STATE CAPITOL
P.O. BOX 942849
SACRAMENTO, CA 94249-0115

California Legislature

The Administration's Policy Package on California Environmental Quality Act Judicial Review

An Informational Hearing of the Assembly Committees on Natural Resources and Judiciary

By the Staff of the Assembly Committees on Natural Resources and Judiciary

I. An Overview of the California Environmental Quality Act

Originally enacted in 1970, and signed into law by then-Governor Ronald Reagan, the California Environmental Quality Act (CEQA) requires government agencies to consider the environmental impacts of governmental actions before approving plans, policies, or development projects. At its core, CEQA seeks to ensure that public agencies do not approve projects without considering the negative impacts a project may inflict on the environment. Although CEQA is too often, and incorrectly, viewed as a tool to skew outcomes in a manner that favors environmentalists and deters development, in reality, "CEQA operates, not by dictating pro-environmental outcomes, but rather by mandating that 'decision makers and the public' study the likely environmental effects of contemplated government actions and thus make fully informed decisions regarding those actions."[1]

The CEQA process begins with a preliminary review of a proposal to determine if the governmental action would trigger a CEQA review. A proposal will only trigger CEQA review if it involves the exercise of discretionary powers by the government agency and results in a direct, or reasonably foreseeable indirect, physical change in the environment.[2] Once a project triggers CEQA, the government agency, typically referred to as the "lead agency," must then determine if the project falls within a statutory or regulatory exemption to CEQA. If it does, the lead agency may file a notice of exemption and no additional actions are required.[3] If a project does not qualify for an exemption, the lead agency must conduct an initial review to determine if the project may have a "significant" environmental impact, based on 21 environmental factors. If the agency finds that the project would not have a significant impact on the environment or that revisions to the project will mitigate potential impacts, the lead agency may file a negative declaration or mitigated negative declaration.[4] If a significant environmental impact may occur, the lead agency must prepare a full environmental impact report or EIR. The EIR process involves the lead agency producing a draft document outlining the environmental impacts of a

[1] *Citizens Coalition Los Angeles v. City of Los Angeles* (2018) 26 Cal.App. 5th 561, 577.
[2] 14 CCR Section 15060 (c).
[3] 14 CCR Section 15062.
[4] *Gentry v. City of Murrieta* (1995) 36 Cal.App. 4th 1359.

project, any available mitigation measures, and a consideration of less environmentally impactful alternatives. The draft document must then be released for public comment. The lead agency must revise the EIR or submit a response to the comments prior to certifying the final EIR.[5] Thus, when examined as a whole, the primary objective of the environmental review required by CEQA is to steer agency decision makers into approving projects in a manner that utilizes feasible alternatives and mitigation measures to lessen the project's impact on the environment. These considerations of the impacts of a project make up the majority of the EIR. CEQA directs agencies to complete and certify an EIR within one year of the project application. The failure to properly consider a project's impacts is what typically results in litigation.

In the event a lead agency fails to properly conduct an EIR, they may be subject to litigation challenging the validity of the document and the overarching approval of the project. Most CEQA lawsuits must be brought within 30 days of the approval of the final EIR.[6] As with most court proceedings questioning government decision making and actions, CEQA litigation is heavily reliant on official government records as well as communications between stakeholders and government officials.

II. Legislative Policy and Budget Committees Serve Two Distinct, Yet Important, Purposes.

The Legislature utilizes policy and budget committees in two distinct matters. The budget committees evaluate executive agencies and policy priorities based on the impact to the state's budget and track agencies' progress toward overall legislative priorities. The Legislature's policy committees are primarily focused on the merits of various policy proposals and their impacts on everyday Californians. Although somewhat time consuming, the policy committee process ensures that legislation is well-designed by the time it reaches the Governor's desk.

