or support in accordance with NEPA and the Environmental Protection Agency's (EPA) guidelines.¹² NEPA in essence strives to install environmental values into government agencies.¹³ Under NEPA, federal agencies must prepare an EIS on the environmental impact of the proposed action, and the uses of the environment in short term activities in relation to the maintenance and upkeep of any long-term activities.¹⁴ NEPA and the required EIS apply in the event of any agency action significantly affecting the quality of the environment.¹⁵ This government action may take the form of federal money being used for a devolvement or the issuance of an environmental permit, such as a Clean Air Act (CAA) permit.¹⁶ When NEPA was enacted it did not impose any new substantive requirements, but rather, it required federal agencies to give "appropriate consideration" to environmental effects while making a decision on developments.¹⁷ NEPA has been influential in the drafting of nineteen State Environmental Protection Acts (SEPA) as well as similar legislation in over 100 countries.¹⁸ In the context of stadium development, NEPA applies when a federal agency is involved either in the receipt of federal funds by the development or the issuance of an environmental

10. *Id.*

11. 42 USC §4332 (NEPA); J.B. RUHL, ET AL., *THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW* 472 (4th ed. 2017).

12. Kathryn C. Plunkett, Comment, *Local Environmental Impact Review: Integrating Land Use and Environmental Planning Through Local Environmental Impact Reviews*, 20 PACE ENVTL. L. REV. 211, 211 (2002).

13. *Id.*

14. RUHL ET AL., *supra* note 11, at 472.

15. *Id.*

16. *Id.* at 473.

17. Catherine J. LaCroix, Comment, *State and Local Efforts to Restrict or Prohibit Select Corporations from Operating Within Their Borders: SEPAs, Climate Change, and Corporate Responsibility: The Contribution of Local Government*, 58 CASE W. RES. L. REV. 1289, 1294 (2008).

18. RUHL ET AL., *supra* note 11, at 472.

permit.¹⁹ Given the nature and size of stadium developments, federal permits and receipt of funds will be a likely possibility.

B. State Environmental Protection Acts (SEPA)

While stadium developments will most likely have fallen under NEPA in the event of a federal agency action, the development will also have to be in compliance with the local state environmental protection act or SEPA. SEPAs largely draw their inspiration from NEPA.²⁰ These SEPAs range in nature and complexity based on the state they are implemented in. SEPAs may be broad enough to address impacts of large developments that local governments approve such as water pollution, air quality, and climate change.²¹ In the same vein as NEPA bringing environmental concerns to federal agencies, SEPAs bring environmental considerations to local governmental decision makers on the state and local levels.²² SEPAs behave in the same manner as NEPA in that a state agency action is required. Each state has implemented some form of SEPA such as CEQA in California or the Wisconsin Environmental Protection Act (WEPA) in Wisconsin.²³

C. California Environmental Quality Act (CEQA)

Due to the amount of stadium development that is happening in California, an individual look into California's SEPA would be beneficial. Shortly after the implementation of NEPA in 1970, California became one of the first states to implement its own SEPA and CEQA was passed by the state's legislature.²⁴ CEQA is arguably the most important law governing land-use planning in California.²⁵ This is demonstrated in the landmark 1972 California case, *Friends of Mammoth v. Board of Supervisors of Mono County* in which the California Supreme Court ruled that CEQA applies to local government approvals for private developments.²⁶ The majority reasoned that the exclusion of private

19. *Id.* at 473.

20. LaCroix, *supra* note 17, at 1293.

21. *Id.* at 1291.

22. *Id.* at 1293.

23. See *Wisconsin Environmental Policy Act (WEPA)*, WIS. DEP'T OF NAT. RESOURCES, <https://dnr.wi.gov/topic/EIA/WEPA.html> (last updated May 15, 2019).

24. *CEQA: The California Environmental Quality Act*, CAL. NAT. RESOURCES AGENCY, <http://resources.ca.gov/ceqa/> (last visited Apr. 24, 2020).

25. Plunkett, *supra* note 12, at 223.

26. *Friends of Mammoth v. Bd. of Supervisors of Mono Cty.*, 502 P.2d 1049 (Cal. 1972).

developments would be inconsistent with the legislative intent behind the enactment of CEQA. .27

California's CEQA is widely considered one of the toughest SEPA's in the nation and this has caused concerns for recent stadium developments.. CEQA is triggered when a potential development that contains either certain natural or manmade conditions, would significantly affect an area, either directly or indirectly. 28 In addition, CEQA must also identify the effects it might have on the environment in question and identify potential alternative versions of the project that then must be taken into account as a possible mitigating factor.29 These mitigating factors may then be required if they are determined to be feasible.30 Ultimately, a project subject to CEQA must show that "specific economic, legal, social, tech, or other benefits" of the project outweigh the unavoidable adverse environmental effect of the proposed development.31

