

AMENDED IN SENATE APRIL 20, 2015
AMENDED IN SENATE MARCH 26, 2015
AMENDED IN SENATE MARCH 12, 2015

SENATE BILL

No. 122

Introduced by Senators Jackson and Hill

January 15, 2015

An act to amend Sections 21082.1, 21091, 21159.9, and 21167.6 of, and to add Section 21167.6.2 to, the Public Resources Code, relating to environmental quality.

LEGISLATIVE COUNSEL'S DIGEST

SB 122, as amended, Jackson. California Environmental Quality Act: record of proceedings.

(1) The California Environmental Quality Act (CEQA) requires a lead agency, as defined, to prepare, or cause to be prepared, and certify the completion of, an environmental impact report (EIR) on a project that it proposes to carry out or approve that may have a significant effect on the environment or to adopt a negative declaration if it finds that the project will not have that effect. CEQA also requires a lead agency to prepare a mitigated negative declaration for a project that may have a significant effect on the environment if revisions in the project would avoid or mitigate that effect and there is no substantial evidence that the project, as revised, would have a significant effect on the environment. CEQA establishes a procedure for the preparation and certification of the record of proceedings upon the filing of an action or proceeding challenging a lead agency's action on the grounds of noncompliance with CEQA.

This bill would require the lead agency, at the request of a project applicant and consent of the lead agency, to prepare a record of proceedings concurrently with the preparation of a negative declaration, mitigated negative declaration, EIR, or other environmental document for projects.

(2) CEQA requires the lead agency to submit to the State Clearinghouse a sufficient number of copies of specified environmental documents prepared pursuant to CEQA for review and comment by state agencies in certain circumstances and a copy of those documents in electronic form, as prescribed. CEQA requires the Office of Planning and Research to implement, utilizing existing resources, a public assistance program to, among other things, establish and maintain a database to assist in the preparation of environmental documents, ~~and~~ *establish and maintain* a central repository for the collection, storage, retrieval, and dissemination of certain notices provided to the office, and provide to the California State Library copies of documents submitted in electronic format to the office pursuant to CEQA.

This bill would require a lead agency to submit to the State Clearinghouse *those* environmental documents ~~in the form~~ *either a hard-copy or electronic form* as prescribed by the office. The bill would instead require the office to establish and maintain a database for the collection, storage, retrieval, and dissemination of environmental documents and notices prepared pursuant to CEQA and to make the database available online to the public. The bill would eliminate the requirement to provide copies of documents to the California State Library. The bill would require the office to submit to the Legislature a report, by July 1, 2016, describing the implementation of this requirement and a status report, by July 1, 2018.

~~(3) This bill would state the intent of the Legislature to enact legislation establishing a public review period for a final environmental impact report, and relating to the record of proceedings for a project for which an environmental impact report is prepared pursuant to CEQA.~~

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 21082.1 of the Public Resources Code
- 2 is amended to read:

1 21082.1. (a) A draft environmental impact report,
2 environmental impact report, negative declaration, or mitigated
3 negative declaration prepared pursuant to the requirements of this
4 division shall be prepared directly by, or under contract to, a public
5 agency.

6 (b) This section does not prohibit, and shall not be construed as
7 prohibiting, a person from submitting information or other
8 comments to the public agency responsible for preparing an
9 environmental impact report, draft environmental impact report,
10 negative declaration, or mitigated negative declaration. The
11 information or other comments may be submitted in any format,
12 shall be considered by the public agency, and may be included, in
13 whole or in part, in any report or declaration.

14 (c) The lead agency shall do all of the following:

15 (1) Independently review and analyze any report or declaration
16 required by this division.

17 (2) Circulate draft documents that reflect its independent
18 judgment.

19 (3) As part of the adoption of a negative declaration or a
20 mitigated negative declaration, or certification of an environmental
21 impact report, find that the report or declaration reflects the
22 independent judgment of the lead agency.

23 (4) Submit a sufficient number of copies, ~~in the form~~ *either a*
24 *hard-copy or electronic form* as required by the Office of Planning
25 and Research, of the draft environmental impact report, proposed
26 negative declaration, or proposed mitigated negative declaration
27 to the State Clearinghouse for review and comment by state
28 agencies, if any of the following apply:

29 (A) A state agency is any of the following:

30 (i) The lead agency.

31 (ii) A responsible agency.

32 (iii) A trustee agency.

33 (B) A state agency otherwise has jurisdiction by law with respect
34 to the project.

35 (C) The proposed project is of sufficient statewide, regional, or
36 areawide environmental significance as determined pursuant to
37 the guidelines certified and adopted pursuant to Section 21083.

38 SEC. 2. Section 21091 of the Public Resources Code is
39 amended to read:

1 21091. (a) The public review period for a draft environmental
2 impact report ~~may~~ shall not be less than 30 days. If the draft
3 environmental impact report is submitted to the State Clearinghouse
4 for review, the review period shall be at least 45 days, and the lead
5 agency shall provide a sufficient number of copies of the document,
6 ~~in the form~~ *either a hard-copy or electronic form* as required by
7 the Office of Planning and Research, to the State Clearinghouse
8 for review and comment by state agencies.