Governor Newsom unveiled a broad set of policy proposals on May 19, 2023 seeking to streamline clean energy, water, and transportation infrastructure projects. Despite the breadth of these policy changes, these proposals were designed to be adopted through the budget process, thus bypassing consideration by policy committees. This "infrastructure package" includes the following 10 policy proposals:

- ***CEQA Administrative Records Review (updated: 05/19/2023)***
- ***CEQA Judicial Streamlining (updated: 05/19/2023)***
- Green Financing Programs for Federal Inflation Reduction Act Funding (updated: 05/19/2023)
- Accelerating Environmental Mitigation (updated: 05/19/2023)
- National Environmental Policy Act (NEPA) Delegation Authority (updated: 05/19/2023)
- Direct Contracting: Public-Private Partnership Authority 1-15 Wildlife Crossings (updated: 05/19/2023)
- Job Order Contracting (updated: 05/19/2023)
- Progressive Design Build Authority for the Department of Transportation and the Department of Water Resources (updated: 05/19/2023)
- Fully Protected Species Reclassification (updated: 05/19/2023)
- Delta Reform Act Streamlining (updated: 05/19/2023)

[5] 14 CCR Section 15088.
[6] See, Public Resources Code Section 21167.

Although this joint informational hearing is only focused on the two CEQA related proposals, the list above illustrates how many policy changes the Governor seeks to enact through the expedited budget committee review process. This package was made public along with the issuance of Executive Order N-8-23, which calls for the convening of an Infrastructure Strike Team to identify streamlining opportunities. When unveiling the proposals, Governor Newsom noted that these proposals seek to "facilitate and streamline project approval and completion to maximize California's share of federal infrastructure dollars and expedite the implementation of projects that meet the state's ambitious economic, climate, and social goals."

The Governor has expressed a desire that the Legislature include these streamlining proposals – released after the May Revision – as "trailer bills" in the 2023-24 State Budget. As a whole, this package of bills represents significant policy changes in various areas, including transportation, wildlife, water, and natural resource laws. Considering these proposals late in the Budget process, especially after budget sub-committees have concluded their work, significantly limits transparency and public input. Hastily considering these proposals also increases the potential for creating unintended consequences while limiting the Legislature's ability to evaluate whether the proposals will actually lead to the positive impacts envisioned by this Administration.

In order to better understand the implications of these proposals, the Transportation Committee, Water, Parks, and Wildlife Committee, Natural Resources Committee, and Judiciary Committee are holding informational hearings to gather information and hear initial stakeholder input on these infrastructure proposals. While these informational hearings are important first conversations, a more thorough policy process is likely needed, especially for the more expansive proposals. By seeking to circumvent the traditional committee process, these budget proposals would limit both houses of the Legislature from thoroughly vetting these proposals.

Furthermore, while accelerating the development and construction of critical infrastructure is a laudable and shared goal, each of these proposals should be evaluated to determine whether it is necessary to take legislative action in June as part of the Budget, or if it is even necessary to undertake a truncated legislative process to consider these proposals through the remainder of this legislative year. These proposals relate to streamlining environmental review for certain projects, expediting public contracting processes, and changing quorum rules for one state agency. Should aspects of these proposals be found to have merit and be passed by the Legislature, there will likely be minimal impact on project implementation timelines, whether these measures are passed in June or August, or even January of next year.

The Legislature may wish to evaluate each of these proposals to understand whether there are sufficient benefits for acting on these policies during a very truncated timeline, given the potential for unintended consequences.

III. California Environmental Quality Act: Record of Proceedings

A. Existing Law Regarding Record of Proceedings

As noted above, CEQA litigation is highly dependent on the record of proceedings that lead to the approval of an EIR. The record of proceedings, generally, refers to all documents presented to or considered by the lead agency. As it relates to CEQA litigation a petitioner is required to

seek the official record from the lead agency within ten days of filing the lawsuit.[7] A petitioner may elect to prepare the record at its own expense, or rely on the agency to do it. Once the request for the record is received, the lead agency has 60 days to prepare and certify the record and transmit the documents to the court.[8] The petitioner and the lead agency may agree to an alternative method of developing the record, but the lead agency is still required to certify the document's accuracy.[9] Specifically related to CEQA matters, the record must contain, at minimum, the following:

- All project application materials.
- All staff reports and related documents prepared by the respondent public agency with respect to its compliance with the substantive and procedural requirements of CEQA and with respect to the action on the project.
- All staff reports and related documents prepared by the respondent public agency and written testimony or documents submitted by any person relevant to any findings or statement of overriding considerations adopted by the lead agency.
- Any transcript or minutes of the proceedings at which the decisionmaking body of the respondent public agency heard testimony on, or considered any environmental document on, the project, and any transcript or minutes of proceedings before any advisory body to the lead public agency that were presented to the decisionmaking body prior to action on the environmental documents or on the project.
- All notices issued by the lead public agency.
- All written comments received in response to, or in connection with, environmental documents prepared for the project, including responses to the notice of preparation.
- All written evidence or correspondence submitted to, or transferred from, the lead public agency with respect to the project.
- Any proposed decisions or findings submitted to the decisionmaking body of the respondent public agency by its staff, the project proponent, project opponents, or other persons.
- The documentation of the final public agency decision, including the final EIR, mitigated negative declaration, or negative declaration, and all documents cited or relied on in the findings or in a statement of overriding considerations.
- Any other written materials relevant to the lead public agency's compliance with CEQA or to its decision on the merits of the project, including the initial study, any drafts of any environmental document, or portions thereof, that have been released for public review, and copies of studies or other documents relied upon in any environmental document prepared for the project and either made available to the public during the public review period or included in the respondent public agency's files on the project, and all internal agency communications, including staff notes and memoranda related to the project or to compliance with CEQA.
- The full written record before any inferior administrative decisionmaking body whose decision was appealed to a superior administrative decisionmaking body prior to the filing of litigation.[10]

[7] Public Resources Code Section 21167.6 (a).
[8] Public Resources Code Section 21167.6 (b).
[9] *Ibid.*
[10] Public Resources Code Section 21167.6 (e).

It should be noted that in CEQA cases, like other writ of mandate proceedings, evidence outside of the record is almost never admissible.[11] Generally, the only exceptions to this rule are for evidence that could not have been produced despite the exercise of reasonable diligence, [12] evidence regarding issues other than the validity of the agency's decision making (jurisdictional concerns or other procedural issues),[13] and evidence related to procedural fairness. [14] Evidence seeking information regarding an individual elected official's decisionmaking processes is never admissible, however, documents that the decision maker relied upon may be obtained utilizing the California Public Records Act (CPRA).[15]

B. Administration Proposal

The Newsom Administration contends that, "in the reported case law, record preparation took between four and 17 months."[16] Although it is unclear what "case law" provided these figures, the Administration appears to indicate that the record takes too long to prepare and thus delays litigation. Accordingly, the administrative record streamlining proposal would seek to remedy this purported issue in the following ways:

- Allow a public agency to prepare a record notwithstanding a petitioner's request to prepare the documents so long as the agency notifies all parties and assumes the initial costs, but appears to permit the lead agency to seek cost recovery from the petitioner.
- Require the record to be submitted electronically to the court, unless the court requests otherwise.
- Limit extensions of the statutory timelines for compiling the record to only cases in which a court deems good cause exists.[17]

The Administration's proposal also seeks to modify the contents of the official record itself. As noted above correspondence of the lead agency on matters related to an EIR is part of the official record. The Newsom Administration proposal would remove from disclosure as an "internal agency communication" all internal electronic communications including, "including emails that were not presented to the final decisionmaking body."[18] However, the proposal notes that nothing in the proposed trailer bill would limit the application of the CPRA or relevant provisions of the Evidence Code.

C. Policy Considerations

How does the proposal apply to lead agencies without decisionmaking bodies?

This proposal appears to capture typical CEQA lead agencies where the final CEQA determination is made by a council or board. In those cases, it is not clear if the proposal is

[11] See, Evidence Code Section 350, *State of California v. Superior Court* (1974) 12 Cal. 3d 237,
[12] Code of Civil Procedure Section 1094.5 (e)
[13] *Running Fence Corp. v. Superior Court* (1975) 51 Cal.App. 3d 400.
[14] *Clark v. City of Hermosa Beach* (1996) 48 Cal.App. 4th 1152.
[15] *City of San Jose v. Superior Court* (2017) 53 Cal.App 3d 1325.
[16] Dept. of Finance, *Proposed Trailer Bill Legislation: CEQA Administrative Record Fact Sheet* available at: https://esd.dof.ca.gov/trailer-bill/public/trailerBill/pdf/954.
[17] *Ibid.*
[18] *Ibid.*

intended to shield all internal electronic communications except those presented to the entire decisionmaking body, if electronic communications sent to individual council or board members, but not the entire body are included, or why communication with important lesser decisionmakers, such as planning commissions and planning directors, should be excluded from the record.

In some cases, CEQA determinations are made by an agency executive, and there is no "final decisionmaking body." In those cases, this proposal could allow the agency to exclude all internal electronic communications from the record. The proposal has the potential to encourage agency staff to withhold communication to the entire decisionmaking body as a means to exclude information from the record.

