

**THE QUI TAM ENVIRONMENTALIST: HOLDING POLLUTERS
ACCOUNTABLE THROUGH THE FALSE CLAIMS ACT**

NOTE

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INTRODUCTION

The 1960s was a decade of change in American society and politics, as people took to the streets to protest the Vietnam War and demand for their civil rights. This decade also witnessed the birth of the modern environmental movement.¹ People began to oppose the indiscriminate use of chemicals such as DDT, a pesticide with long-lasting effects on the environment.² The American public demanded the government to regulate actions with adverse environmental impacts and to have a voice in the regulatory and enforcement process.³ Rachel Carson's *Silent Spring* spearheaded the call for public participation: "The public must decide whether it wishes to continue on the present road, and it can do so only when in full possession of the facts. In the words of Jean Rostand, 'The obligation to endure gives us the right to know.'"⁴

In 1970, Congress took the first step toward democratizing environmental decision-making with the enactment of the National Environmental Policy Act (NEPA), and environmental protections have continued to expand ever since.⁵ Fifteen states, plus the District of Columbia and Puerto Rico, have adopted similar legislation since the enactment of NEPA.⁶ Out of these state environmental policy acts—heretofore referred as

1. Bradley C. Karkkainen, *NEPA and the Curious Evolution of Environmental Impact Assessment in the United States*, in *TAKING STOCK OF ENVIRONMENTAL ASSESSMENT: LAW, POLICY AND PRACTICE* 48 (Jane Holder et al. eds., 2007).

2. *Id.* at 49.

3. *See id.* at 50.

4. RACHEL CARSON, *SILENT SPRING* 13 (First Mariner Books ed. 2002).

5. Though NEPA provided for public participation through traditional notice and comment rulemaking procedures, *see generally* 40 C.F.R. § 1503.1(4) (requiring the lead agency to affirmatively request comments from interested or affected persons or organizations), it did not contain a citizen suit provision. However, the Supreme Court interpreted NEPA to create "a discrete procedural obligation on Government agencies . . . and a right of action in adversely affected parties to enforce that obligation." *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 319 (1975).

6. California, CAL. PUB. RES. CODE §§ 21000-177 (2017); Connecticut, CONN. GEN. STAT. §§ 22a-1 to 22a-1h (2017); District of Columbia, D.C. CODE ANN. §§ 8-109.1 to 109.11 (2017); Georgia, GA. CODE ANN. §§ 12-16-1 to 16-8 (2017); Hawaii, HAW. REV. STAT. §§ 343-1 to 343-8 (2017); Indiana, IND. CODE ANN. §§ 13-12-4-1 to 4-10 (2017); Maryland, MD. NAT. RES. CODE ANN. §§ 1-301

SEPA—the acts in California, New York, Washington, Minnesota, Massachusetts, and Hawaii extend the impact consideration requirements to their local governments.⁷ Unlike NEPA, many SEPA contain procedural and substantive requirements that require the adoption of feasible project alternatives or mitigation measures to reduce significant environmental impacts.⁸ Going one step further, California makes its SEPA requirements applicable to private projects that require local or state agency entitlements.⁹

Yet, even with expanded procedural and substantive requirements, the public may still find its hands tied when confronting undesirable uses of land. Just as with NEPA, a Californian may appeal to the judiciary upon demonstrating that the lead agency’s environmental impact report fails to meet the statutory requirements.¹⁰ However, the preliminary assessments that determine the level of environmental review a proposed project must undergo are based primarily on information provided by the project proponent.¹¹ In

to 1-305 (2017); Massachusetts, MASS. GEN. LAWS ANN. ch. 30, §§ 61, 62 to 62H (2017); Minnesota, MINN. STAT. ANN. §§ 116D.01 to 116D.06 (2017); Montana, MONT. CODE ANN. §§ 75-1-101 to 1-105, 75-1-201 to 1-207 (2017); New York, N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (2017); North Carolina, N.C. GEN. STAT. §§ 113A-1 to 113A-13 (2017); Puerto Rico, P.R. LAWS ANN. tit. 12, §§ 1121-27 (2017); South Dakota, S.D. CODIFIED LAWS ANN. §§ 34A-9-1 to 9-13 (2017); Virginia, VA. CODE §§ 3.1-18.8, 10.1-1200 to 10.1-1212 (2017); Washington, WASH. REV. CODE §§ 43.21C.010 to 21C.910 (2017); Wisconsin, WIS. STAT. ANN. § 1.11 (2017).

7. Just as NEPA only concerns federal actions or those with a sufficient federal nexus, the SEPA for the remaining states concern only state action and not those of local governments. Kathryn C. Plunkett, *Local Environmental Impact Review: Integrating Land Use and Environmental Planning Through Local Environmental Impact Reviews*, 20 PACE ENVTL. L. REV. 211, 214 (2002).

8. See DAVID SIVE ET AL., “LITTLE NEPAS” AND THEIR ENVIRONMENTAL IMPACT ASSESSMENT PROCEDURES, SK094 ALI-ABA 1175, 1178 (2005).

9. See CAL. PUB. RES. CODE § 2100(g) (2017). The SEPA of Minnesota, MINN. STAT. ANN. § 116D.02, and New York, N.Y. ENVTL. CONSERV. LAW § 8-0103, also apply to some private actions and projects.

10. See *Preservation Action Council v. City of San Jose*, 141 Cal. App. 4th 1336, 1355-56 (2006) (stating that the lead agency’s Environmental Impact Report (EIR) violated the California Environmental Quality Act (CEQA) by ruling out feasible project alternatives without having substantial evidence of infeasibility).

11. See, e.g., COUNTY OF LOS ANGELES, ENVIRONMENTAL DOCUMENT REPORTING PROCEDURES AND GUIDELINES 402.B (1987) (“If a project is to be carried out by a private person or private organization, the lead County agency may

that case, what happens if the project proponent provides false information or omits material facts that cause for the project to be approved without the otherwise required environmental impact studies? Neither California nor any other state's SEPA provides an avenue for the public to pursue actions against these polluters. However, the application fees that project proponents must pay to obtain statutorily required environmental clearance for a given permit or approval are directly correlated with the level of environmental review carried out.¹² Therefore, a false statement may not only reduce the level of environmental review necessary for the application's approval, but it may also reduce the application fee owed by the applicant to the permitting agency. In part, this article argues that this type of action, if carried out with the requisite intent, could be considered a "reverse false claim" under the False Claims Act (FCA) and state statutes modeled after the FCA.¹³

The purpose of this note is to explore how private individuals and organizations may use the *qui tam* provision of the False Claims Act as an enforcement tool against those who make false representations in environmental studies. Part I provides an overview of NEPA and the California Environmental Quality Act (CEQA),¹⁴ laying the foundation for

require such person or organization to submit data and information which will enable the lead County agency to prepare the Initial Study."), http://planning.lacounty.gov/assets/upl/general/LAC_CEQA_Guidelines_1.pdf. For a more thorough explanation of the levels of environmental review under CEQA, see *infra* Part I-C.

12. For example, the County of Los Angeles charges a fee of \$3,124 for projects which are determined have no significant environmental impacts and thus qualify for a Negative Declaration. L.A. COUNTY CODE § 12.04.020(A)(3)(a)(2) (2017). On the other hand, a project requiring a major Environmental Impact Report must be accompanied by an initial fee of \$10,000, plus additional supplemental deposits for any costs exceeding the initial fee. *Id.* § 12.04.020(A)(1)(a)-(b).