9 (b) The public review period for a proposed negative declaration
10 or proposed mitigated negative declaration ~~may~~ shall not be less
11 than 20 days. If the proposed negative declaration or proposed
12 mitigated negative declaration is submitted to the State
13 Clearinghouse for review, the review period shall be at least 30
14 days, and the lead agency shall provide a sufficient number of
15 copies of the document, ~~in the form~~ *either a hard-copy or*
16 *electronic form* as required by the Office of Planning and Research,
17 to the State Clearinghouse for review and comment by state
18 agencies.

19 (c) (1) Notwithstanding subdivisions (a) and (b), if a draft
20 environmental impact report, proposed negative declaration, or
21 proposed mitigated negative declaration is submitted to the State
22 Clearinghouse for review and the period of review by the State
23 Clearinghouse is longer than the public review period established
24 pursuant to subdivision (a) or (b), whichever is applicable, the
25 public review period shall be at least as long as the period of review
26 and comment by state agencies as established by the State
27 Clearinghouse.

28 (2) The public review period and the state agency review period
29 may, but are not required to, begin and end at the same time. Day
30 one of the state agency review period shall be the date that the
31 State Clearinghouse distributes the CEQA document to state
32 agencies.

33 (3) If the submittal of a CEQA document is determined by the
34 State Clearinghouse to be complete, the State Clearinghouse shall
35 distribute the document within three working days from the date
36 of receipt. The State Clearinghouse shall specify the information
37 that will be required in order to determine the completeness of the
38 submittal of a CEQA document.

39 (d) (1) The lead agency shall consider comments it receives on
40 a draft environmental impact report, proposed negative declaration,

1 or proposed mitigated negative declaration if those comments are
2 received within the public review period.

3 (2) (A) With respect to the consideration of comments received
4 on a draft environmental impact report, the lead agency shall
5 evaluate comments on environmental issues that are received from
6 persons who have reviewed the draft and shall prepare a written
7 response pursuant to subparagraph (B). The lead agency may also
8 respond to comments that are received after the close of the public
9 review period.

10 (B) The written response shall describe the disposition of each
11 significant environmental issue that is raised by commenters. The
12 responses shall be prepared consistent with Section 15088 of Title
13 14 of the California Code of Regulations.

14 (3) (A) With respect to the consideration of comments received
15 on a draft environmental impact report, proposed negative
16 declaration, proposed mitigated negative declaration, or notice
17 pursuant to Section 21080.4, the lead agency shall accept comments
18 via ~~email~~ *electronic mail* and shall treat ~~email~~ *electronic-mail*
19 comments as equivalent to written comments.

20 (B) Any law or regulation relating to written comments received
21 on a draft environmental impact report, proposed negative
22 declaration, proposed mitigated negative declaration, or notice
23 received pursuant to Section ~~21080.4~~, *21080.4* shall also apply to
24 ~~email~~ *electronic-mail* comments received for those reasons.

25 (e) (1) Criteria for shorter review periods by the State
26 Clearinghouse for documents that must be submitted to the State
27 Clearinghouse shall be set forth in the written guidelines issued
28 by the Office of Planning and Research and made available to the
29 public.

30 (2) Those shortened review periods may not be less than 30
31 days for a draft environmental impact report and 20 days for a
32 negative declaration.

33 (3) A request for a shortened review period shall only be made
34 in writing by the decisionmaking body of the lead agency to the
35 Office of Planning and Research. The decisionmaking body may
36 designate by resolution or ordinance a person authorized to request
37 a shortened review period. A designated person shall notify the
38 decisionmaking body of this request.

1 (4) A request approved by the State Clearinghouse shall be
2 consistent with the criteria set forth in the written guidelines of
3 the Office of Planning and Research.

4 (5) A shortened review period may not be approved by the
5 Office of Planning and Research for a proposed project of
6 statewide, regional, or areawide environmental significance as
7 determined pursuant to Section 21083.

8 (6) An approval of a shortened review period shall be given
9 prior to, and reflected in, the public notice required pursuant to
10 Section 21092.

11 (f) Prior to carrying out or approving a project for which a
12 negative declaration has been adopted, the lead agency shall
13 consider the negative declaration together with comments that
14 were received and considered pursuant to paragraph (1) of
15 subdivision (d).

16 SEC. 3. Section 21159.9 of the Public Resources Code is
17 amended to read:

18 21159.9. The Office of Planning and Research shall implement
19 a public assistance and information-~~program~~, *program* to ensure
20 efficient and effective implementation of this-~~division~~, *division*
21 *and* to do both of the following:

22 (a) Establish a public education and training program for
23 planners, developers, and other interested parties to assist them in
24 implementing this division.

25 (b) (1) Establish and maintain a database for the collection,
26 storage, retrieval, and dissemination of environmental documents,
27 notices of exemption, notices of preparation, notices of
28 determination, and notices of completion provided to the-~~office~~.
29 *Office of Planning and Research*. The database shall be available
30 online to the public through the Internet. The-~~office~~ *Office of*
31 *Planning and Research* may coordinate with another state agency
32 to host and maintain the online database.