The proposal allows the agency to pick and choose what documents to include in the record. Communication by e-mail and text is ubiquitous, and relatively easy to track and disclose. It's hard to suggest that e-mails and texts are not a common and important form of agency communication and decisionmaking, and therefore a relevant part of the agency record. If the problem is that including emails and texts creates a burden for preparation of the record, perhaps agency staff should be prohibited from communicating about a project via e-mail and text?

If the Governor's broader CEQA reforms are enacted, the Legislature may wish to eliminate these provisions of the trailer bill language or significantly modify the proposal to ensure that the full-scope of agency decision can be properly reviewed by the courts.

Impacts of internal electronic communications exemption.

The Newsom Administration argues that excluding external electronic communications from the official record will save time as lead agencies would not be forced to gather and review e-mails searching for relevant correspondence. While this may be true, this exception is likely to result in the omission of significant information regarding an agency's decisionmaking process from the official record, and therefore the evidence of the adequacy of the ultimate decision of the lead agency. Given the highly electronic nature of modern government business, significant portions of the information that presently compose the official record for CEQA litigation is likely to be relevant but would be omitted from the official record. Indeed, due to ambiguity in the language of the proposal, one may be able to argue that attachments of critical documents contained in electronic communications may also be exempt from disclosure in the official record. For example, if a lead agency considering a transportation project received a study on potential greenhouse gas (GHG) emission impacts from a consultant via e-mail, would the document's inclusion in the electronic communication be sufficient to keep it out of the official record? Should the language be interpreted to permit such an omission, this proposal would significantly undermine a court's ability to review the adequacy of an agency's decision and determine if it was made in conformity with the evidence on the record. Additionally, such a sweeping change to the existing law governing the official record would treat judicial review of CEQA determinations differently than judicial review of all other types of public agency decision making.

While this language could be clarified to avoid such ambiguity, as presently drafted, the chilling effect on government accountability that would result should the proposal be enacted would be

significant. However, it is unclear if such a sweeping exclusion of information is the actual intent of the Newsom Administration.

Accordingly, should the Legislature agree to adopt this proposal, it should require significant clarification of this provision to avoid substantially impairing the court's ability to review the merits of an agency's decisions under CEQA.

The California Public Records Act and the internal communications exemption.

Setting aside the potentially detrimental impact to judicial review that exempting electronic communications from an official record may have, the proposal may actually result in *more* work and delay for lead agencies. As noted above, existing law does permit petitioners to utilize the CPRA to seek internal agency documents that can be deemed public records and that may be relevant to CEQA litigation.[19] Pursuant to the CPRA, a public record is, "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."[20] It is not difficult to envision a scenario, should this proposal be enacted, in which CEQA litigants simply turn to the CPRA to gain access to documents not contained in the official record. In such an instance, the lead agency would have to search for and provide records of electronic communications, notwithstanding the proposed changes to the CEQA records statute.

Much like CEQA, the CPRA is subject to frequent litigation. Should a CEQA litigant believe a lead agency failed to adequately comply with a CPRA request, they would be able to file suit seeking records under the CPRA. Should that lawsuit become protracted it would almost certainly delay the CEQA litigation, thus completely undermining the goal of expediting CEQA cases that the Newsom Administration seeks with this proposal. In fact this very scenario recently played out in San Diego County. As a result of an overly aggressive e-mail retention and deletion policy, the County was deleting all e-mails that did not contain official government documents within 60 days, including e-mails involving EIRs. When the County planning documents were litigated for not adequately adhering to CEQA, the County would not produce e-mails requested by the plaintiffs. As a result the County was sued utilizing a CPRA claim. That claim delayed the CEQA case by nearly four years.[21] Of note to this proposal, the court deciding that matter noted, "e-mail, especially combined with the ability to attach documents, is also used to communicate important information previously sent by mail or private delivery service."[22]

Furthermore, protracted litigation about disclosure of these records could prove very costly to public agencies. Existing law *requires* the court to award court costs and reasonable attorney's fees to the requester should the agency improperly withhold any requested record, while only requiring the requester to pay the agency's costs and attorney fees if the court finds that the requester's case is clearly frivolous.[23] Therefore, litigation over disclosure of the electronic communications sought to be protected by the Administration's proposal could have the

[19] *City of San Jose v. Superior Court, supra.*
[20] Government Code Section 7920.530 (a).
[21] *Golden Door Properties, LLC. v. Superior Court* (2020) 52 Cal.App 5th 837.
[22] *Id.* at 875.
[23] Government Code Sections 7923.110, 7923.115.

unintended consequence of imposing much higher litigation costs on public agencies that choose to withhold those records.

