June 6th, 2023

The Honorable Luz M. Rivas
Chair, Assembly Committee on Natural Resources
1021 O Street, Room 164
Sacramento, CA 95814

The Honorable Brian Maienschein
Chair, Assembly Committee on Judiciary
1021 O Street, Room 104
Sacramento, CA 95814

Re: Administration's Policy Package on California Environmental Quality Act Judicial Review (Record of Proceedings) – OPPOSE

Dear Chairs Rivas and Maienschein,

We are writing to express our opposition to Governor Newsom's proposal to amend the record of proceedings provisions in the California Environmental Quality Act (CEQA). The proposal included in the trailer bill package on May 19th would allow agencies to unilaterally exclude internal agency communications from the record of proceedings (also known as "administrative record") while allowing agencies to co-opt preparation of the record from petitioners if it is not completed within a certain timeframe. As explained below, this proposal would erode public trust in state and local government, undermine transparency in the decision-making process, and frustrate the public's fundamental right to access to information concerning the people's business set forth in the California Constitution and California Public Records Act.

This proposal is a stealth attack on the California Constitution and California Public Records Act.

The California Constitution declares that "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and ***the writings of public officials and agencies shall be open to public scrutiny***." (Cal. Const., Art. I § 3(b)(1).) Likewise, the California Public Records Act ("CPRA") includes a legislative declaration that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Cal Gov Code § 7921.000.) The Governor's proposal limits the public's access to "writings of public officials and

agencies" and gives agencies legal "cover" to block disclosure and review of such documents by claiming they are not part of the "administrative record" and/or are protected by a privilege. Agencies already often seek to evade full disclosure of such materials in response to public record act requests or as part of CEQA litigation, and this proposal will give them a legal justification to avoid producing any of them, or to simply "cherry-pick" communications favorable to the agency's or developer's views. As such, this proposal frustrates access to information regarding the people's business—the enforcement of California's landmark environmental law—and blocks courts from considering such information in enforcing CEQA.

This proposal would undermine unbiased and transparent decision-making in projects affecting the environment and public health.

Internal emails and other agency communications sometimes reveal developer attorneys or their lobbyists or consultants attempting to pressure agencies to downplay the environmental or public health harms of a project in CEQA documents such as an environmental impact report (also known as "EIR"). Currently CEQA allows the court to consider these communications and assess whether the EIR is based on solid science, or whether developer influence inappropriately shaped or changed that analysis. This proposal would frustrate informed decision-making, public trust, and transparency in the CEQA process by blocking consideration and review of these materials by the court. Internal emails can also reveal expert agency staff raising issues with the adequacy or accuracy of the environmental analysis, which can sometimes be brushed aside and not included in the final public environmental documents due to developer pressure. This proposal will shield such unbiased expert opinions from the decision-maker and court, undermining public accountability and trust. It would also allow an agency either on its own or in coordination with the developer/applicant to cherry-pick emails to include in the record, while excluding unfavorable emails.

This is particulalry problematic because existing CEQA case law already allows the developer and its consultants or lawyers to prepare the EIR as long as the agency signs off on the final product (*see Friends of La Vina v. County of L.A.*, 232 Cal. App. 3d 1446, 1452-1458) even though preparers of environmental documents make crucial decisions on close calls regarding whether an impact is "significant" or a mitigation measure "feasible" (*Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 918). And these conclusions in the EIR—even if they were drafted by the developer's consultants —are already afforded great deference by the courts under the "substantial evidence" standard (*Federation of Hillside and Canyon Assns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1259). This proposal would further limit transparency and accountability by shielding communications regarding how the EIR was prepared from from the public and courts. Courts and the public would never know if critical issues raised by agency staff were dismissed, because the agency could decline to produce them, or only produce favorable communications.

CEQA already provides for a streamlined litigation process and this proposal would not meaningfully expedite that process.

CEQA already has a streamlined litigation process as compared to general civil litigation. Civil litigation is governed by the Civil Discovery Act and allows for time-consuming and sometimes-burdensome discovery such as form interrogatories, special interrogatories, requests for admission, physical exams, production of documents, emails, and text messages, depositions of key persons and "persons most knowledgeable," as well as document and deposition subpoenas of third parties. This process can take years to complete before a case goes to trial. In contrast, CEQA already limits the "administrative record" to a smaller set of documents than is appropriate for discovery in a normal civil litigation lawsuit.

The proposal would not meaningfully decrease the length of CEQA litigation. A developer-side CEQA law firm predicts this proposal would only shorten the overall litigation length by "several months."[1] Given that large-scale projects often take years to study and obtain approvals, shaving a few months off the post-approval litigation process is a drop in the bucket. More importantly, such a minor decrease in the time to resolve litigation is not worth the significant erosion in public transparency and accountability resulting from this proposal.

At the same time, this proposal allows agencies to "take over" preparation of the record if a petitioner does not complete the record within 60 days of receiving the documents from the agency. The proposal is silent on who would bear the cost at that juncture and thus incentivizes agencies to take over that process, assert the petitioner has made errors in compiling it, and then demand the petitioner pay for the record if the petitioner loses the case. Agencies and developers already routinely assert cost bills between $30,000 and $100,000 for record preparation, which could financially cripple or even bankrupt small community organizations who bring CEQA litigation but are unsuccessful. This proposal would give agencies a powerful tool to co-opt preparation of the record and then seek such cost bills against small community groups.

CEQA and its judicial review provisions ensure protection of California communities and the environment.

Large-scale discretionary developments subject to CEQA often have significant impacts on public health, wildlife, and communities. CEQA results in the improvement of development proposals, inclusion of mitigation measures, and reduction of pollution and other harms to communities. For vulnerable communities, CEQA is often the only tool available to provide input on the environmental and public health impacts of development proposals and enforce CEQA through its judicial review provisions. Research demonstrates that CEQA is not a major barrier to housing development and instead helps protect the health and safety of communities.[2] There are indeed numerous substantial barriers to affordable housing in this state such as real estate speculation, construction costs, inequitable zoning in existing communities, and lack of tenant protections. This proposal will address none of these.

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[1] *A Practical Guide to Gov. Newsom's May 2023 Budget-Revised CEQA Trailer Bills* (May 23, 2023); https://www.hklaw.com/en/insights/publications/2023/05/a-practical-guide-to-gov-newsoms-may-2023-budgetrevised-ceqa

[2] *California's Living Environmental Law: CEQA's Role in Housing, Environmental Justice, & Climate Change* (2021); https://rosefdn.org/wp-content/uploads/CEQA-California_s-Living-Environmental-Law-10-25-21.pdf

While every law needs occasional refinement, this bill would undermine transparency and accountability in decision-making processes that deeply affect California communities. Unlike many other states that have succumbed to conservative campaigns to undermine laws designed to protect public health and the environment, California remains an environmental leader because we view environmental laws not as merely "permitting" or "clearances," but as reflections of our values that we should take a close look at the impacts and risks of development before moving forward. This proposal would allow agencies to brush over inconvenient facts and opinions, and hide them from view of the public and the judiciary. We urge you to reject it.

Sincerely,

J.P. Rose
Policy Director, Urban Wildlands Program
Center for Biological Diversity

Matthew Baker
Policy Director
Planning & Conservation League