33 (2) The-~~office~~ *Office of Planning and Research* may phase in
34 the submission of electronic documents and use of the database
35 by state and local public agencies.

36 (3) The-~~office~~ *Office of Planning and Research* shall develop
37 a budget for the development, hosting, and maintenance of the
38 database and shall submit the budget to the Department of Finance
39 for consideration and approval.

1 (4) (A) Pursuant to Section 9795 of the Government Code, the
2 office *Office of Planning and Research* shall, no later than July 1,
3 2016, submit to the Legislature a report describing how it plans to
4 implement this subdivision, and shall provide an additional report
5 to the Legislature no later than July-2018 *1, 2018*, describing the
6 status of the implementation of this subdivision.

7 (B) Pursuant to Section 10231.5 of the Government Code, this
8 paragraph is inoperative on July 1, 2022.

9 SEC. 4. Section 21167.6 of the Public Resources Code is
10 amended to read:

11 21167.6. Notwithstanding any other law, in all actions or
12 proceedings brought pursuant to Section 21167, except as provided
13 in Section 21167.6.2 or those involving the Public Utilities
14 Commission, all of the following shall apply:

15 (a) At the time that the action or proceeding is filed, the plaintiff
16 or petitioner shall file a request that the respondent public agency
17 prepare the record of proceedings relating to the subject of the
18 action or proceeding. The request, together with the complaint or
19 petition, shall be served personally upon the public agency not
20 later than 10 business days from the date that the action or
21 proceeding was filed.

22 (b) (1) The public agency shall prepare and certify the record
23 of proceedings not later than 60 days from the date that the request
24 specified in subdivision (a) was served upon the public agency.
25 Upon certification, the public agency shall lodge a copy of the
26 record of proceedings with the court and shall serve on the parties
27 notice that the record of proceedings has been certified and lodged
28 with the court. The parties shall pay any reasonable costs or fees
29 imposed for the preparation of the record of proceedings in
30 conformance with any law or rule of court.

31 (2) The plaintiff or petitioner may elect to prepare the record
32 of proceedings or the parties may agree to an alternative method
33 of preparation of the record of proceedings, subject to certification
34 of its accuracy by the public agency, within the time limit specified
35 in this subdivision.

36 (c) The time limit established by subdivision (b) may be
37 extended only upon the stipulation of all parties who have been
38 properly served in the action or proceeding or upon order of the
39 court. Extensions shall be liberally granted by the court when the
40 size of the record of proceedings renders infeasible compliance

1 with that time limit. There is no limit on the number of extensions
2 that may be granted by the court, but no single extension shall
3 exceed 60 days unless the court determines that a longer extension
4 is in the public interest.

5 (d) If the public agency fails to prepare and certify the record
6 within the time limit established in paragraph (1) of subdivision
7 (b), or any continuances of that time limit, the plaintiff or petitioner
8 may move for sanctions, and the court may, upon that motion,
9 grant appropriate sanctions.

10 (e) The record of proceedings shall include, but is not limited
11 to, all of the following items:

12 (1) All project application materials.

13 (2) All staff reports and related documents prepared by the
14 respondent public agency with respect to its compliance with the
15 substantive and procedural requirements of this division and with
16 respect to the action on the project.

17 (3) All staff reports and related documents prepared by the
18 respondent public agency and written testimony or documents
19 submitted by any person relevant to any findings or statement of
20 overriding considerations adopted by the respondent agency
21 pursuant to this division.

22 (4) Any transcript or minutes of the proceedings at which the
23 decisionmaking body of the respondent public agency heard
24 testimony on, or considered any environmental document on, the
25 project, and any transcript or minutes of proceedings before any
26 advisory body to the respondent public agency that were presented
27 to the decisionmaking body prior to action on the environmental
28 documents or on the project.

29 (5) All notices issued by the respondent public agency to comply
30 with this division or with any other law governing the processing
31 and approval of the project.

32 (6) All written comments received in response to, or in
33 connection with, environmental documents prepared for the project,
34 including responses to the notice of preparation.

35 (7) All written evidence or correspondence submitted to, or
36 transferred from, the respondent public agency with respect to
37 compliance with this division or with respect to the project.

38 (8) Any proposed decisions or findings submitted to the
39 decisionmaking body of the respondent public agency by its staff,
40 or the project proponent, project opponents, or other persons.

1 (9) The documentation of the final public agency decision,
2 including the final environmental impact report, mitigated negative
3 declaration, or negative declaration, and all documents, in addition
4 to those referenced in paragraph (3), cited or relied on in the
5 findings or in a statement of overriding considerations adopted
6 pursuant to this division.

7 (10) Any other written materials relevant to the respondent
8 public agency's compliance with this division or to its decision on
9 the merits of the project, including the initial study, any drafts of
10 any environmental document, or portions thereof, that have been
11 released for public review, and copies of studies or other documents
12 relied upon in any environmental document prepared for the project
13 and either made available to the public during the public review
14 period or included in the respondent public agency's files on the
15 project, and all internal agency communications, including staff
16 notes and memoranda related to the project or to compliance with
17 this division.

18 (11) The full written record before any inferior administrative
19 decisionmaking body whose decision was appealed to a superior
20 administrative decisionmaking body prior to the filing of litigation.