Accordingly, the Legislature should strongly consider the unintended impacts on CEQA litigation timelines and costs before potentially approving this proposal.

There are procedures under current law to make preparation and certification of the record of the record more efficient and faster, and that do not compromise the content of the record.

Each of the prior expedited judicial review bills that have passed the Legislature, dating back to 2011, has included provisions for concurrent, electronic preparation of the record, as well as limitations on public comments after the close of the public comment period. In addition, Public Resources Code Section 21167.6.2 authorizes any lead agency to prepare the record concurrently with the administrative process. Under these procedures, all materials are submitted, compiled, and posted electronically during the administrative process, allowing the agency to certify the record within 30 days of its final CEQA determination. The concurrent preparation procedures treat electronic documents as the solution, not the problem.

IV. California Environmental Quality Act: Infrastructure Projects: Streamlining Judicial Review.

A. Existing Law Regarding CEQA Litigation.

Once a party challenges an agency's decision pursuant to CEQA, the courts are required to review the adequacy of the decision. Such reviews utilize a "substantial evidence" standard that requires a court to determine if the lead agency's decision was consistent with the substantial body of evidence contained in the official record.[24] Because the evidence in the record can be voluminous and highly technical, CEQA litigation can take time. In addition to the length of litigation, CEQA reform advocates argue that the eventual court decision in CEQA cases can be unpredictable. While claims about CEQA litigation frequently reach hyperbolic levels, Public Resources Code Section does 21168.9 confer significant latitude to judicial officers in crafting remedies for CEQA violations. Should a court determine a CEQA violation occurred it may do any of the following:

- Mandate that the determination, finding, or decision be voided by the public agency, in whole or in part.
- Mandate that the public agency and any real parties in interest suspend any or all specific project activity or activities, pursuant to the determination, finding, or decision, that could result in an adverse change or alteration to the physical environment, until the public agency has taken any actions that may be necessary to bring the determination, finding, or decision into compliance with CEQA.
- Mandate that the public agency take specific action as may be necessary to bring the determination, finding, or decision into compliance with CEQA.

In essence, an adverse CEQA ruling can result in a judicial determination that ranges from simply requiring updated mitigation measures to stopping a proposed project from ever going

[24] *Vineyard Area Citizens v. City of Rancho Cordova* (2007) 40 Cal. 4th 412.

forward. Accordingly, it is unsurprising that many reform advocates highlight the need for quick resolutions to CEQA litigation as a means of establishing certainty for public projects. To that end, existing law already provides CEQA cases preferences over *all* other civil litigation,[25] including those cases given calendaring preferences in the Code of Civil Procedure due to the poor health of the litigants.[26] The Code of Civil Procedure provisions build upon the existing law's efforts to deter unnecessary or frivolous CEQA litigation, including provisions enabling the court to require plaintiffs to put forward a financial security payment for potential damages when an affordable housing development is challenged.[27]

B. Administration Proposal

Scope of projects eligible for streamlining.

The Administration proposes to offer expedited judicial review (i.e., requiring the courts to resolve lawsuits within 270 days, to the extent feasible) to a broad range of infrastructure projects falling into four categories – energy, transportation, water, and semiconductor or microelectronic.

Prior expedited judicial review legislation has been limited in scope and/or duration (Approximately 30 projects have been eligible for expedited review since 2011. Of those, fewer than half proceeded to approval and only four have faced litigation.) This bill applies to an unlimited number of projects in and does so in perpetuity.

While the proposal is part of a package billed as advancing clean energy and climate goals, many eligible project types are likely to increase GHG emissions in construction, operation, or both, as well as have a range of other significant environmental impacts. There is no requirement that eligible projects result in GHG emissions benefits, or even mitigate GHG emissions.

Additionally, this proposal encompasses some projects that, regardless of any potential benefits of harms to the environment, remain highly controversial to impacted communities. One aspect of the Administration's proposal would authorize judicial streamlining for "water related projects." These projects are defined as the Sacramento-San Joaquin Delta Conveyance Project (Delta Conveyance Project), water storage projects funded by the Water Storage Investment Program under Proposition 1, recycled water projects, water desalination projects, and water canal or conveyance projects (e.g., California Aqueduct that is part of State Water Project). This proposal would limit the timeline for court consideration of these highly complicated, and controversial, "water related projects."