13. See, e.g., 31 U.S.C. § 3729(a)(1)(G) (2012); CAL. GOV. CODE § 12651(a)(7) (2017).

14. Many of the features of the federal FCA and NEPA, including the reverse claim provision and subsequent interpretational amendments, trickled down from the federal statute into the state analogs. Similarly, the California Environmental Quality Act was used by many states as a template when crafting their own SEPAs. This article is framed on interpretations of NEPA and CEQA, as well as FCA and CFCA, as representative statutes. The theories discussed throughout this article, however, are intended to be generally applicable in any state where the legislature has enacted: (1) an FCA analog with reverse false claim provisions, and (2) an

the rest of the article by introducing two fictitious case studies. Part II discusses the history and applicability of the False Claims Act (FCA) and the California False Claims Act (CFCA), particularly focusing on the reverse claims provision and its evolution. Part III returns to the case studies, identifying situations under which *qui tam* reverse false claim actions may be instituted against parties who falsify or omit material facts from their environmental studies or make false promises. This note concludes by suggesting that the FCA's reverse false claim provision allows *qui tam* actions for treble damages against persons who (1) provided false information or omitted material facts which caused the lead agency to forego more stringent environmental review of a project, or (2) made a false promise to adopt mitigation measures on which an entitlement approval was conditioned.

I. ENVIRONMENTAL STUDIES

How do we draw a line between the promotion of economic development and environmental protection? Ultimately, this is a question of public policy. The purpose of NEPA is to assist governmental actors by ensuring that their decision-making processes consider both the benefits and detriments of a proposed action.¹⁵ Analogous state statutes, such as the California Environmental Quality Act (CEQA), create similar procedural requirements for local actions and require certain private activities to undergo a similar level of scrutiny.¹⁶

A. *A Brief History of the National Environmental Policy Act*

Nearly half a century ago, due in large part to the fallout from the Santa Barbara oil blowout,¹⁷ President Richard Nixon signed into law the

environmental protection statute with fee-differentiated tiered levels of environmental review.

15. *Rivers Unlimited v. United States Dept. of Transp.*, 533 F. Supp. 2d 1 (D.D.C. 2008).

16. *See Neighbors of Cavitt Ranch v. County of Placer*, 131 Cal. Rptr. 2d 379 (Cal. Ct. App. 2003); *POET, LLC v. California Air Resources Bd.*, 218 Cal. App. 4th 681 (Cal. Ct. App. 2013).

17. This environmental catastrophe, during which an estimated 3-million gallons of crude oil were released into the coast of California, killing thousands of birds, fish, and sea mammals, is often regarded as the defining event that led to the

National Environmental Policy Act of 1969.¹⁸ Lauded by some as “the environment’s Magna Carta,” NEPA laid out a plan to ensure that the federal government would take the driver’s seat in environmental protection.¹⁹ NEPA’s Congressional declaration of national environmental policy expressed, withholding no poetic license, Congress’s aspirations for the government’s role in environmental protection:

The Congress, recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.²⁰

To achieve its intergenerational equity goals, NEPA required all federal agencies to consider the environmental consequences of any major federal action “significantly affecting the quality of the human

birth of the modern environmental movement. See Christine Mai-Due, *The 1969 Santa Barbara Oil Spill That Changed Oil and Gas Exploration Forever*, L.A. TIMES (May 20, 2015, 6:38 PM). The spill occurred due to the operator’s failure to use a protective casing around an oil drilling point, a deviation from federal minimum requirements established by the U.S. Geological Survey. *Id.*

18. 42 U.S.C. § 4321 (1970).

19. See Michael C. Blumm, *The National Environmental Policy Act at Twenty: A Preface*, 20 ENVTL. L. 447, 448-49 (1990).

20. 42 U.S.C. § 4331 (2012).

environment.”²¹ Those who proposed projects subject to NEPA would be required to prepare, as determined by the lead agency, an Environmental Assessment (EA) or an Environmental Impact Statement (EIS).²² These environmental documents would equip the decision-maker with the information necessary to consider alternatives to the project, including mitigation measures which would reduce the environmental impacts of the project.²³ However, decades of legal decisions have chipped away at the protections that many believed NEPA to embody. By 1978, the Supreme Court had established that NEPA’s requirements were purely procedural in nature.²⁴ The Supreme Court drove the last nail into the environmental coffin in 1989, when it decided in *Robertson v. Methow Valley Citizens Council* that NEPA did not require for the adoption of any mitigation measures, but simply for these to be discussed.²⁵

B. *The California Environmental Quality Act*

Not long after NEPA was enacted, the California legislature passed the California Environmental Quality Act (CEQA).²⁶ Although CEQA was modeled almost entirely as a NEPA analog,²⁷ the California Supreme Court took a different route in interpreting its provisions. In *Friends of Mammoth v. Board of Supervisors*, the California Supreme Court stated that, in resolving issues of legislative intent, CEQA should be interpreted “in such manner as to afford the fullest possible protection to the environment within

21. *Id.* § 4332 (C).

22. 40 C.F.R. §§ 1501.3-4 (2016). An Environmental Assessment is a concise analysis used to determine whether the environmental impacts of the proposed project are so minor as to make a finding of no significance (FONSI), or whether a detailed Environmental Impact Statement should be prepared. *Id.* § 1508.9.

23. *See id.* § 1502.14.

24. *See Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

25. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989) (stating that NEPA allows an agency to issue a permit that would lead to the loss of an entire deer population, even if it would be prevented by adopting a mitigation measure, so long as the EIS discusses the mitigation measure in sufficient detail).

26. CAL. PUB. RES. CODE §§ 21000-189 (2017).

27. *See Friends of Mammoth v. Bd. of Supervisors*, 502 P.2d 1049, 1057-58 (1972).

the reasonable scope of the statutory language.”²⁸ However, perhaps the most significant portion of the decision would come in dicta. In discussing environmental impact reports, the Court stated that CEQA “require[s] that mitigation measures and alternatives to the proposed action be considered.”²⁹ Further, the Court stated that “if the adverse consequences to the environment can be mitigated, or if feasible alternatives are available, *the proposed activity, such as the issuance of a permit, should not be approved.*”³⁰ The Court’s interpretation would be codified into law four years later by the California Legislature.³¹

C. *The Environmental Assessment Process Under CEQA*

The first step in the CEQA process is to determine whether the project is subject to CEQA.³² Once a project proposal is determined to be covered by CEQA, the agency prepares an initial study.³³ The purpose of the initial study is “to determine whether the project will require an [Environmental Impact Report] or whether a negative declaration or mitigated negative declaration will be sufficient.”³⁴ These three environmental assessments consist of varying levels of scrutiny, depending on the expected environmental impact of the proposed project.³⁵ A negative declaration is a document that describes the proposed project and sets forth the lead agency’s findings as to why the project will not have a significant effect on the environment.³⁶ A mitigated negative declaration allows the lead agency to forego further environmental review once the initial study found significant environmental effects in exchange for the applicant’s agreement to

28. *Id.* at 1056.

29. *Id.* at 1059 n.8.

30. *Id.* (emphasis added).

31. See CAL. PUB. RES. CODE § 21002 (2016) (“The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.”).

32. John Watts, *Reconciling Environmental Protection with the Need for Certainty: Significance Thresholds for CEQA*, 22 *ECOLOGY L.Q.* 213, 225 (1995).