21 (f) In preparing the record of proceedings, the party preparing
22 the record shall strive to do so at reasonable cost in light of the
23 scope of the record.

24 (g) The clerk of the superior court shall prepare and certify the
25 clerk's transcript on appeal not later than 60 days from the date
26 that the notice designating the papers or records to be included in
27 the clerk's transcript was filed with the superior court, if the party
28 or parties pay any costs or fees for the preparation of the clerk's
29 transcript imposed in conformance with any law or rules of court.
30 Nothing in this subdivision precludes an election to proceed by
31 appendix, as provided in Rule 8.124 of the California Rules of
32 Court.

33 (h) Extensions of the period for the filing of any brief on appeal
34 may be allowed only by stipulation of the parties or by order of
35 the court for good cause shown. Extensions for the filing of a brief
36 on appeal shall be limited to one 30-day extension for the
37 preparation of an opening ~~brief~~, *brief* and one 30-day extension
38 for the preparation of a responding brief, except that the court may
39 grant a longer extension or additional extensions if it determines

1 that there is a substantial likelihood of settlement that would avoid
2 the necessity of completing the appeal.

3 (i) At the completion of the filing of briefs on appeal, the
4 appellant shall notify the court of the completion of the filing of
5 briefs, whereupon the clerk of the reviewing court shall set the
6 appeal for hearing on the first available calendar date.

7 SEC. 5. Section 21167.6.2 is added to the Public Resources
8 Code, to read:

9 21167.6.2. (a) (1) Notwithstanding Section 21167.6, upon
10 the written request of a project applicant received no later than 30
11 days after the date that the lead agency makes a determination
12 pursuant to subdivision (a) of Section 21080.1, Section 21094.5,
13 or Chapter 4.2 (commencing with Section 21155) and with the
14 consent of the lead agency as provided in subdivision (e), the lead
15 agency shall prepare and certify the record of proceedings in the
16 following manner:

17 (A) The lead agency for the project shall prepare the record of
18 proceedings pursuant to this division concurrently with the
19 administrative process.

20 (B) All documents and other materials placed in the record of
21 proceedings shall be posted on, and be downloadable from, an
22 Internet Web site maintained by the lead agency commencing with
23 the date of the release of the draft environmental document for the
24 project. If the lead agency cannot maintain an Internet Web site
25 with the information required pursuant to this section, the lead
26 agency shall provide a link on the agency's Internet Web site to
27 that information.

28 (C) The lead agency shall make available to the public in a
29 readily accessible electronic format the draft environmental
30 document for the project, and all other documents submitted to,
31 cited by, or relied on by the lead agency, in the preparation of the
32 draft environmental document for the project.

33 (D) A document prepared by the lead agency or submitted by
34 the applicant after the date of the release of the draft environmental
35 document for the project that is a part of the record of the
36 proceedings shall be made available to the public in a readily
37 accessible electronic format within 5 business days after the
38 document is released or received by the lead agency.

39 (E) The lead agency shall encourage written comments on the
40 project to be submitted in a readily accessible electronic format,

1 and shall make any comment available to the public in a readily
2 accessible electronic format within 5 business days of its receipt.

3 (F) Within 7 business days after the receipt of any comment
4 that is not in an electronic format, the lead agency shall convert
5 that comment into a readily accessible electronic format and make
6 it available to the public in that format.

7 (G) The lead agency shall certify the record of proceedings
8 within 30 days after the filing of the notice required pursuant to
9 Section 21108 or 21152.

10 (2) This subdivision does not require the disclosure or posting
11 of any trade secret as defined in Section 6254.7 of the Government
12 Code, information about the location of archaeological sites or
13 sacred lands, or any other information that is subject to the
14 disclosure restrictions of Section 6254 of the Government Code.

15 (b) Any dispute regarding the record of proceedings prepared
16 pursuant to this section shall be resolved by the court in an action
17 or proceeding brought pursuant to subdivision (b) or (c) of Section
18 21167.

19 (c) The content of the record of proceedings shall be as specified
20 in subdivision (e) of Section 21167.6.

21 (d) The negative declaration, mitigated negative declaration,
22 draft and final environmental impact report, or other environmental
23 document shall include a notice in no less than 12-point type stating
24 the following:

25
26 “THIS DOCUMENT IS SUBJECT TO SECTION 21167.6.2
27 OF THE PUBLIC RESOURCES CODE, WHICH REQUIRES
28 THE RECORD OF PROCEEDINGS FOR THIS PROJECT TO
29 BE PREPARED CONCURRENTLY WITH THE
30 ADMINISTRATIVE—~~PROCESS~~, *PROCESS*; DOCUMENTS
31 PREPARED BY, OR SUBMITTED TO, THE LEAD AGENCY
32 TO BE POSTED ON THE LEAD AGENCY’S INTERNET WEB
33 ~~SITE~~, *SITE*; AND THE LEAD AGENCY TO ENCOURAGE
34 WRITTEN COMMENTS ON THE PROJECT TO BE
35 SUBMITTED TO THE LEAD AGENCY IN A READILY
36 ACCESSIBLE ELECTRONIC FORMAT.”