The specific criteria and processes a stadium development are subject to before construction may even begin to take place highlights the reason why developers have turned to the California Legislature to pass special legislations that shortens the timeline for potential challenges arising from CEQA. These potential challenges have presented an internal problem for CEQA as well. CEQA faces a problem in that its own vagueness in application has allowed for numerous challenges in court.32 CEQA, as a process in general, has garnered support throughout the nation. In terms of environmental legislation, CEQA is largely seen as a watershed piece of environmental legislation that a state can implement and has been approved by the highest court in the land.33 In 2002, the Supreme Court in *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency* ruled in favor of CEQA and the delays it imposed to ensure the protection of Lake Tahoe.34 CEQA is a necessary hurdle that stadium developers have to address when building in California.

27. *Id.* at 1060.

28. LaCroix, *supra* note 17, at 1298.

29. *Id.*

30. *Id.*

31. *Id.* at 1299.

32. See Katherine V. Mackey, *Reforming "The Blob:" Why California's Latest Approach to Amending CEQA is a Bad Idea*, 39 COLUM. J. ENVTL. L. 357, 374-375 (2014).

33. See *id.*, at 359 (discussing the vast economic impact CEQA has had on California and the rest of the nation).

34. See *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

D. Environmental Impact Statement (EISs)

What links NEPA, SEPA's and CEQA to one another and proves to be a hurdle for developers in general is that each of the environmental protection plans require an EIS to be conducted before construction can even begin. An EIS is required when "federal agency actions [may] significantly affect[] the quality of the human environment."³⁵ Though only pertaining to projects that utilize federal money or federal agency action such as granting a permit, NEPA's guidelines in 42 U.S.C. § 4332 for an EIS generally relate to the guidelines in states' SEPA's as they were modelled after NEPA.

Though a surprisingly short statute in general, 42 U.S.C. §4332 (NEPA) provides a list of five provisions that must be included in the prepared EIS.³⁶ The first is unsurprising in that the environmental impact of the proposed action must be included.³⁷ The second is that the EIS must identify any adverse environmental effects that cannot be avoided if the proposed action would go ahead as planned.³⁸ Third, alternatives to the proposed action must be considered.³⁹ This third point is interesting in that the listed alternatives to the action in the EIS can be a point to challenge an EIS report in that it did not examine enough or the correct alternatives. This aspect of an EIS has been the focal point of several cases and the courts have ruled that to satisfy this point an alternative must be "reasonable" and that the agency has to only consider it.⁴⁰ Fourth, the "relationship between local and short-term uses of man's environment and the maintenance and enhancement of long-term productivity" must be considered in an EIS.⁴¹ Lastly, "any irreversible and irretrievable commitments of resources which would be involved in the proposed action" must be considered.⁴²

These five short requirements produce documents for some developments that number in the thousands of pages and lead to expensive, hard fought legal battles before construction has even begun on the development. One such EIS required under CEQA was over 10,000 pages long.⁴³ The actual process of

35. RUHL ET AL., *supra* note 11, at 472.

36. 42 U.S.C. § 4332(C) (2019).

37. 42 U.S.C. § 4332(C)(i) (2019).

38. 42 U.S.C. § 4332(C)(ii) (2019).

39. 42 U.S.C. § 4332(C)(iii) (2019).

40. *See Simmons v. United States Army Corps of Eng'rs*, 120 F.3d 664 (7th Cir. 1997); *see also*, *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178 (10th 2013).

41. 42 U.S.C. § 4332(C)(iv) (2019).

42. 42 U.S.C. § 4332(C)(v) (2019).

43. Mackey, *supra* note 32, at 378. *See also*, FARMERS FIELD, FARMERS FIELD ENVIRONMENTAL IMPACT REPORT (2012), https://cityplanning.lacity.org/EIR/ConventionCntr/DEIR/files/NOA_English.pdf /.

implementing these requirements into an EIS in California under CEQA is a daunting, tedious task in and of itself. First there must be a preliminary study that analyzes: the environmental impact of the development, the environmental impact of the construction process, alternatives to the proposed action, expert opinions, expected consumed resources and other relevant EIS'S and impacts.⁴⁴ Next, there is a “notice of preparation period” that informs other California agencies of the proposed action asking for their input on what should be considered in the EIS.⁴⁵