33. *Id.*

34. *Id.*

35. *Id.*

36. See 14 CAL. CODE REGS. tit. 14, §§ 15070-71 (2017).

implement identified mitigation measures.³⁷ An Environmental Impact Report (EIR), the most thorough form of CEQA review, is a detailed statement intended “to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.”³⁸

In comparison to the other types of studies, EIRs offer significant informational advantages to the public and to decision-makers. Even though mitigated negative declarations “often involve close study of a project’s major impacts, EIRs offer more consistently thorough review.”³⁹ Also, “EIRs require much more extensive public participation and input from other agencies, which can be useful in framing the analysis of a project’s major impacts.”⁴⁰ Unlike mitigated negative declarations, EIRs “require analysis of project alternatives, so that many larger projects may need to undertake analysis of both onsite and offsite alternatives that would avoid or reduce impacts.”⁴¹

Before issuing either a negative declaration or a mitigated negative declaration, the agency must follow a series of procedural steps, including the issuance of a notice of intent to adopt the declaration.⁴² However, once an agency decides to prepare an EIR, the project must pass an additional set of hurdles. First, the agency must issue a notice of preparation “to each agency with discretionary or trustee responsibility over the project.”⁴³ With the assistance of comments submitted by the agency and the public in response to the notice of preparation and comments received during the scoping meeting, the agency determines the scope of the EIR.⁴⁴ The agency then prepares a draft EIR, which must be circulated to the public within thirty days of the date of public notice.⁴⁵ During this time, the public may submit comments to the draft EIR, to which the agency must summarize and respond.⁴⁶

37. *See id.*

38. CAL. PUB. RES. CODE § 21061 (2017).

39. Watts, *supra* note 32, at 227.

40. *Id.*

41. *Id.*

42. *See* 14 CAL. CODE REGS. tit. 14, § 15070 (2017).

43. Watts, *supra* note 32 at 230.

44. *See id.*

45. *Id.*

46. *Id.*

Once the EIR is completed, CEQA requires the agency to make findings as to whether the proposed project's impacts on the environment are significant.⁴⁷ If significant impacts are identified, the agency must either implement feasible mitigation measures or alternatives for each significant impact, or make findings that "specific legal, social, economic, or other benefits outweigh the significant effect on the environment."⁴⁸

D. Case Studies Under CEQA

Local governments have a significant level of discretion when it comes to implementing the procedural requirements of CEQA and achieving the Act's substantive goals.⁴⁹ This section follows two fictitious entities as they seek approval of their proposed projects in the City of Los Angeles. For purposes of brevity and clarity, the application processes explained in these fictitious case studies are significantly simplified. Though each project is approved, we later learn that their approval was, in great part, due to the applicants either purposely omitting material facts or making false statements. These case studies present the framework under which the legal theories in Part III will be discussed.

1. Case Study 1: Prime Petroleum

Prime Petroleum (Prime) is a refiner of petroleum products seeking approval to replace its aging crude storage tanks with new, larger, state-of-the-art equipment. Prime's legal department determines that these changes will require a permit from the Los Angeles Department of City Planning

47. *Id.*

48. *Id.* at 231.

49. Elisa Barbour and Michael Teitz, *CEQA Reform: Issue and Opinions*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (Apr. 2005), http://www.ppica.org/content/pubs/op/OP_405EBOP.pdf.

(City Planning).⁵⁰ Upon receiving Prime's permit application,⁵¹ City Planning determines that the proposed project is subject to CEQA,⁵² and orders for an initial study to be conducted.⁵³ As required by the Los Angeles Municipal Code, Prime pays an application fee of \$2,280 for the processing of the initial study.⁵⁴

During the initial study process, City Planning identifies that the new tanks Prime intends to install have double the storage capacity of its current storage tanks. City Planning staff believes that they have identified a potential significant environmental effect; by doubling its crude storage capacity, Prime may intend to process twice as much crude. However, Prime quickly addresses City Planning's concerns. Prime receives its crude oil from vessels that unload it at a nearby marine terminal, where the crude is then piped to the refinery. At any given time, several vessels will be waiting to unload their crude. The current tanks only allow a single vessel to unload its crude at a time, and at a very slow rate. As a result, vessels usually wait outside of the marine terminal for days before they are able to unload. By doubling the tanks' size, two vessels will be able to unload at once, and at twice the current speed. This means that: (1) vessels will spend less time waiting to unload, thus reducing the amount of pollutants they spew into the

50. Depending on the municipality and the type of project to be carried out, an entity seeking to engage in any construction project might be required to obtain a series of permits from different regulatory agencies. *See generally About the Construction Process*, L.A. DEPT. OF BLDG. AND SAFETY, <http://www.ladbs.org/services/getting-started/about-the-construction-process> (indicating that projects may require approvals from City Planning, Fire Safety, Public Works, Transportation, Health, the Air Quality Management District, and other entities) (last visited 2/18/2017).

51. For a basic overview of the L.A. Department of City Planning's steps for permit review, *see Land Use (Entitlement) Permit Process*, L.A. DEPT. OF CITY PLANNING, <http://planning.lacity.org/LandUseGraphic.html>.

52. CEQA requires public agencies to follow the Act's procedures before approving any "project." CAL. PUB. RES. CODE § 21002 (2017). Under CEQA, a project is "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" including "[a]n activity that involves the issuance to a person of a . . . permit . . . by one or more public agencies." *Id.* § 21065.

53. The purpose of the initial study is to determine whether the proposed project could potentially cause significant effects on the environment, thus requiring the drafting of an EIR. *See* 14 CAL. CODE REGS. tit. 14, § 15063 (2017).

54. L.A. MUN. CODE § 19.05-A-1 (2017).

already compromised Los Angeles air; and (2) reduced traffic near the marine terminal reduces the possibility of an accident that could release thousands of barrels of crude into the ocean. Further, Prime states that they do not intend to increase the amount of crude they receive. If anything, Prime responds, doubling the capacity of their tanks will help improve the air quality in Los Angeles.

After receiving Prime's responses, City Planning staff finds that there is no substantial evidence that the proposed project may have a significant effect on the environment, and decides to prepare a negative declaration.⁵⁵ Before adopting the negative declaration, City Planning staff is required to issue a notice of intent to adopt said declaration, informing the public about the dates on which they may submit comments and the dates of any related hearings.⁵⁶ After the end of the public review period, City Planning decides to adopt the proposed negative declaration and files a notice of determination, as required by CEQA.⁵⁷ Having received environmental clearance, Prime then obtains all of the necessary permits to replace its crude storage tanks.

However, not everything is heavenly in the City of Angels. Shortly after Prime begins operating with their brand-new tanks, a savvy petroleum expert working for an environmental non-profit realizes that Prime may have slicked its way through the CEQA process. The new tanks are not only larger, but they are fitted with heating coils that allow for the storage of crude at a higher temperature and have higher vapor pressure limits. This means that Prime may now be able to change its feedstock from Alaska North Slope crude (ANS) to a blend of Bakken shale oil and Western Canadian Select (WCS).⁵⁸ The quality of this type of feedstock raises important concerns.

55. See 14 CAL. CODE REGS. tit. 14, § 15070 (2017).

56. *Id.* § 15072(g).

57. *Id.* § 15075.