37
38 (e) (1) The lead agency shall respond to a request by the project
39 applicant within 10 business days from the date that the request
40 pursuant to subdivision (a) is received by the lead agency.

1 (2) A project applicant and the lead agency may mutually agree,
 2 in writing, to extend the time period for the lead agency to respond
 3 pursuant to paragraph (1), but they shall not extend that period
 4 beyond the commencement of the public review period for the
 5 proposed negative declaration, mitigated negative declaration,
 6 draft environmental impact report, or other environmental
 7 document.

8 (3) The request to prepare a record of proceedings pursuant to
 9 this section shall be deemed denied if the lead agency fails to
 10 respond within 10 business days of receiving the request or within
 11 the time period agreed upon pursuant to paragraph (2), whichever
 12 ends later.

13 (f) The written request of the applicant submitted pursuant to
 14 subdivision (a) shall include an agreement to pay all of the lead
 15 agency’s costs of preparing and certifying the record of proceedings
 16 pursuant to this section and complying with the requirements of
 17 this section, in a manner specified by the lead agency.

18 (g) The costs of preparing the record of proceedings pursuant
 19 to this section and complying with the requirements of this section
 20 are not recoverable costs pursuant to Section ~~1033~~ 1032 of the
 21 Code of Civil Procedure.

22 (h) Pursuant to subdivision (f) and Section 21089, the lead
 23 agency may charge and collect a reasonable fee from the person
 24 making the request pursuant to subdivision (a) to recover the costs
 25 incurred by the lead agency in preparing the record of proceedings
 26 pursuant to this section.

27 ~~SEC. 6. It is the intent of the Legislature to enact legislation~~
 28 ~~establishing a public review period for a final environmental impact~~
 29 ~~report prepared pursuant to, and relating to the record of~~
 30 ~~proceedings for a project for which an environmental impact report~~
 31 ~~is prepared pursuant to, the California Environmental Quality Act~~
 32 ~~(Division 13 (commencing with Section 21000) of the Public~~
 33 ~~Resources Code).~~

SENATE COMMITTEE ON ENVIRONMENTAL QUALITY

Senator Wieckowski, Chair

2015 - 2016 Regular

Bill No: SB 122
Author: Jackson and Hill
Version: 3/26/2015
Urgency: No
Consultant: Joanne Roy
Hearing Date: 4/15/2015
Fiscal: Yes

SUBJECT: California Environmental Quality Act: record of proceedings

ANALYSIS:

Existing law, under the California Environmental Quality Act (CEQA):

1. Requires lead agencies with the principal responsibility for carrying out or approving a proposed discretionary project to prepare a negative declaration, mitigated negative declaration, or environmental impact report (EIR) for this action, unless the project is exempt from CEQA (CEQA includes various statutory exemptions, as well as categorical exemptions in the CEQA guidelines). (Public Resources Code (PRC) §21000 et seq.).
2. Establishes a procedure for preparing and certifying the record of proceedings for an action against a public agency on the grounds of noncompliance with CEQA. (PRC §21167).
3. Prohibits an action from being brought on alleged grounds of noncompliance with CEQA unless the alleged grounds for noncompliance were presented to the public agency orally or in writing by any person during the public comment period or prior to the close of the public hearing on the project before issuance of the notice of determination (NOD). (PRC §21177).
4. Requires the lead agency to submit to the State Clearinghouse a sufficient number of copies of specified environmental review documents and a copy in an electronic form under specified circumstances. (PRC §21082.1).
5. Requires the Governor's Office of Planning and Research (OPR) to establish and maintain a database to assist in the preparation of environmental documents. (PRC §21159.9(b)).
6. Requires OPR to establish and maintain a central repository for the collection, storage, retrieval, and dissemination of specified notices and make those notices

available through the internet. (PRC §21159.9(c)).

This bill:

1. Regarding concurrent preparation of the record of proceeding:
 - A. Upon written request by a project applicant and with consent of the lead agency, requires the lead agency to concurrently prepare the record of proceedings with the administrative process.
 - B. Requires all documents and other materials placed in the record of proceedings to be posted on a website maintained by the lead agency.
 - C. Requires the lead agency to make publicly available, in electronic format, the draft environmental document, and associated documents, for the project.
 - D. Requires the lead agency to make any comment publicly available electronically within five days of its receipt.
 - E. Requires the lead agency to certify the record of proceedings within 30 days after filing notice of determination or approval.
 - F. Requires certain environmental review documents to include a notice, as specified, stating that the document is subject to this section.
 - G. Requires the applicant to pay for the lead agency's cost of concurrently preparing and certifying the record of proceedings.
2. Regarding the State Clearinghouse database system for CEQA documents:
 - A. Requires OPR to establish and maintain a database for the collection, storage, retrieval, and dissemination of environmental documents and notices prepared pursuant to CEQA and to make the database available online to the public.
 - B. Requires OPR to submit a report describing the implementation of the database to the Legislature by July 1, 2016 and a status report by July 2018.
3. States the intent of the Legislature to enact legislation establishing a public review period for a final environmental impact report.