After this preliminary study is conducted and the other agencies have been heard, a draft EIS is released to the public for comment.⁴⁶ This draft EIS may be written by the agency, a private entity or even by the party that requested the proposed action such as a stadium developer, though the lead agency must review the draft EIS before submission if it was done by outside of the agency.⁴⁷ After the draft EIS is submitted, it is available for public review and comment for at least thirty days.⁴⁸ Several methods of public notice may involve publication in the Federal Register, an agency’s website, the EPA’s EIS database, notices in the local newspapers or direct mailings to those effected.⁴⁹ This comment process allows the general public to be aware of the proposed action or development and become involved in the process.⁵⁰ This has led to numerous challenges as the comment process allows for the public to place their concerns on the record in consideration of the EIS, which may be a future point of litigation. This comment period is where the public can introduce the alternatives discussed above. After this notice period is concluded, the agency must evaluate the comments received and respond in a written statement that addresses the concerns received.⁵¹ A second statement must then be circulated that includes any “significant new information.”⁵² After these considerations from the public are heard, the agency may then produce a final EIS with the purpose of ensuring the public of any environmental consequences the proposed

44. Jeremy H. Danney, Comment, *Sacking CEQA: How NFL Stadium Developers May Have Tackled the California Environmental Quality Act*, 19 PENN ST. ENVTL. L. REV. 131, 134 (2011).

45. *Id.* at 136.

46. *Id.* at 137.

47. *Id.* at 137

48. *Id.*

49. *How Citizens Can Comment and Participate in the National Environmental Policy Act Process*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/nepa/how-citizens-can-comment-and-participate-national-environmental-policy-act-process> (last visited Apr. 24, 2020).

50. *See generally*, Council on Environmental Quality Executive Office of the President, *A Citizen’s Guide to the NEPA: Having Your Voice Heard* (December 2007), https://ceq.doe.gov/docs/get-involved/Citizens_Guide_Dec07.pdf.

51. Danney, *supra* note 44, at 138.

52. *Id.*

action may have and that the agency has done its due diligence in preparing for these consequences.⁵³

As demonstrated, the EIS process is daunting but essential part of the process that a developer must wade through. The California Supreme Court has addressed the size and scope of an EIS under CEQA and has attempted to provide some direction as to when an EIS must be written in the early stages of a development. In *Save Tara v. City of West Hollywood*, the California Supreme Court states that an EIS “must be written late enough in the development process to contain meaningful information, but they must be written early enough so that whatever information is contained can practically serve as an input into the decision making process.”⁵⁴ Though not entirely too specific, *Save Tara v. City of West Hollywood* remains the most detailed guideline for how the California Supreme Court will interpret CEQA and its guidelines.⁵⁵ The California Supreme Court’s guidelines demonstrate that an EIS must be done early enough in the development that it will actually have an effect on the construction of the development. This though adds on to the timeline of development and more importantly, the window for challenges directed towards the development when it is in its infancy.

While the EIS process can be long and expensive, the special legislation seen for recent developments has not focused on these aspects but rather the focus has been on the window for which challenges can be made.⁵⁶ This is because every part of the EIS may be challenged in court.⁵⁷ If a stadium development requires both an EIS under NEPA and an EIS under CEQA or another SEPA, both can be challenged in court. Most stadium developments are subject to both NEPA and a state’s SEPA due to the necessary involvement of local and federal agencies because of the typical size and expenses of such a development.

Though any part of an EIS can be challenged, two general challenges arise in relation to an EIS. The first is the sufficiency of the analysis in general.⁵⁸ While courts are reluctant to impose any set guidelines or mandatory scientific methodology, the courts want an EIS to use, as the Seventh Circuit states in

53. *Id.*

54. *Save Tara v. City of West Hollywood*, 194 P.3d 344, 35 (Cal. 2008) (quoting *No Oil, Inc. v. City of Los Angeles*, 529 P.2d 66, 71 n. 5 (Cal. 1974)).

55. *San Francisco 49ers*, Coblenz Patch Duffy and Bass LLP, <https://www.coblenzlaw.com/case-study/san-francisco-49ers/> (last visited Feb. 22, 2019).

56. Smith, *supra* note 4.

57. Mackey, *supra* note 32, at 361.

58. RUHL ET AL., *supra* note 11, at 504.

Sierra Club v. Martia, “high quality” science and “scientific integrity.”⁵⁹ The second challenge is the EIS’s analysis of the alternatives to proposed action as briefly mentioned above. Though the comment process an agency may receive numerous alternatives for the proposed action, the agency only has to consider those that are deemed “reasonable alternatives.”⁶⁰ After hearing these “reasonable alternatives,” the agency does not have to act on them, but rather only analyze them for their feasibility. This was the focus in *WildEarth Guardians v. National Park Service* in which the Tenth Circuit heard a case involving the National Park Service having to produce an EIS when trying to figure out how to address the management of the elk population.⁶¹ The National Park Service considered an alternative action which would reintroduce wolves to the park in an effort to help manage the elk population, but ultimately determined that this alternative was not feasible.⁶²