58. Historically, West Coast refineries relied almost exclusively on ANS, a medium sour crude. See Sandy Fielden, *After The Oil Rush – ANS Decline and the West Coast Crude Market*, RBN ENERGY (Jan. 02, 2013), <https://rbnenergy.com/after-the-oil-rush-ans-decline-and-the-west-coast-crude-market>. However, the cost of ANS crude continues to rise as production declines due to depletion. *Id.* Rising costs have pushed refineries toward cheaper feedstocks such as WCS, more often referred to as “tar sands.” See John R. Auers et al., *North American Production Boom Pushes Crude Blending*, 111(5) OIL & GAS J. 88, 88–92 (2013). However, being overwhelmingly dense in nature, WCS must be blended in order to be transported and refined, and it must be processed at higher temperature. See *id.* On the other hand, Bakken shale oil is extremely light and

Refining these types of crude “requires putting more of the crude barrel through aggressive carbon rejection and hydrogen addition processing.”⁵⁹ This translates to using more energy, which in turn means burning more fuel to create the energy, leading to increases in refinery emissions.⁶⁰ Thus, though it is possible that Prime does not intend to use its new tanks to store more crude, the refinery is now capable of switching to a dirtier feedstock that is guaranteed to increase emissions beyond pre-tank upgrade levels.

Now comes the smoking gun. While poring through Prime’s annual report to its shareholders, the savvy scientist finds statements over the course of several years discussing the planned tank upgrade. These statements clearly indicate Prime’s reason for upgrading its tanks: to allow for a full switch from ANS to a Bakken/WCS blend. Because of the increased emissions associated with switching feedstock, the initial study process would have found the project to cause significant effects on the environment, thus triggering the requirement to produce a full Environmental Impact Review (EIR). Also, the initial application fee for an EIR would have cost Prime \$21,448, an additional \$19,168 when compared to the application fee associated with a negative declaration.⁶¹

cheap, usually requiring equipment able to handle higher vapor pressures; by blending it with WCS, refineries might be able to create feedstock similar to ANS, but at a fraction of the cost. *Id.* However, Bakken shale oils contain a high-level of high melting point waxes that may cause equipment blockages. *See generally* Dan Eberhart, *Light on the Top, Heavy on the Bottom: A Crude Oil Refinery Primer*, CANARY 3 (Feb. 14, 2014), <http://canaryusa.com/crude-oil-refinery-primer>. It is important to mention that switching to Bakken/WCS does not simply entail installing a new tank. Depending on the existing equipment, the entire refinery operation might need to be upgraded, including hydrocrackers, cokers, and desulfurization units. *See* Greg Karras, *Combustion Emissions from Refining Lower Quality Oil: What is the Global Warming Potential?*, 44 ENVTL. SCI. & TECH. 9584, 9585 (2010).

59. Greg Karras, *Oil Refinery CO2 Performance Measurement*, UNION OF CONCERNED SCIENTISTS 14 (Sept. 2012).

60. *Id.*

61. LA MUN. CODE § 19.05-A-2-(a)-(2) (2017). Note that this is only an initial fee, as the applicant will be billed for any costs associated with the EIR process that exceed the application fee amount. *Id.* § 19.05-A-2-(c).

2. Case Study 2: Western Scrappers

Western Scrappers (Western) is a scrap metal company seeking to establish a new recycling facility within the city of Los Angeles. The recycling facility will process both ferrous and non-ferrous metals. While the largest part of its operation will consist of crushing vehicles, Western will also accept metal scrap drop-offs from walk-in clients. While the facility will be located in an area zoned for heavy industrial use, the Los Angeles Municipal Code requires all scrap metal recycling facilities to obtain a conditional use permit (CUP) from the regional planning commission.⁶² When Western's team files an application with the commission, City Planning staff informs them that a CEQA review will be required.⁶³ Western makes a payment of \$2,280 for the CEQA study fees.⁶⁴

During the initial study process, City Planning staff determines that several aspects of Western's proposed project could have significant environmental effects. The first issue relates to traffic; the proposed facility would be constructed in a dense residential area, and increased truck traffic could create constant traffic jams on a main city avenue. A second issue is the excessive noise from crushing cars and handling scrap metal. A third issue is the possible emissions of particulate matter lifted by trucks and machinery operating within the facility. The last issue is the possible discharges of toxic pollutants into the sewage system due to rain, causing chemicals to leach from metals stored outside the facility into the publicly owned treatment works.

As required by CEQA, City Planning staff reports these preliminary findings to Western so that it may have a chance to propose mitigation measures.⁶⁵ Soon after receiving the findings, Western proposes the following measures to mitigate the potentially significant environmental effects. To address traffic concerns, Western proposes to relocate its entry point, so that trucks must enter through a relatively unused side-street, instead of through the busy city avenue. To mitigate noise concerns, Western proposes to limit its hours of operation from 7:00 AM until 5:00 PM, and to erect a soundproof barrier around the entire facility. To mitigate particulate matter concerns, Western proposes to water down the entire facility every hour so that dust will not become airborne. Lastly, Western proposes to cover

62. LA MUN. CODE § 12.03 (2017).

63. See *supra* note 46 and accompanying text.

64. For more information about CEQA fees, see *supra* note 31.

65. See CAL. CODE REGS. tit. 14, § 15070 (2017).

metal piles stored outside at all times, so that rain will not cause any chemicals to leach into the sewer system.

After considering Western's proposed mitigation measures, City Planning staff determines that all identified significant environmental effects will be reduced to a level of no significance.⁶⁶ As a result, City Planning staff recommends for a Mitigated Negative Declaration to be issued.⁶⁷ The notice and comment period is carried out as required by law, and the City Planning staff's recommendation reaches the Regional Planning Commission. The Commissioners accept the staff recommendation and issue the required permits. The Commission's decision to approve the requested permit is conditioned on Western's promise to adopt the mitigation measures that Western has proposed.⁶⁸

Several years later, a local resident whose newborn child is constantly disturbed by Western's noise comes across the Commission's decision. It becomes clear to her that Western has not kept any of the promises upon which the permit was conditioned. Lines of idling trucks cause heavy traffic jams on the busy city avenue. People are awoken from their sleep as the clashing sounds of metal against metal shake their windows at 3 A.M. Neighbors find their cars covered by a layer of dust each morning. This is the result of hundreds of trucks driving in and out of Western's facility, and the company's failure to wet the roads. By the time the resident discovered these inconsistencies, Western had already been cited several times for violations of the Clean Water Act, due to toxic discharges into the sewer system. The source of these pollutants was Western's uncovered piles of metal, which towered tens of feet above the chain-link fences.

Years have passed, and Western continues to operate without having implemented the mitigation measures upon which its permit was conditioned. After incessant calls and e-mails from community members, code enforcement has issued a few fines for the above-mentioned violations. However, with the term of its permit nearing its end and considering that it does not intend to continue operating, Western decides to absorb any fines as costs of doing business. After all, Western understands one thing: it will be more economically feasible to pay fines through the end of its permit period than to make capital investments to comply with its permit conditions. At the

66. *Id.*

67. *See* CAL. PUB. RES. CODE § 21064.5 (2017).