Background

1. *CEQA: The Environmental Review Process.*

A CEQA environmental review document is a public document. It provides for transparency as well as an opportunity for citizens to comment on the document and participate in the environmental review process.

CEQA provides a process for evaluating the environmental effects of a project, and includes statutory exemptions as well as categorical exemptions in the CEQA guidelines. If a project is not exempt from CEQA, an initial study is prepared to determine whether a project may have a significant effect on the environment. If the initial study shows that there would not be a significant effect on the environment, the lead agency must prepare a negative declaration. If the initial study shows that the project may have a significant effect on the environment, then the lead agency must prepare an EIR.

Generally, an EIR must accurately describe the proposed project, identify and analyze each significant environmental impact expected to result from the proposed project, identify mitigation measures to reduce those impacts to the extent feasible, and evaluate a range of reasonable alternatives to the proposed project. Prior to approving any project that has received an environmental review, an agency must make certain findings. If mitigation measures are required or incorporated into a project, the agency must adopt a reporting or monitoring program to ensure compliance with those measures.

If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the proposed project, the effects of the mitigation measure must be discussed but in less detail than the significant effects of the proposed project.

2. *What Is Analyzed In an Environmental Review?*

Pursuant to CEQA, an environmental review analyzing the significant direct and indirect environmental impacts of a proposed project, may include water quality, surface and subsurface hydrology, land use and agricultural resources, transportation and circulation, air quality and greenhouse gas emissions, terrestrial and aquatic biological resources, aesthetics, geology and soils, recreation, public services and utilities such as water supply and wastewater disposal, cultural resources such as historical and archaeological resources, and tribal cultural resources.

Comments

1. *Purpose of Bill.*

According to the authors:

[CEQA] ensures that state and local agencies make informed decisions when undertaking projects that may impact the environment. Stakeholders have voiced concern that the current CEQA process can be cumbersome and inefficient. In May 2014, the Senate Judiciary and Environmental Quality Committees sent a joint letter to a broad range of CEQA stakeholders – developers, business, environmental, and labor groups, planners, local governments, and academics – asking for community input on how to improve the process without undercutting the statute’s goal of fostering informed environmental decisionmaking. Drawing upon stakeholder responses to that letter, this bill will enact three substantive changes to CEQA that will help expedite the process while protecting the integrity of the act.

First, it will authorize lead agencies to concurrently prepare their administrative records while going through the CEQA process, rather than after the process has concluded. Second, it will improve the accessibility of CEQA related documents by expanding the use of California’s online CEQA State Clearinghouse. Third, it will improve the predictability and efficiency of the public comment process by modifying the criteria for submitting late comments.

During the Senate Judiciary Committee hearing last year on SB 1451 (Hill and Roth) regarding CEQA “document dumping,” Senator Jackson and Senator Hill agreed to explore ways to improve the CEQA process in conjunction with the broader CEQA community. As part of that effort, they sent a joint letter to CEQA stakeholders asking for community input on how to improve the process without undercutting the statute’s goal of fostering informed environmental decisionmaking. The Senate Environmental Quality and Judiciary Committees received 13 responses from stakeholders who collectively represent a cross-section of the CEQA community. Two broad consensus recommendations emerged from these 13 responses, and many community members indicated that these two recommended changes would greatly improve the CEQA process: concurrent preparation of the record of proceedings and a centralized database for CEQA documents.

2. *Concurrent Preparation of the Record of Proceedings.*

A. *Potential Time-Saver for Post-Decision CEQA Challenge.*

SB 122 provides the option of preparing the record of proceedings during the CEQA environmental review process in order to save time and effort in the event of a post-decision CEQA challenge. Depending on factors such as the complexity and length of the environmental review, preparation can take multiple months. However, in situations where an agency believes a project is likely to be challenged, it is probably more efficient and expeditious if the record is prepared concurrently with the preparation of other project-specific environmental documents. Additionally, concurrently prepared records may be more defensible in court, given that they are not post-hoc recreations assembled some time (potentially several months) after the relevant CEQA decision is made.

Concurrent preparation is not specifically prohibited under existing law, but it has only been expressly authorized for certain projects (e.g. AB 900 (Buchanan and Gordon), Chapter 354, Statutes of 2011, environmental leadership development projects (ELDPs)). Providing public agencies a general authorization to engage in concurrent preparation may take away any uncertainty on the matter and make a public agency more likely to adopt the practice for appropriate projects.

B. *Time is Money*

In general, preparation of the record of proceedings begins after a lawsuit is filed and the petitioner pays. This can result in a substantial amount of time to go by before there is any resolution.

One issue that some CEQA stakeholders contend is that CEQA litigation delays projects. As noted above, the concurrent preparation of the record of proceedings can save the project applicant several months of delay. It seems logical and reasonable that the beneficiary of an action should pay for that action to occur.

If a project applicant believes that litigation is inevitable, it may behoove that entity to ask the lead agency to prepare the administrative record in conjunction with the environmental review process – the efficiency of simultaneous preparation can possibly save months of time preparing for litigation, such as tracking down and collecting documents to add to the

administrative record.