Eligibility requirements & certification process for projects.

In addition to the project certification requirements and expedited record certification procedures, this proposal seeks to adopt the familiar 270-day timeline for the adjudication of a CEQA dispute arising from a project certified in accordance with this proposal. Given the staff and cost pressures that such a timeline places on the judicial branch, project applicants would also be required to pay the costs of the trial court and Court of Appeal related to the court's

[25] Public Resources Code Section 21167.1 (a).
[26] Code of Civil Procedure Section 36.
[27] Code of Civil Procedure Section 529.9.

hearing and adjudicating any expedited CEQA lawsuit (except for transportation projects). Given that the courts are a government agency largely funded by General Fund expenditures and the fees charged to litigants, requiring a party to pay the government's cost to adjudicate their case is somewhat unusual and may give rise to concerns that the party funding the courts may receive special treatment.

Equally unique are the provisions of the bill limiting judicial review of an agency's decision to certify a project for the streamlined litigation provisions proposed by the trailer bill. While such an action would typically be subject to review through a writ of mandate, this bill forecloses such actions. Coupled with the blanket exemption from the Administrative Procedure Act provided for the development of criteria for certifying a project for streamlined judicial review, this proposal provides various parts of the Executive Branch with significant, and unchecked, leeway to certify projects as the Executive Branch sees fit.

C. Policy Considerations

This proposal abandons all of the "environmental leadership" requirements common to prior expedited judicial review laws.

AB 900 (Buchanan) Chap. 354, Stats. 2011, SB 7 (Atkins) Chap. 19, Stats. 2021, and each of the several project-specific bills that have passed the Legislature since 2011 have all included progressively stronger environmental leadership requirements. These bills require eligible projects to undergo an EIR, achieve GHG neutrality in construction and operation, exceed CEQA requirements for GHG and traffic mitigation, and, for building projects, earn LEED certification. This proposal includes *none* of these requirements.

Are eligible projects consistent with climate and other environmental goals?

According to Governor Newsom, the infrastructure package is aimed at "accelerating the building of clean infrastructure so California can reach its world-leading climate goals." However, this proposal does not have any direct requirements or other mechanisms to assure eligible projects have a GHG benefit or are otherwise consistent with the state's climate goals. As noted above, the broad project categories include project types that are likely to increase GHG emissions, as well as air pollution and water consumption, while reducing available habitat and impacting other resources.

Should the Legislature opt to advance these proposals, the Legislature should strongly consider amending into the trailer bill many of the GHG and other environmental requirements contained in prior CEQA streamlining measures to ensure that projects receiving priority treatment in the courts actually further California's climate goals.

The standards and process for certification of eligible projects is exceptionally vague.

In addition to the broad range of eligible projects it's not clear when and how projects will be certified as eligible. In some cases, it's not clear that the certifying entity will have any record, experience, or jurisdiction regarding the project. In particular, the Executive Director of the California Energy Commission (CEC) and the Director of the Office of Planning and Research (OPR) are charged with certifying projects completely outside their jurisdiction and normal duties. Is it not clear at what stage of project review the certification decision by the CEC or

OPR would be made, what record it is based on, or what role the public may have, beyond the minimal requirement to publish "evidence and materials submitted in for the certification…at least 15 days before the certification of the project." Further, is it not clear how the certifying entity can enforce the various conditions and requirements, such as the requirement to pay the lead agency and court costs.

Accordingly, should the Legislature opt to adopt the Governor's proposals, at minimum, additional clarity should be added to the trailer bill language to strengthen the project certification process and ensure robust public participation in the creation of the rules governing project certification.

Appropriateness of limiting judicial review of agency certification?

As discussed above this proposal explicitly prohibits Executive Branch certification of projects for judicial streamlining from judicial review. For efficiency's sake this prohibition may be appropriate in most cases, however, the existing language may be overly broad and will prevent any judicial review even in cases of official malfeasance or governmental overreach. For example, should officials approve a project that does not meet established criteria, which is proposed to be developed without meaningful public input, project opponents would have no recourse to challenge the decision in court.

Accordingly, should the Legislature opt to approve this proposal it should strongly consider modifying the prohibition on judicial review of project certification to include exceptions for, at minimum, official malfeasance and abuse of discretion.