The scope of who can challenge an EIS demonstrates why developers turn to legislators and ask for special legislations to circumvent the issue. Any interested citizen may challenge an EIS on the basis of adequacy under CEQA in a California court as long as all the available internal avenues through agency challenge have been exhausted.⁶³ This challenge causes the project to halt because the necessary EIS is being challenged in court, an expensive problem in the world of development and construction. If the court determines that the EIS was insufficient or the environmental impact was undervalued, the project will not be able to progress until it incorporates mitigating measures in an effort to minimize the environmental effect.⁶⁴ If the EIS was related to a permit required for the proposed stadium development, then the agency would have to provide justification that the benefits of the project outweigh the resulting environmental damage.⁶⁵ These benefits usually include economic development of the area of the proposed stadium, benefits to the local economy, and job creation.⁶⁶ This is the one of the arguments for the special legislation related to the Los Angeles Clippers’ proposed Inglewood arena.⁶⁷

The level of deference an agency receives in courts can largely determine the outcome of a case. In California, an EIS required by CEQA would face *de*

59. *Sierra Club v. Marita*, 46 F.3d 606, 616 (7th Cir. 1995).

60. RUHL ET AL., *supra* note 11, at 506.

61. *See WildEarth Guardians v. National Park Service*, 703 F.3d 1178 (10th Cir. 2013).

62. *Id.* at 1185.

63. Danney, *supra* note 44, at 139.

64. Mackey, *supra* note 32, at 363.

65. Conor O’Brien, Note, *I Wish They All Could Be California Environmental Quality Acts: Rethinking NEPA in Light of Climate Change*, 36 B.C. ENVTL. AFF. L. REV. 239, 263 (2009).

66. *See* Machey, *supra* note 32, at 363.

67. *See* Smith, *supra* note 4.

novo review on aspects related to an agency following the requirements set forth under CEQA.⁶⁸ California courts would show deference to the agency's factual conclusions and the issuance of the EIS.⁶⁹ This level of deference varies per state and in federal jurisdiction.⁷⁰ A court has discretion in providing remedies in such cases with some SEPAs, such as CEQA, having the ability to choose between different remedies depending on the violation.⁷¹ These remedies can vary in extremity and prove too difficult for developers to plan for, given the multiple possible outcomes.⁷² One such extreme remedy is that the court may declare the entire EIS void and require the whole process to be restarted.⁷³ This would be detrimental to a development given the time and expense needed to undertake such a project for a second time. A less extreme remedy would be for the court to only declare part of the EIS unacceptable.⁷⁴ This still requires the developer to plan for an alternate outcome which ultimately costs the developer more money.

While the remedies can be extreme and expensive for both the developer and agency involved, these remedies are outlying cases in which the EIS guidelines have not been followed. In most cases the agency, and thus the developer, is successful in defending the EIS, but the heavy litigation involved and threat of challenges has impacted the willingness of construction by developers.⁷⁵ The ease in which a challenge can be brought under CEQA in addition to the initial strictness of the act has affected the development behind stadiums. The examination of an EIS and CEQA in this comment is not an attack on the policy. CEQA has been a staple in environmental laws and much like NEPA has provided a standard for other states' SEPAs, but modern trends show in the use of special legislations that the legislatures are willing to give breaks and advantages to certain business and provide them the means to bypass parts of CEQA or at least shorten the process.⁷⁶ The increased amount of challenges

68. Mackey, *supra* note 32, at 364.

69. *Id.*

70. *See* Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21. Landmark case in Wisconsin in which the Wisconsin Supreme Court ruled that no deference should be given to agency legal interpretations in judicial review. *Id.* ¶ 3. *See* Jeffrey A. Mandell & Barbara Neider, *Supreme Court Ends Great Weight Deference to Agency Legal Interpretations, Splinters on Rationale*, STAFFORD ROSENBAUM (July 11, 2018), <https://www.staffordlaw.com/blog/article/supreme-court-ends-great-weight-deference-to-agency-legal-interpretations-s/>.

71. Mackey, *supra* note 32, at 375.

72. *Id.* at 376.

73. *Id.*

74. *Id.*

75. *Id.* at 378.