For example, under AB 900, five project applicants have/are utilizing concurrent preparation process as an ELDP. Those projects had to meet stringent standards in order to be an ELDP and benefit from AB 900's provisions, including concurrent preparation of the administrative record for which the project applicant pays.

SB 122's concurrent preparation provision is discretionary and not mandatory. If an applicant has no reason to believe that its project will be subject to litigation, then the applicant does not have to utilize this option.

C. No Opposition on Previous Concurrent Preparation Bills, So Why Now?

In the past four years, there have been multiple bills proposing concurrent preparation of the record of proceedings that are either the same proposal in SB 122 or slightly varied –

- SB 731 (Steinberg and Hill) (2013)
- AB 37 (Perea) (2013)
- SB 984 (Simitian, Steinberg, and Strickland)/AB 1570 (Perea) (2012)
- AB 900 (Buchanan and Gordon) (2011), which was specific only to environmental leadership development projects (ELDPs).

No opposition or concern was raised on any of the bills mentioned above regarding concurrent preparation of the record of proceedings. However, many entities oppose SB 122, stating, “SB 122's concurrent preparation of the administrative record process will rarely – if ever – be utilized because it would impose new, unrecoverable costs on the project applicant and expose applicants to new delays and litigation.”

Opposition has had multiple opportunities on several bills over the past few years to raise concern about this issue and chose not to. A question arises – Why not then and why now?

3. Increased Use of Internet Resources – The State Clearinghouse.

The authors state, “[OPR] operates a limited online CEQA repository (called “CEQAnet”) as part of the State Clearinghouse used for state-level review of environmental documents. This second component of the bill will direct OPR to expand its online CEQA repository to include copies of all CEQA documents in a single repository, forming a true statewide CEQA clearinghouse.”

Many CEQA stakeholders have noted that the CEQA process makes poor use of internet resources for distributing information, providing notice to affected parties, and facilitating the submission of comments. The current CEQA process is still largely paper-based, and information that is posted online is often buried deep within agency or project proponent websites. Currently, OPR has operates a limited online CEQA repository as part of the State Clearinghouse used for state-level review of environmental documents. This bill proposes to expand OPR's clearinghouse to include copies of all CEQA documents in a single, electronic database system, which would be available via the Internet and to the public. Stakeholders believe such a resource would greatly expedite the CEQA process by eliminating transmission times for relevant documents. In addition, universal accessibility of such a resource would make it much harder to justify last minute "document dumps."

A fully functioning clearinghouse would provide California residents with an easy to use, universal point of entry into the CEQA process, furthering the policy of transparency and public participation in the environmental review process.

4. *Proposed Central Database: Potential Cost Savings.*

Expanding OPR's CEQA database would likely require some type of financial commitment by the state, but it is possible that any new costs could be offset by reductions in agency staff time and resources used to distribute paper-based materials. Last year, the California Research Bureau (CRB) researched CEQA-related document handling costs for selected state agencies and looked into issues such as clerical document management and preparation and delivery costs. According to CRB:

We estimate that the cumulative annual cost to State entities in staff time commitments for clerical processing and handling of CEQA-related documents exceeds \$250,000 and may easily be in excess of \$500,000, with additional expenditures for materials, supplies, and delivery services. Not all of these staff expenditures are truly avoidable costs, as few State entities delegate any clerical staff full-time to CEQA-related document handling functions. But it appears plausible that an effective, electronic document management system and web-based application for CEQA-related document submission and retrieval by Lead Agencies and Reviewing Agencies could generate cost savings across the state.

Under CEQA, the Legislature declares the policy of the state shall be that "All persons and public agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner in order to conserve the available financial, governmental, physical, and social

resources with the objective that those resources may be better applied toward the mitigation of actual significant effects on the environment.” (PRC §21003(f)). SB 122 proposes to help move CEQA forward by utilizing technology that was not present when CEQA was originally established.

5. *Late Comments and Document Dumping.*

A.Late Comments: Sometimes Strategic Gamesmanship; Sometimes Legitimately Late.

When a person or organization fails to comment within the lead agency time limits provided for an environmental review, the lead agency may assume that the person or agency has no comment (Guidelines §15207). However, this does not mean that the lead agency should ignore late comments. Although the CEQA Guidelines and judicial precedent indicate that a lead agency does not need to respond to a late comment in writing, the lead agency does need to exercise discretion because all comments – including late ones – become part of the project’s administrative record. (*Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App. 4th 1109).

Sometimes interested parties to a project may submit comments late in the review process and perhaps voluminous amounts of content in their comment as a tactic to delay a project – this is referred to as “document dumping”. As mentioned earlier, the comment becomes a part of the administrative record to which future litigants can refer. The California Supreme Court has stated, “We cannot, of course, overemphasize our disapproval of the tactic of withholding objections...solely for the purpose of obstruction and delay,” and stressed that strategically delaying commenting on a project is not a “game to be played by persons who...are chiefly interested in scuttling a particular project.” (*Citizens of Goleta Valley v. Board of Supervisors of Santa Barbara County* (1990) 52 Cal. 3rd 553, 368).

However, this may not always be the case – interested parties, who submit late comments, may raise genuine, significant issues that were not adequately addressed in the environmental review or provide important information that was not available earlier in the process.