68. *See generally* CAL. PUB. RES. CODE § 21002 (2017) (stating that agencies should not approve proposed projects if there are feasible alternatives or feasible mitigation measures).

very least, Western has already realized over \$19,000 in savings by promising to adopt mitigation measures, instead of undergoing a lengthy and costly EIR process.⁶⁹

II. THE FALSE CLAIMS ACT⁷⁰

During the days of the Civil War, fraud ran amok along Union lines.⁷¹ Soldiers reported opening crates of weapons, only to find themselves digging through sawdust-filled boxes.⁷² With the passage of the False Claims Act of 1863, Congress created civil and criminal penalties for those who presented fraudulent claims to the United States.⁷³ Since these were times before federal agencies were staffed with expert forensic investigators with wide access to information, Congress instead decided to rely on a different group of crime-fighters: the citizenry.⁷⁴ Unlike other statutes, the FCA provided private citizens the right to commence civil actions on behalf of the United States government against anyone who defrauded the government through a claim for payment.⁷⁵ Instead of simple whistleblowers, private citizens filing

69. For fees associated with environmental clearances, *see* L.A. MUN. CODE § 19.05 (2017).

70. The remainder of this article will, for the most part, discuss elements of the federal False Claims Act, instead of concentrating on the California False Claims Act. This is because the CFCA is, at least in the aspects that concern this article, almost identical to the federal FCA. *Compare* 31 U.S.C. § 3279 (2012) (federal false claims provision) *with* CAL. GOV. CODE § 12651 (2017) (California false claims provision). Both federal and state code citations will be provided. Additionally, the case law discussed will be federal cases, since few relevant reverse claim cases exist at the state level and “[f]ederal decisions are persuasive on the meaning of the [California] False Claims Act.” *State ex rel. Bowen v. Bank of America Corp.*, 126 Cal. App. 4th 225 (2005). However, where California case law provides supplementary or complementary information, those cases will be cited.

71. James B. Helmer, Jr. and Robert Clark Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the United States Ex Rel. Gravitt V. General Electric Co. Litigation*, 18 OHIO N.U. L. REV. 35, 35 (1991).

72. *Id.*

73. *Id.* The seven acts for which a person can be penalized under the False Claims Act are found in 13 U.S.C. § 3729(a)(1)(A)–(G) (2012).

74. *Id.* at 36.

75. *Id.*

a *qui tam* action took the role of “a bounty hunter or private attorney general.”⁷⁶ States followed suit and adopted their own versions of the act.⁷⁷

A. *Qui Tam* Actions

Similar to many of the legal concepts that underlie the American legal system, the idea of using citizens to pursue those who defraud the government came from England.⁷⁸ The term *qui tam* is a shortened version of the Latin phrase—*qui tam pro domino rege quam pro se ipso in hac parte sequitur*—he who sues on behalf of the King as well as for himself.⁷⁹ Under the False Claims Act, “[a] person may bring a civil action for a violation of [the Act] for the person and for the United States Government.”⁸⁰ The citizen, also known as the “relator,” is required to serve on the Government a copy of the complaint.⁸¹ Within 60 days of being served with the complaint, the Attorney General may decide to intervene and take over the FCA action.⁸² However, if the Attorney General decides not to intervene, the relator has the right to carry on with the civil action.⁸³

While I question neither the patriotism nor the love for accountability of *qui tam* relators, the False Claims Act rewards those who recover Uncle Sam’s due. If the Attorney General decides not to pursue the claim, a prevailing relator will be awarded between 25 and 30 percent of the proceeds of the action, in addition to attorneys’ fees and reasonable expenses.⁸⁴ The relator may also be entitled to a portion of the bounty in situations where the Attorney General decides to take the reins.⁸⁵ In this scenario, the relator will receive between 15 and 25 percent of the proceeds, in addition to attorneys’

76. *Id.*

77. *See, e.g.*, CAL. GOV. CODE § 12650 (2017) (the California False Claims Act).

78. Helmer et al., *supra* note 71, at 37.

79. *Qui Tam Action*, BLACK’S LAW DICTIONARY (10th ed. 2014).

80. 31 U.S.C. § 3730(b)(1) (2012); CAL. GOV. CODE § 12651(a) (2017).

81. 31 U.S.C. § 3730(b)(2) (2012); CAL. GOV. CODE § 12652(c)(3) (2017).

82. 31 U.S.C. § 3730(b)(2) (2012); CAL. GOV. CODE § 12652(c)(4) (2017).

83. 31 U.S.C. § 3730(c)(3) (2012); CAL. GOV. CODE § 12652(f)(1) (2017).

84. 31 U.S.C. § 3730(d)(2) (2012); CAL. GOV. CODE § 12652(g)(3) (2017).

85. 31 U.S.C. § 3730(d)(1) (2012).

fees and reasonable expenses.⁸⁶ The typical FCA suit involves employees of federal contractors who become aware of their employers' practices of overbilling the government for goods or services.⁸⁷

B. Reverse False Claims

Since its enactment in 1863, the FCA has undergone a series of substantial changes aimed at extending the reach of the act, including increases to the financial incentives provided to *qui tam* relators and establishing employment protections for whistleblowers.⁸⁸ Residing under the shadow of the Act is a section rarely employed: the reverse false claims provision.⁸⁹ This provision was included by Congress in the 1986 amendments to the FCA as a response to the courts' narrow interpretations of the Act.⁹⁰ In discussing this amendment, the Senate Judiciary's Committee stated that:

[T]he subcommittee added a clarification that an individual who makes a material misrepresentation to avoid paying money owed the Government should be equally liable under the Act as if he had submitted a false claim. The Justice Department testified that recent court rulings had produced an ambiguity as to whether such "reverse false claims" were covered by the False Claims Act, and the subcommittee agreed that such matters should be addressable under the Act.⁹¹

86. *Id.* Under the CFCA, the relator will receive between 15 and 33 percent, plus attorneys' fees and reasonable expenses. *See* CAL. GOV. CODE § 12652(g)(2) (2017).

87. *See* Helmer et al., *supra* note 71 at 40–41.

88. *See* Tyler Robinson et al., *Rise of the "Reverse" False Claim & Proposed Rules from CMS on Reporting & Returning Overpayments*, ILL. DEF. COUNS. (Jan. 9, 2014), <http://www.iadtc.org/news/152147/Rise-of-the-Reverse-False-Claim—Proposed-Rules-from-CMS-on-Reporting—Returning-Overpayments.htm>.

89. 31 U.S.C. § 3729(a)(1)(G) (2012).

90. *Id.*

91. S. REP. NO. 99-345, at 14 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5280.

As indicated by its name, the purpose of the reverse false claims provision of the FCA is to hold liable anyone who defrauds the government by making a false statement which reduces or cancels an obligation to pay the government.⁹² However, lack of statutory clarity led to further narrow judicial interpretations of this provision. In interpreting the meaning of “obligation,” the Eighth Circuit held that the obligation reduced or avoided by the false claim must be fixed and “cannot be merely a potential liability.”⁹³ Rather, “a defendant must have had a present duty to pay money or property that was created by a statute, regulation, contract, judgment, or acknowledgment of indebtedness.”⁹⁴ In other words, an individual must first owe a fixed amount to the government or be contractually obligated to pay a contingent amount in order to fall under the purview of the FCA’s reverse claims provision.⁹⁵ As such, an individual who made a false statement so as to reduce or eliminate a future liability (for example, misrepresenting material facts so as to reduce the cost of a permit) could not be held liable under the False Claims Act.⁹⁶ Due to this interpretation, the reverse claims provision has been primarily used in situations where a government contractor, holding property that belongs to the government, makes a false statement in order to avoid returning that property to the government.⁹⁷

C. Reverse False Claims After FERA

The Fraud Enforcement and Recovery Act of 2009⁹⁸ (FERA) was Congress’s response to the nation’s ongoing economic crisis.⁹⁹ The Act’s main goal was to provide federal agencies the necessary resources to

92. *Id.*

93. *See* U.S. v. Q Int’l Courier, Inc., 131 F.3d 770, 773 (8th Cir. 1997).