76. *See* Danney, *supra* note 44.

over the recent years have led to attempts to make judicial review easier for CEQA challenges.⁷⁷

PART II: PAST USE OF SPECIAL LEGISLATION AND THE CONTINUING TREND

A. Past Uses and Criticism

Part I was intended to provide the technical background material in an effort to demonstrate why these special legislations have been passed. The ease and ability for a challenge to an EIS has caused developers to seek other means to move forward with construction on their projects which have resulted in special legislations. Special legislations can have different forms though. As mentioned several times earlier, the proposed Los Angeles Clippers Inglewood Arena has received a special legislation that has shortened the window in which challenges to the future EIS can be made.⁷⁸ This is a special legislation that is passed by the legislature but is targeted at one specific development and does not extend or change the general environmental regulation landscape. This was the method in which a developer attempted to use to construct a stadium in Industry, California in 2009 in the hopes of luring a National League Football team back to the Los Angeles area.⁷⁹ In the same year, then Governor Arnold Schwarzenegger signed California Bill No. 81, which officially exempted from CEQA “any activity or approval, necessary for or incidental to, the development, planning, design, site acquisition, subdivision, financing, leasing, construction, operation, or maintenance of [the proposed National Football League stadium].”⁸⁰ This stadium development ultimately fell through as other sites drew more interest by the eventual relocation of the former St. Louis Rams and San Diego Chargers of the National Football League in addition to the public backlash for California Bill No 81.⁸¹

The other method in which special legislations are used for stadium developments is to take a broader approach to CEQA or a state’s SEPA and provide exceptions for certain uses or industries generally. State legislatures have passed new exemptions to SEPA regulations that allow certain types of

77. Mackey, *supra* note 32, at 359.

78. Smith, *supra* note 4.

79. John Adams, *Los Angeles, Are You Ready For Some NFL Football?*, NBC L.A. (Oct. 22, 2009), <https://www.nbclanageles.com/news/local/Los-Angeles-Are-You-Ready-For-Some-Football-64701932.html>.

80. Alex B. Porteshawver, *Under Review: Stadium Construction and State Environmental Policy Acts*, 21 MARQ. SPORTS L. REV. 339, 350 (2010).

81. Jason Henry, *Industry NFL Stadium Proposal Overshadowed By Inglewood, Carson*, SAN GABRIEL VALLEY TRIB., Feb. 26, 2015, <https://www.sgvtribune.com/2015/02/26/industry-nfl-stadium-proposal-overshadowed-by-inglewood-carson/>.

projects to be exempt from environmental review because they feel the incidental benefits outweigh the potential costs.⁸² Instead of being targeted at one specific development, a special legislation can be used by a development but it also applies by the greater whole. This was the case for the new National Football League San Francisco 49ers' stadium in Santa Clara, California.⁸³

The 49ers utilized a special exemption in the guidelines of CEQA that allowed for developments to bypass an EIS if the development was classified as a "citizen-sponsored plan."⁸⁴ A "citizen-sponsored plan" is a plan that is voted on and approved by the public through a referendum. The 49ers chose this route and with the help and cooperation of Santa Clara, were able to garner the correct number of signatures and votes to meet the required threshold to become exempt from CEQA as a "citizen-sponsored plan."⁸⁵ The 49ers and Santa Clara did face a challenge though for the lack of an EIS by a local amusement park company. They argued that since the City of Santa Clara was involved in the stadium development from the beginning, the city should have done an EIS at the initial moment of involvement.⁸⁶ The 49ers eventually had to perform an EIS for other reasons associated with the development, highlighting the complexity associated with stadium developments and the scope of such the project.⁸⁷

These two instances of stadium developments illustrate the two ways special legislation can be utilized to help spur development. It is important going forward to note the differences between these two approaches and why one was more successful than the other in regard to special legislation. The key issue in these two approaches is public image and limiting the exposure to challenges as much as feasibly possible. The 49ers were able to do this by working directly with the city and being dedicated to keeping the process of their stadium development transparent and public.⁸⁸ The 49ers were reported to have spent over \$4 million on public image campaigns prior to the referendum.⁸⁹ The 49ers would also pay the city of Santa Clara back for the expenses of the eventual 3,000-page long EIS report.⁹⁰

While the 49ers were transparent with the public throughout the process, the proposed stadium development in the Los Angeles area was not. This

82. Porteshawver, *supra* note 80, at 345-46.

83. *Id.* at 346.

84. *Id.*

85. *Id.*

86. *See* Cedar Fair, L.P. v. City of Santa Clara, 123 Cal. Rptr. 3d 667 (Cal. Ct. App. 2011).

87. Porteshawver, *supra* note 80, at 349.

88. Danney, *supra* note 44, at 142.

89. John Wildermuth, *Santa Clara Voters OK 49ers Stadium*, SF GATE, June 9, 2010, <https://www.sfgate.com/49ers/article/Santa-Clara-voters-OK-49ers-stadium-3185613.php>.