Historic lack of use of the 270-day streamlining.

Acceding to the myth that CEQA slows development, several litigation streamlining measures have been enacted over the past decade. The Legislature's first foray into expediting the review of CEQA cases was the passage of AB 900 in 2011. That measure provided that "environmental leadership" projects, projects meeting specified environmental and labor requirements, would be granted immediate appellate-level review within 175 days of a case being filed. Those provisions were ultimately struck down as unconstitutional.[28] Moving away from the strict timeline and original appellate jurisdiction provisions, the Legislature began adopting project-specific CEQA streamlining bills that adopted a 270-day hearing timeline at the superior courts if such a timeline was "feasible." (See, SB 743 (Steinberg) Chap. 386, Stats. 2013.) In addition to the project-specific CEQA exemptions, the Legislature has repeatedly reenacted provisions of AB 900 adopting the "if feasible" 270-day timeline approach, including the recent 2021 extension of the AB 900 framework.[29]

When examining both "environmental leadership" bills and those for specific projects, since 2011, at least a dozen CEQA litigation streamlining bills have been adopted by the Legislature, with dozens more having been introduced for favored projects. These bills simply boost the idea that CEQA, and related litigation, stifles development. However, research suggests that actual litigation is exceedingly rare. Between 2002 and 2015 no single year saw more than 250 CEQA-

[28] *Planning and Conservation League v. State of California* (2012) RG12626904 (Alameda Sup. Ct.).
[29] SB 7 (Atkins) Chap. 19, Stats. 2021.

related cases filed statewide.[30] Additionally, a 2012 study by the Attorney General's office suggested that the actual rate of litigation over matters related to CEQA may be as low as 0.3 percent of all projects approved in California.[31] Given the low rate at which projects subject to CEQA are actually litigated, it appears that the real deterrence to large-scale development in California is more likely local zoning laws, land use policies, construction costs, and the general lack of open space in this state's largest cities.

Similar to CEQA litigation overall, data suggests projects that have been given CEQA-streamlining by the Legislature are rarely are litigated in court. Based on data provided by the Judicial Council, of the approximately 30 projects that have qualified for expedited CEQA review since 2011, only four projects have faced CEQA litigation. Of those four cases, two were high-profile stadium projects that, in some cases, utilized taxpayer money to build a private facility, one was a luxury condominium tower, and one is the reconstruction of the Capitol Annex. Notably, in addition to the relatively low-rate of litigation, of those 30 projects that qualified for expedited review another four were either terminated or withdrawn, and thus never built, due to financial or other business considerations and not environmentally-related legal exposure.[32] Of particular note, CEQA streamlining proved insufficient to convince the Oakland Athletics baseball club to build a new stadium in California as the Athletics are presently trying to convince the Nevada Legislature to finance a new stadium in that state.[33] Accordingly, despite the Legislature's use of CEQA-streamlining, an equal number of qualified projects benefited from these laws as those that failed under the weight of their own financial difficulties.

Although the existing law's 270-day CEQA litigation provisions are rarely utilized, as noted above this proposal dramatically scales back the GHG emission reduction and environmental leadership requirements typically contained in CEQA streamlining measures. Unfortunately the litigation data discussed above does not illuminate whether or not the minimal use of the CEQA streamlining provisions is the result of the stringent environmental standards (which are arguably an important prerequisite to obtaining streamlining) or the result of the streamlining provisions being relatively useless in the broader context of conducting environmental reviews and litigating CEQA cases.

Accordingly, the Legislature should strongly consider if the 270-day timeline for CEQA litigation is actually a helpful tool or if other alternatives should be considered to provide greater, and more useful, legal certainty for projects subject to environmental review. Unfortunately, seeking to adopt this proposal through the budget process significantly limits the Legislature's ability to consider such alternatives.

Are existing CEQA priority statutes inadequate?

---

[30] BAE Urban Economics, *CEQA in the 21st Century* (Aug. 2016), p. 19, available at https://rosefdn.org/wp-content/uploads/2016/08/CEQA-in-the-21st-Century.pdf.
[31] Office of the Attorney General, *Quantifying the Rate of Litigation Under the California Environmental Quality Act: A Case Study* (2012).
[32] California Senate Office of Research, *Review of Environmental Leadership Projects*, (Apr. 2019) at p. 5.
[33] AB 734 (Bonta) Chap. 959, Stats. 2018, Jeff Passan, *The Las Vegas A's? The latest on potential move from Oakland,* ESPN, Apr. 21, 2023, available at: https://www.espn.com/mlb/story/_/id/36246762/las-vegas-latest-potential-mlb-team-move-oakland.