94. *Id.*

95. *See id.*

96. *See id.*

97. *See, e.g.,* United States v. Pemco Aeroplex, Inc. 195 F.3d 1234 (11th Cir. 1999) (finding that there were grounds for a reverse false claims action against the defendant, an aircraft maintenance contractor who purchased spare aircraft wings from the government at a significantly lower-than-market price by falsely claiming that the spare wings it held were of an older model).

98. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009) (hereinafter “FERA”).

99. *See* S. REP. 111-10, at 4 (2009) *as reprinted in* 2009 U.S.C.C.A.N. 430, 430–32.

investigate and prosecute financial fraud, placing emphasis on mortgage lending fraud.¹⁰⁰ Recognizing the importance of the FCA as “one of the most potent civil tools for rooting out waste and fraud in Government,” FERA amended the FCA to provide clarity to the Act’s false claim provisions.¹⁰¹ The Legislature’s intent was clear; FERA did not extend the applicability of the reverse false claims provision, but rather clarified Congress’s original intent in response to the courts’ narrow interpretations of the law which undermined the purpose and effectiveness of the FCA.¹⁰² As stated by the Senate Judiciary Committee,

[b]y including contingent obligations such as, ‘implied contractual, quasi-contractual, grantor-grantee, licensor-licensee, fee-based, or similar relationship,’ this new section reflects the Committee’s view, held since the passage of the 1986 Amendments, that an ‘obligation’ arises across the spectrum of possibilities from the fixed amount debt obligation where all particulars are defined to the instance where there is a relationship between the Government and a person that ‘results in a duty to pay the Government money, whether or not the amount is yet fixed.’¹⁰³

Additionally, the committee noted that the inclusion of the term “statutory” in the definition of an “obligation” ensures that duties that are created by statutory authority, whether they create an express or implied contract or other relation, fall within the scope of the FCA.¹⁰⁴

Also, the FERA lowered the level of culpability required to be subject to reverse false claims liability.¹⁰⁵ While the FCA originally required for a person to submit a false statement or record for reverse false claims liability to attach, the post-FERA FCA states that “mere knowledge and avoidance of an obligation is sufficient, without the submission of a false record, to give

100. *Id.* at 431–32.

101. *Id.* at 433.

102. *See id.* (stating that the purpose of FERA is to “correct[] and clarif[y]” provisions of the FCA that, due to the courts’ narrow interpretations, undermined the effectiveness of the FCA).

103. *Id.* at 441 (citations omitted).

104. *Id.* at 442.

105. *United States ex rel. Customs Fraud Investigators, LLC. v. Victaulic Co.*, 839 F.3d 242, 255 (3d Cir. 2016) (hereinafter “CFI”).

rise to liability.”¹⁰⁶ The False Claims Act’s scienter requirement is defined as follows:

- (1) the terms “knowing” and “knowingly”
 - (A) mean that a person, with respect to information
 - (i) has actual knowledge of the information;
 - (ii) acts in deliberate ignorance of the truth or falsity of the information; or
 - (iii) acts in reckless disregard of the truth or falsity of the information; and
 - (B) requires no proof of specific intent to defraud.¹⁰⁷

III. ENVIRONMENTAL ENFORCEMENT THROUGH REVERSE FALSE CLAIM ACTIONS

Though few reverse false claim actions have been initiated since the FERA amendments to the FCA, it is reasonable to state that the universe of actions subject to the act has been greatly expanded. This section will revisit the two case studies presented in section I and discuss *qui tam* citizen enforcement theories under the post-FERA reverse false claim provision. Also, this section will discuss additional substantive and procedural considerations related to reverse false claims actions, including pleading requirements.

A. Revisiting the Case Studies After FERA

1. Prime Petroleum: False Statements Leading to Less Stringent Review

In *United States ex rel. Customs Fraud Investigators, LLC v. Victaulic Co., (CFI)* the Third Circuit reviewed the validity of a reverse false claim action dealing with a pipe fitting importer that avoided a duty by failing to disclose that their imported pipe fittings did not meet statutory import

106. *Id.* See also 13 U.S.C. § 3729(b)(1) (2012) (defining “knowing” and “knowingly” as having actual knowledge of the information or acting in deliberate ignorance or reckless disregard of the truth or falsity of the information. Further, no proof of specific intent to defraud is necessary for liability to attach.).

107. 31 U.S.C. § 3729(b)(1) (2012).

requirements.¹⁰⁸ According to the Tariff Act of 1930, imported pipe fittings must be marked with certain information before they are released into the stream of commerce.¹⁰⁹ Any importer that releases unmarked or improperly marked pipe fittings into the market is required to pay a “marking duty” to the U.S. government.¹¹⁰ However, the Act relies primarily on the importers to self-report any marking duties owed as a result of placing unmarked or improperly marked pipe fittings in the stream of commerce.¹¹¹ Further, the Act is clear that marking duties are not discretionary and “shall not be construed to be penal.”¹¹² The Court held that a person’s failure to report information that would have created a non-discretionary, non-penal statutory fee may give rise to reverse claims liability.¹¹³

In deciding whether reverse false claim liability could attach to the defendant, the Third Circuit discussed a series of factual elements that could support a false claim liability finding: (1) a relationship between a person and an agency governed by a statutory procedure;¹¹⁴ (2) the statute involved can create a financial obligation between the person and the agency;¹¹⁵ (3) the obligation is neither penal nor discretionary;¹¹⁶ (4) creation of that financial obligation depends on the person’s disclosure of relevant information;¹¹⁷ (5) the person failed to disclose information that would have led to the creation of such a statutory obligation;¹¹⁸ and (6) as a result of failing to disclose such information, the person either avoided or reduced the obligation that would have otherwise be owed to the government.¹¹⁹

Despite the differences between both cases, *Prime* shares the factual underpinnings that the Court discussed in its finding of an actionable reverse

108. *CFI*, 839 F.3d at 255.

109. *Id.* at 245–46.

110. *Id.* at 246.

111. *Id.*

112. *Id.* This is essential since the courts have settled that presenting a false claim (or withholding information) to avoid a fine or discretionary assessment does not create a reverse false claim liability under the FCA. *See, e.g., United States v. Southland Gaming of the Virgin Islands, Inc.*, 182 F. Supp. 3d 297, 315 (V.I. 2016).

113. *See CFI*, 839 F.3d at 258.

114. *Id.* at 245–46.

115. *See id.* at 254.

116. *Id.* at 246.