90. Danney, *supra* note 44, at 142.

development was initially challenged on the grounds that the EIS was not made available during the public comment process.⁹¹ The resulting court process created a standstill in the development process and the developers looked to the legislature for relief in what would become known as California Bill No. 81.⁹² This Bill was controversial at the time and critics were worried that it would create a slippery slope for other future developments.⁹³

The critics' warning of a slippery slope has proven to be the case as special legislations are currently being passed eleven years after California Bill No. 81 for the stadium development in Industry.⁹⁴ This is in large part because of the amount of development within the sector in both California and the rest of the nation. California has a large economy. If California was an independent country, it would be the eighth largest economy in the world.⁹⁵ The size of California's economy and its relation to the US economy, pressures legislatures to grant special legislations for developments given CEQA's requirements and mandated studies.⁹⁶ SEPA's in general have been reviewed by legislatures outside of California in a recent trend that highlights many of the same perceived negatives as well. Such criticism is aimed at the costs of the required EIS, the delays associated with awaiting an EIS decision and subsequent permit, the suspicion that EIS challenges are being used for the wrong reasons, and used as a weapon in the hands of "not in my backyard" (NIMBY) suits.⁹⁷ These fears have led to worries that CEQA is too broad and cumbersome for the complexities of modern developments.⁹⁸ To some, CEQA has become the leading symbol of over regulation and is responsible for the downturn in the California economy in how it has impacted future developments.⁹⁹ This criticism led to the California State Legislature in 2014 to create new requirements for filling an EIS challenge.¹⁰⁰

This overall criticism towards CEQA and states' SEPA's are to be expected from developers as construction is a highly complex sector in which environmental concerns can be found in any stage of a development. In general, construction is the Nation's principle manufacturing activity that accounts for

91. *Id.* at 144.

92. *Id.* at 144-45.

93. *Id.* at 148.

94. Fenno, *supra* note 4.

95. Mackey, *supra* note 32, at 359.

96. *Id.*

97. LaCroix, *supra* note 17, at 1311.

98. Plunkett, *supra* note 12, at 247-48.

99. *Id.*

100. Mackey, *supra* note 32, 372.

over 60% of the raw materials used each year.¹⁰¹ On a global scale construction accounts for one sixth of the world's fresh water and forty percent of the world's material and consumed energy.¹⁰² State legislators have recognized this sector and have introduced special legislation for twenty-seven of the past thirty-eight stadiums constructed since the 1990's providing some relief in regards to states' SEPA's.¹⁰³ These special legislations have provided some relief for projects that are among the most complex developments and have lasting impacts both environmental and economic on the area they are built.

B. Current Complexities

As demonstrated above, a stadium developer can seek several avenues in which to help alleviate a state's SEPA and the EIS process. The developer may seek to petition a state's legislature for a special exemption for their specific project such as California Bill No. 81. The other option is to attempt to implement a broader exemption for certain types of projects and try position one's project within those guideposts. This is the avenue the San Francisco 49ers attempted in working directly with the City of Santa Clara and having a transparent process with the local area. The most recent stadium development that has been discussed, the Los Angeles Clippers Inglewood arena, choose to seek special legislation that would shorten the window in which challenges could be made to the EIS report.¹⁰⁴ Stadiums have a large impact on the environment and the greater area in which they are located. Shortening or expediting an EIS report could prove to present future problems for the local area and the owners or developers of the stadium due to complexities of development.

As demonstrated, an EIS analyzes and highlights the environmental impact of both the actual development process and the everyday impact of the completed project. These everyday impacts to the environment through a sports stadium's annual ¹⁰⁵use showcases how an impactful a stadium development can be on an area. The average Major League Baseball stadium uses approximately twelve million gallons of water per year.¹⁰⁶ Stadiums use a large amount of water on a daily basis. The recently built National Football League Dallas Cowboys' AT&T Stadium has over 1,600 toilets to accommodate the 80,000-

101. Porteshawver, *supra* note 79, at 354.

102. Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 243 (2008).