As discussed above, CEQA litigation already enjoys significant litigation preferences and protections for project proponents and lead agencies. For example, affordable housing projects challenged under CEQA can seek the imposition of financial assurances from plaintiffs to ensure the project is not harmed by frivolous litigation.[34] Additionally, the existing civil litigation calendaring preferences means that CEQA litigation takes priority over all other civil cases, including those involving elderly or terminally ill plaintiffs, eviction and other housing related matters, labor and back wage disputes, and cases in which person's civil rights and liberties are at stake. It should be further noted that unlike many of the above described cases that directly impact the lives of ordinary Californians, CEQA litigation frequently involves private developers or large government agencies.

In justifying the proposed trailer bill language, the Newsom Administration notes, "California expects to make historic investments in infrastructure as a result of funding made available by the federal Infrastructure Investment and Jobs Act, Inflation Reduction Act, and CHIPS and Science Act, as well as separate investments reflected in this Administration's proposed budget… Given the substantial public benefits expected from these infrastructure investments, it is imperative that the environmental review and planning processes proceed as efficiently as possible."[35] Beyond references to recent federal legislation, which notably does not appear to have any significant requirements regarding timelines for project approvals, the Newsom Administration provides no evidence or discussion as to why the above described CEQA litigation preferences and protections are inadequate.

Given the minimal utilization of prior 270-day judicial streamlining, the Legislature should press the Administration as to why these provisions are needed for projects that may be funded using federal dollars, if such a timeline would actually be utilized by these projects, and if an alternative solution may accomplish the legal finality the Administration seeks in a more efficient and effective manner.

The impact to court personnel and calendars from expediting review of CEQA cases.

As noted above, this proposal would require all qualified CEQA litigation to be provided a fast-tracked 270-day litigation timeline. In order to ensure that the courts can meet this timeline, the Judicial Council of California notes that this proposal would require significant court resources. CEQA cases can be highly complex, and in order to facilitate proper review of the cases staff assets may be pulled from other judicial departments. Given that this proposal provides no additional resources to the courts, there is little chance that these positions could be backfilled. Additionally, given this proposal's elimination of the requirements regarding environmental leadership or clear GHG emissions reductions contained in prior judicial streaming bills, this measure may dramatically expand the number of cases that actually seek judicial streamlining. While the courts successfully managed the few cases that have actually been fast-tracked since 2010, should this proposal result in an influx of streamlined cases, the courts may become overwhelmed.

In the event CEQA cases overwhelm civil departments, significant impacts may occur. First, most courts maintain only a handful of departments with specialized CEQA experience. Should

[34] Code of Civil Procedure Section 529.9.
[35] Dept. of Finance, *Proposed Trailer Bill Legislation: CEQA Judicial Streamlining Fact Sheet*, available at: https://esd.dof.ca.gov/trailer-bill/public/trailerBill/pdf/956.

those departments become inundated with streamlined CEQA cases, other CEQA cases may be diverted to civil departments lacking the requisite knowledge of the intricacies of CEQA to properly evaluate a case. This may then result, despite the best effort of judicial officers and court staff, in inconsistent or otherwise substandard decisions as a result of the lack of specialized knowledge in CEQA. Even more problematic would be the diversion of court resources away from other civil matters. Prioritizing and expediting CEQA cases will deny justice to everyday Californians as their cases are put on hold while CEQA cases proceed. Furthermore, should CEQA cases overburden limited court resources, the quality of decisions in other civil matters may suffer due to the over extension of court resources. While this measure appears to contemplate project proponents paying for court costs, the inconsistency of such funding would likely preclude the courts from being able to adequately anticipate ongoing revenues and augment staffing levels.

Accordingly, while the topic of this proposal may not be appropriate for the budget, should the Legislature decide to move forward with the proposal it should strongly consider allocating significant new resources to the courts for training and staffing for CEQA matters. To the extent that the Newsom Administration believes that such resources would be inappropriate as a result of the present budget constraints, *the Administration may wish to consider delaying the proposal until the state's financial outlook improves or altering this proposal to lessen the financial burden on the judicial branch.*