117. *Id.*

118. *See id.*

119. *Id.*

false claim suit in *CFI*.¹²⁰ First, Prime and City Planning have a relationship created by statute.¹²¹ At the time, Prime sought to obtain the necessary permit approvals from the City, allowing it to construct and install new crude storage tanks.¹²² Second, the Los Angeles Municipal Code creates a financial obligation between Prime and City Planning.¹²³ The Municipal Code sets fixed application fees that vary according to the type of CEQA study required, the project's fire danger, and the size of the lot.¹²⁴ Third, the obligation is an application fee; it is neither penal nor discretionary.¹²⁵ Fourth, the application fee varies in cost according to the required CEQA study level, which is determined according to the applicant's disclosures.¹²⁶ Fifth, Prime failed to disclose its plans to switch crude feedstock; an action which would have greatly increased the refinery's environmental impacts

120. It is important to mention that an earlier version of FERA specifically named marking duties within the proposed definition of "obligation." *See supra* note 98, at 14 n. 10. However, the Senate ultimately removed marking duties from the definition of "obligation" since the post-FERA definition is so clear and expansive that "any such specific language would be unnecessary." *See id.* The Court in *CFI* began its analysis of the case acknowledging the expansive nature of post-FERA reverse false claims liability, supporting the notion that the factors it considered apply beyond marking duty cases. *See generally CFI*, 839 F.3d at 254–56 (discussing the value of reverse false claims liability as a deterrent in situation where, without the risk of treble damages, the benefits of concealing information to avoid paying a mandatory fee exceed the risks of detection. This is particularly necessary in cases where, due to the government's inability to check the veracity of every claim made by a person, the success of the statutory scheme primarily depends on full and truthful self-disclosures from persons regulated by the statute).

121. *See supra*, note 50 and accompanying text.

122. *Id.*

123. *See* LA MUNI. CODE § 19.05 (2012).

124. *Id.* In case of EIRs, the Municipal Code also states that the applicant is responsible for reimbursing the city for any expenses which may exceed the cost of the EIR application fee.

125. *Id.* ("For the processing of each initial study . . . or environmental impact report (EIR) filed in connection with a permit application . . . the following fees *shall* be paid to the appropriate City departments.") (emphasis added).

126. *See id.* (establishing filing fees for the different levels of environmental review); *see also supra* note 55 and accompanying text (discussing how the CEQA Initial Study process, which is primarily driven by the applicant's disclosures of their project proposal, determines the level of environmental review that applies to a project).

and would have triggered a full EIR.¹²⁷ Lastly, as a result of its failure to disclose material information, Prime reduced its obligation to City Planning.¹²⁸ Thus, under the Third Circuit's analysis in *CFI*, reverse false claim liability may attach to a person that makes false statements or fails to disclose material information and as a result qualifies for a lower level of environmental review, thus decreasing an obligation to the government.¹²⁹

2. Western Scrappers: False Promises to Mitigate

Western Scrappers seems to present a set of facts that could intuitively give rise to an FCA claim.¹³⁰ However, the courts have not decided any post-FERA reverse false claim actions for failure to keep agreed-upon conditions that were material to the government's decision to issue a permit. Nevertheless, a tried-and-true FCA liability theory might provide grounds for reverse false claim actions under these facts: the false certification theory.

Under the false certification theory, "when a defendant submits a claim, it . . . certifies compliance with all conditions of payment."¹³¹

127. See Prime Petroleum: False Statements Leading to Less Stringent Review, *supra* Part III-A-1.

128. See *id.* at 11. The LAMC contains a full cost recovery provision, which allows the City to seek reimbursements from applicants for the actual costs associated with preparing the EIR. LA MUNI. CODE § 19.05(c) (2012). This shows that a project proponent may have two "obligations" under FCA: an established duty to pay a fixed application fee, and a contingent, non-fixed duty to reimburse the city for the actual cost of processing its EIR. See *id.* In the case at hand, Prime reduced the amount of the fixed statutory application fee by failing to disclose material information, which led Prime to be placed in a category (negative declaration instead of EIR) that carries a lower application fee.

129. *CFI*, 839 F.3d at 259.

130. In this case study, City Planning granted Western Scrappers the requested permits under the condition that Western adopt a series of mitigating measures; none of these measures were put in place by the company. See Western Scrappers: False Promises to Mitigate, *supra* Part III-A-2.

131. The false certification theory can be broken up into two categories: express false certifications—these consist of explicit statements by the defendant to the government claiming to be in compliance with contractual or statutory requirements; and implied false certifications—these occur when, though the defendant does not explicitly certify compliance with a contractual or statutory requirement, its knowledge that compliance is required and the fact that it makes a

However, if the defendant submits a claim and knowingly misrepresents compliance or omits to mention its non-compliance with statutory, regulatory, or contractual terms, those omissions may give rise to FCA liability if the misrepresentation or omission “is material to the . . . [Government’s] course of action.”¹³² Although the false certification theory has not been used in reverse false claim actions,¹³³ the results under both traditional and reverse FCA claims would follow the purpose of each provision. In a traditional false claim action, the FCA seeks to deter and punish actors that present false or fraudulent claims for approval.¹³⁴ In a reverse false claim action, the FCA seeks to deter and punish actors who reduce obligations to the government by misrepresentation or omission.¹³⁵ While in a traditional FCA action the false certification theory allows the government to punish an entity that misrepresented its compliance with a material agreed-upon term in order to receive payment, applying the theory to reverse false claims would lead to a reasonable extension, allowing the government to punish an entity that violated the terms of an agreement in order to reduce its obligation to the government.¹³⁶

claim for payment is taken as an implicit certification of compliance. *See, e.g., Universal Health Servs., Inc. v. United States*, 136 S.Ct. 1989, 1995 (2016). In *Universal Health Services*, a *qui tam* relator brought action against UHS under the implied false certification theory of liability. *Id.* at 1996–98. The plaintiff alleged that one of UHS’s satellite mental health clinics submitted payment claims to the government for services rendered to Medicaid beneficiaries. *Id.* However, and contrary to state law, many of the service providers were “unqualified, unlicensed, . . . [or] unsupervised.” *Id.* at 1998. By billing services performed by these individuals under the Medicaid payment codes and National Provider Identification numbers that correspond to state-regulated job titles, UHS’s claims constituted actionable misrepresentations. *Id.* at 2000.

132. *Id.* at 2001. *See also* 31 U.S.C. § 3729(b)(1) (2012) (defining “knowingly” as having actual information, acting in deliberate ignorance or reckless disregard of the truth or falsity of the information; however, no proof of specific intent to defraud is required to act “knowingly”); *id.* at § 3729(b)(4) (defining “material” as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”).

133. For a brief discussion of this matter, see *infra* note 131.

134. *See* 31 U.S.C. § 3729(a)(1)(A) (2012).

135. *See id.* at § 3729(a)(1)(G).

136. While a decision from the Southern District of New York appears to indicate that the implied false certification theory applies to reverse false claim actions, the Court did not provide sufficient analysis to establish a workable test.

At first glance, there appears to be a temporal component that casts a shadow over the notion of false certifications in the context of reverse false claims. In traditional false claim actions, the “certification” of compliance with contractual or statutory requirements appears to take place at the time the person presents the claim for payment.¹³⁷ In *Western Scrappers*, however, the “certification” was one of future compliance with a contractual or statutory requirement; *Western* agreed to adopt a series of mitigation measures—this was a requirement, under *Western*’s facts, to qualify for a less expensive mitigated negative declaration instead of having to pay for a full environmental impact report—in order to obtain the agency’s environmental clearance.¹³⁸ However, this incongruence appears to be addressed by the Ninth Circuit in *United States ex rel. Hendrow v. University of Phoenix*.¹³⁹ In *Hendrow*, the Court stated that the word “certification” does not have “some paramount and talismanic significance.”¹⁴⁰ The fact “[t]hat the theory of liability is commonly called ‘false certification’ is no indication that ‘certification’ is being used with technical precision, or as a term of art.”¹⁴¹ “False Claims liability attaches ‘because of the fraud surrounding the efforts to obtain the contract or benefit status,’” regardless of “whether it is a certification, assertion, statement, or secret handshake.”¹⁴² If the representation was knowingly false when made, and that representation “is the cause of the Government’s providing the benefit,” False Claims liability attaches.¹⁴³

The Court in *Hendrow* established a four-element test to establish FCA liability under the false certification theory.¹⁴⁴ First, there must be a

See *United States v. Raymond & Whitcomb Co.*, 53 F. Supp. 2d 436, 444–47 (S.D.N.Y. 1999). However, this decision supports the idea of expanding implied false certification to false claim actions.