103. Porteshawver, *supra* note 80, at 352.

104. Smith, *supra* note 4.

105. Grant, *supra* note 8, at 153.

106. *Id.*

person capacity stadium.¹⁰⁷ The new Yankee Stadium for the New York Yankees of Major of the MLB has 800 toilets installed in the ballpark.¹⁰⁸ The Indianapolis Colts of the NFL had a rusty pipe problem in their newly built Lucas Oil Stadium.¹⁰⁹ The problem was solved by the constant running of the pipes until the rust was flushed out resulting in the use of over fourteen million gallons of water in a month's time.¹¹⁰

Carbon production and trash are another complex aspect of the stadium use. A single Major League Baseball game creates on average 179 tons of carbon per game.¹¹¹ A National Football League game creates on average 716 tons of carbon per game.¹¹² With a 162-game schedule for 30 teams, a Major League Baseball season will generate over 30,000 tons of carbon.¹¹³ The Seattle Mariners of Major League Baseball alone generate nearly three million pounds of trash per year.¹¹⁴ These instances of water use, carbon, trash, greenhouse gas emission, air emissions from construction and traffic, and other environmental concerns would be considered in an EIS report. These concerns would then be documented for the developers and owners going forward in managing the development. The complexities of how a stadium operates and its impact could be overlooked if the EIS process is expedited or negated altogether.

Special legislations passed by state legislators do not preclude federal involvement in certain environmental areas. The most common federal involvement with stadiums, if federal funding is not involved, is the granting of permits under the Clean Air Act and the Clean Water Act. The Clean Air Act (CAA) regulates a national standard for the amount of harmful emissions that affect air quality.¹¹⁵ Depending on where a stadium development is located and the amount of expected harmful emissions produced, determines what level of regulation under the CAA a stadium development is subject to.¹¹⁶ If the stadium development falls under the stricter areas of enforcement (nonattainment areas, which is most of California) then the development must conduct a

107. *Id.* at 153-54.

108. *Id.* at 154.

109. *Id.* at 163-64.

110. *Id.* at 164.

111. *Id.* at 168.

112. *Id.*

113. *Id.* 168-69.

114. *Id.* at 154.

115. RUHL ET AL., *supra* note 11, at 165.

116. *See Id.* at 168.

“nonattainment new source review. . .¹¹⁷ This review requires that the new development will not further worsen the air quality.¹¹⁸

The Clean Water Act (CWA) operates in a similar way in that a stadium development would be classified as either a “point source” or “non-point source” with “point source” having the stricter requirements for compliance.¹¹⁹ Unless directly discharging into a waterway via a ditch or pipe, a stadium would likely be considered a “non-point” because stormwater runoff is not considered a “point source.”¹²⁰ Though stormwater runoff is not a regulated under the higher standard in the CWA, a stadium development must still consider it, as the EPA has demonstrated it will intervene if the stadium’s development plan to address a concern is not adequate.¹²¹ This happened to the Colorado Rockies of the MLB, in which the EPA intervened and directly oversaw their Storm Water Management Plan for Coors Field.¹²² The EPA also stepped in during the construction of MetLife Stadium, home of the New York Jets and New York Giants of the National Football League. The EPA intervened in the construction to “promote the. . . efforts to prevent, reduce and eliminate pollution.”¹²³ Stadium developers should attempt to address environmental concerns throughout the development process to limit the federal government’s involvement.

Lastly, there is an issue of corporate responsibility that is attached to SEPAs and EIS for a stadium developer to be aware of. NEPA and SEPAs have introduced an idea of corporate responsibility to the development process.¹²⁴ An EIS makes the developer aware of the environmental impacts on the local area and community.¹²⁵ By seeking special legislation to alter the requirements of an EIS or to narrow the window in which a challenge can be made, the developer risks the alienation of the local community most effected. This alienation of the developer’s future neighbors will not be a beneficial relationship if future problems were to arise in result of the stadium development. The EIS has

117. *The Clean Air Act in a Nutshell: How it Works*, U.S. ENVTL. PROTECTION AGENCY, (Mar. 22, 2013), <https://www.epa.gov/clean-air-act-overview/clean-air-act-nutshell-how-it-works>.

118. This is implemented through a “lowest achievable emission rate” (LAER) permit. LAER requires “new sources install controls at least as effective as the best used by an existing pollution source of the same kind.” *Id.*

119. *See Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1226–27 (11th Cir. 2009).

120. *See Decker v. Northwest Env'tl. Def. Ctr.*, 568 U.S. 597, 614–15 (2013).

121. *See id.*

122. Grant, *supra* note 8, at 156.

123. *Id.*

124. LaCroix, *supra* note 16, at 1315.

125. *Id.* at 1297.

changed what constitutes “reasonable behavior” of the developers.¹²⁶ This is evident in California Bill No. 81, which caused considerable public outcry and criticism, and the lack of support ultimately killed the proposed project.¹²⁷ Though the advantages of seeking special legislation from a state’s legislature is an attractive avenue for a stadium developer to take, the developer needs to consider the complications that could arise from a shortened EIS process, as well as the complexities and future issues such a development will have on an area.

PART III: GOING FORWARD

While special legislation to alter the EIS process will continue to be sought in the coming years, there are efforts being made to reform the system to make sure environmental concerns are still being considered. In California, there are proposed reforms to CEQA in an attempt to modernize the 1970’s regulation.¹²⁸ These proposed reforms include:

- 1) clarifying the requirements and application of the statute; 2) requiring greater disclosure of the basis of agency determination; 3) streamlining the review and litigation process; 4) expanding and streamlining the state’s role in supervision and information management; 5) standardizing and perhaps codifying specific significance thresholds; 6) reducing local variation; strengthening tiering; and 7) clarifying the state legal and policy framework in which CEQA is operating.¹²⁹

Developers may also enter into agreements with local communities before the EIS process as well as during the EIS process in an effort to prevent law suits.¹³⁰ This was demonstrated in the San Francisco 49ers case in which they entered into an agreement with the city of Santa Clara in an effort to have their stadium development placed on the ballot to be voted on by the general public. This transparency with the community affected by the development shows how working with local government units can be beneficial to both parties.

There are other solutions to this development problem outside of the state legislature. One such approach to development is the consideration of the Leadership in Energy and Environmental Design (LEED) Green Building Rating System.¹³¹ This rating system was developed by the United States Green-

126. *Id.* at 1316.

127. Mackey, *supra* note 32, at 365; Danney, *supra* note 44, at 144–45.

128. Mackey, *supra* note 32, at 383.

129. *Id.*

130. Porteshawver, *supra* note 80, at 359.

131. Alex B. Porteshawver, Comment, *Green Sports Facilities: Why Adopting New Green-Building Policies Will Improve the Environment and the Community*, 20 MARQ. SPORTS L. REV. 241, 243–44 (2009).

Building Council (USGBC) with the purpose of encouraging and accelerating the “adoption of sustainable green building and development practices through the creation and implementation of universally understood and accepted tools and performance criteria.”¹³² This system would evaluate several factors including the location and siting of the project, the water efficiency, the energy produced and consumed, the materials and resources required, and the innovation and design of the project.¹³³ Several cities have implemented LEED standards into the building codes already.¹³⁴ Through implementing LEED standards into local ordinances and building codes it places environmental concerns in the forefront of the development process. These standards would be just that, standards that have to be met by everyone by statute.

Environmental concerns are a predominant part of modern discussions. The growing popularity of going green has been noticed by state and local officials, and they have begun to implement new laws and regulations that serve the purpose of adopting greener practices throughout the Nation.¹³⁵ This popularity has been noticed in the sports world as well. The largest stadium in North America, the University of Michigan’s stadium, “The Big House,” has implemented a “zero waste initiative” which has diverted 89% of waste created to compost and recycling.¹³⁶ The four largest professional North American sports leagues, the National Football League, National Basketball Association, Major League Baseball and National Hockey League, have implemented green-focused campaigns.¹³⁷ This focus on environmental concerns by the major leagues may pose additional pressure on developers wishing to expedite the EIS process due to the possibility of a negative environmental image that contrasts the league’s campaign.

CONCLUSION

As the Las Vegas Raiders stadium quickly rose into the desert skyline,¹³⁸ the newly constructed stadium is among an ever-continuing set of developments for the annual \$435 billion professional sports industry.¹³⁹ As the industry

132. *Id.* at 244.

133. *Id.*

134. *Id.* at 245.

135. W.S. Miller, *Changing Playing Fields: The Sports Attorney’s Obligation to Learn Green*, 21 MARQ. SPORTS L. REV. 139, 140 (2010).

136. Ben Blevins, *U-M Increases Michigan Stadium Waste Diversion Rate in 2018*, UNIV. OF MICH. ATHLETICS, (Dec. 7, 2018), <https://mgoblue.com/news/2018/12/7/football-u-m-increases-michigan-stadium-waste-diversion-rate-in-2018.aspx>.

137. Miller, *supra* note 133, at 141.

138. Horwath, *supra* note 2.

139. Grant, *supra* note 8.

continues to expand and clubs continue to build new stadium developments, these developments will continue to be subject to NEPA and SEPA requirements. These requirements under NEPA and SEPAs, such as CEQA, require federal, state, and local agencies to give “appropriate consideration” to environmental effects when making decisions regarding these developments.¹⁴⁰ As demonstrated by California Bill No. 81, special legislation can alienate a project from public support and create a legal and public opinion minefield for a developer.¹⁴¹

Going forward, both developers and state legislatures have to be careful when deciding on whether or not special legislation is the correct avenue to facilitate stadium development. NEPA and SEPAs were implanted to force government agencies and developers to consider the environmental harm they may commit to the local area and the people that live there.

140. LaCroix, *supra* note 17.

141. Mackey, *supra* note 32, at 365; Danney, *supra* note 44, at 144-45.