137. For example, in *United States ex rel. Hendrow v. University of Phoenix*, the *qui tam* relator alleged that University of Phoenix violated the FCA by submitting yearly certifications of compliance with an incentive compensation ban—this is a requirement to qualify for Title IV funds—even though the University was not in compliance. 461 F.3d 1166, 1169 (9th Cir. 2006).

138. *See* Case Study 2: *Western Scrappers*, *supra* Part I-D-2.

139. 461 F.3d 1166 (9th Cir. 2006).

140. *Id.* at 1172.

141. *Id.*

142. *Id.* (citations omitted).

143. *Id.* at 1171–72.

144. *Id.*

false claim or course of conduct related to a “breach of contract, or violation of regulations or law, or receipt of money from the government.”¹⁴⁵ Second, the claim or course of conduct must have been knowingly “false when made.”¹⁴⁶ Third, “the false statement or course of conduct must be material to the government’s decision [to provide a benefit]” and there is a relation “between the subject matter of the false statement and the event triggering [the] Government’s loss.”¹⁴⁷ Lastly, “for a false statement or course of action to be actionable under the false certification theory . . . it is necessary that it involve an actual claim,” be it a request for the government “to pay out money *or forfeit moneys due*.”¹⁴⁸

The facts of *Western Scrappers* may fit well into the *Hendrow* framework.¹⁴⁹ In addressing the first part of the *Hendrow* test, I postulate that Western’s course of conduct (or “false certification”) is its continuous operation in breach of its promise to adopt mitigation measures; a promise on which the granting of environmental clearance was conditioned upon.¹⁵⁰ The third factor¹⁵¹ does not require extensive analysis: first, the promise to adopt the identified mitigation measures was not only relevant but necessary to support the agency’s adoption of a mitigated negative declaration instead

145. *Id.* at 1171 (citing *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265 (9th Cir. 1996)).

146. *Id.* at 1772. *See also supra*, note 121 and accompanying text (defining the scienter requirement under the FCA).

147. *Id.* (citing *Anton*, 91 F.3d at 1266). As to the materiality component, the Court stated that “the question is merely whether the false certification—or assertion, or statement—was relevant to the government’s decision to confer a benefit.” *Id.* at 1173.

148. *Id.* (emphasis added).

149. It is important to consider the fact that the four-part test in *Hendrow* was set forth with a traditional false claims action in mind, as that’s the claim that was before the court. For the purposes of extending the false certification theory to reverse false claims, this section reconciles the different terms between traditional and reverse false claim actions; for example, instead of referring to a “false or fraudulent claim for payment,” *see* 31 U.S.C. § 3729(a)(1)(A) (2012), I refer to “improperly avoid[ing] or decreas[ing] an obligation to pay.” *See id.* at § 3729(a)(1)(G).

150. *See Western Scrappers: False Promises to Mitigate, supra* Part III-A-2.

151. Since the second element needs more extensive discussion, its analysis is presented at the end of this paragraph.

of requiring an EIR;¹⁵² second, the promise to mitigate is precisely what led the agency to forego an EIR, thus reducing Western's obligation.¹⁵³ The fourth element is also satisfied, as Western's promise cause the government to "forfeit moneys due."¹⁵⁴ The second element, however, presents some difficulties. For liability to attach, the relator would need to show that Western acted with the requisite scienter at the time the promise was made.¹⁵⁵

I propose several ways in which the *qui tam* relator could show that Western acted with the requisite scienter. First, by showing that Western actually knew that it would not implement the mitigation measures;¹⁵⁶ for example, by producing communications between company executives indicating their intent not to implement mitigations. Second, by showing that Western should have known that it could not keep its promise;¹⁵⁷ for example, by showing that if Western would have reviewed its projected cash flow, it would have determined that it did not have the requisite capital to implement the mitigation measures. Third, by showing that Western disregarded information that showed it could not implement the measures;¹⁵⁸ for example, by showing that Western failed to make simple inquiries which would have shown that cutting its hours of operation would have made the venture unprofitable. Unless the relator is an insider with access to this information, evidence to prove scienter would be obtained during discovery.¹⁵⁹ While the defendant would likely move for dismissal due to failure to state a claim, lacking these details at the pleading stage is not fatal.¹⁶⁰

152. See *supra* note 31 (CEQA only allows for a mitigated negative declaration to be adopted when the project is expected to have significant impacts on the environment, but the project proponent agrees to implement a series of mitigation measures to eliminate the finding of significance).

153. See *supra* note 63 and accompanying text.

154. *Id.*

155. *Hendrow*, 461 F.3d at 1171–72.

156. See *Western Scrappers: False Promises to Mitigate supra* Part III-A-2.

157. *Id.*

158. *Id.*

159. *Id.*

160. Rule 9(b) of the Federal Rules of Civil Procedure states that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b). In the context of FCA reverse claims, a plaintiff "must provide 'particular details of a scheme to . . .

CONCLUSION

The current state of the law gives the unrepentant polluter an incentive to be less than truthful, if not outright deceitful, at the time of requesting environmental clearance for a development project. This is because half-truths or empty promises are not punished by SEPAs.¹⁶¹ Further, the resources of a city's code enforcement division might be so limited that a polluter may operate in violation of its permit conditions without facing the fear of an impending shutdown for years.¹⁶²

The False Claims Act is "intended to reach all types of fraud, without qualification, that might result in a financial loss to the Government."¹⁶³ The legislative purposes of state FCAs are often stated in even broader terms; in California, the "[u]ltimate purpose of the [FCA] is to protect the public fisc. To that end, the FCA *must be construed broadly as to give the widest possible coverage and effect to its prohibitions and remedies.*"¹⁶⁴ Using the False Claims Act as a sword against foul players could not only incentivize private actors to take the fight to the gates of those polluting our neighborhoods, but also deter polluters from taking actions adverse to the public interest. But most importantly, at least in the context of the False Claims Act: Uncle Sam will get what belongs to him.

avoid [or decrease] obligations paired with reliable indicia that lead to a strong inference that . . . obligations [were] avoided [or decreased]." *CFI*, 839 F.3d at 258.

161. See *Western Scrappers: False Promises to Mitigate supra* Part III-A-2.

162. See, e.g., Tony Barboza, *Questions Remain After Exide Deal with Federal Prosecutors*, L.A. TIMES (March 12, 2015, 6:47 PM). In this example, battery smelter Exide operated without a full permit for decades. The City was aware of this, as well as fully knowledgeable about the company's extensive record of hazardous waste, clean water, and clean air violations. *Id.*

163. *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968).

164. *State ex rel. Bowen v. Bank of America Corp.*, 23 Cal. Rptr. 3d 746, 754–55 (Cal. Ct. App. 2005) (internal citations omitted) (emphasis added).