The crux of the late comments issue is trying to address the tactic of document dumping without unduly punishing genuine comments that may be late for a legitimate reason.

B. Recent Legislative History on Late Comments/Document Dumping.

In 2011-12, Senator Simitian convened a CEQA stakeholder group. Among the topics of discussion was late comments (sometimes referred to as “document dumping”). Some stakeholders wanted to limit opportunity for late comments. Others, who were concerned about placing too strict of limits on public participation at the end of the environmental review process, wanted more opportunities to participate earlier in the process. After much discussion and debate, the Senate Environmental Quality Committee consultant developed a compromise to address these concerns, but that language ultimately did not come to fruition – the final consensus of the stakeholder group members was that they all preferred the exhaustion of administrative remedies statute in its current form over the compromise.

C. SB 122: Work in Progress.

Discussions with stakeholders indicate that the last minute submission of written comments is a problem in at least some CEQA processes.

Documents and information presented to an agency late in the process or during a final hearing do not allow sufficient time for review, analysis, and incorporation into the decisionmaking process. The authors of this bill are committed to addressing the problem posed by written comments submitted late in the CEQA process, but they are also committed to preserving the public’s ability to fully participate in the process. The third component of this bill is intended to establish new procedural requirements in order to better accommodate late written comments into the CEQA workflow and the authors are working with stakeholders to find a solution. Should this bill be voted out of committee and substantially amended, the Senate Environmental Quality Committee may wish to hear this bill again.

6. Technical and Clarifying Amendments Needed.

A. On page 7, line 17, this bill refers to “July 2018” as the deadline for providing a report to the Legislature describing the status of expanding the OPR’s database. **An amendment is needed to specify a day in July to the deadline, “July 1, 2018.”**

B. This bill requires a lead agency to submit to the State Clearinghouse environmental documents “in the *form* required” by OPR. The word, “form”, can be broadly interpreted and possibly misinterpreted to mean the *substantive* form of a document, e.g. requiring only an executive summary

be submitted, as opposed to the *medium* in which the information is supposed to be submitted, e.g. hardcopy or electronic format. **An amendment is needed to clarify that form is in reference to the *medium* required by OPR, by specifying “hardcopy or electronic form”.**

C. On page 12, line 35, there is a drafting error referencing Code of Civil Procedure §1033. **An amendment is needed to change §1033 to §1032.**

Related/Prior Legislation

SB 127 (Vidak, Fuller, and Nielsen) establishes CEQA administrative and judicial review procedures for a project funded by the Water Quality, Supply, and Infrastructure Improvement Act of 2014 (Proposition 1 water bond), including concurrent preparation of the record of proceedings. SB 127 is a 2-year bill and is currently in the Senate Environmental Quality Committee.

SB 1451 (Hill and Roth) (2014) would have expanded CEQA’s exhaustion requirements by precluding an individual from challenging a public agency’s compliance with the act if the alleged grounds of noncompliance were known or could have been known with the exercise of reasonable diligence during the public comment period, but the alleged grounds of noncompliance were presented to the public agency at a time other than during the public comment period. This bill also would have expanded CEQA’s exhaustion requirements by precluding a person from challenging a public agency’s compliance if the person objected to the approval of the project at a time other than during the public comment period when a public comment period was provided. SB 1451 died in Senate Judiciary Committee.

SB 731 (Steinberg and Hill) (2013) would have enacted the “CEQA Modernization Act of 2013,” making various clarifications and revisions to CEQA, including requiring the lead agency, at the request of a project applicant, to prepare and certify the record of proceedings concurrent with the administrative process for certain environmental documents under certain conditions. SB 731 died in Assembly Local Government Committee.

AB 37 (Perea) (2013) would have required the lead agency, upon request of a project applicant, to prepare and certify the record of proceedings concurrently with the administrative process for projects subject to CEQA review. AB 37 was subsequently amended to address integrated regional water management plans and was eventually placed on the Senate Inactive file.

SB 984 (Simitian) (2012) would have required a lead agency to prepare and certify the record of proceedings concurrent with the administrative process for certain

environmental documents under certain conditions, and would have sunsetted January 1, 2016 (contingent enactment with AB 1570 (Perea)). SB 984 died on the Senate Floor.

AB 1570 (Perea) (2012) contained provisions relating to certification of the record of proceedings concurrent with the administrative process for certain environmental documents under certain conditions, and would have sunsetted on January 1, 2016 (contingent enactment with SB 984 (Simitian)). AB 1570 died in Senate Committee on Rules.

AB 900 (Buchanan and Gordon), Chapter 354, Statutes of 2011, established CEQA administrative and judicial review procedures for an environmental leadership development project, including a requirement for concurrent preparation of the administrative record.

SOURCE: Author

SUPPORT:

Association of Environmental Professionals
Brandt-Hawley Law Group
California Labor Federation
California League of Conservation Voters
Center for Biological Diversity
Chatten-Brown & Carstens
Natural Resources Defense Council
Shute, Mihaly & Weinberger LLP
State Building and Construction Trades Council

OPPOSITION:

Associated General Contractors of California
Association of California Cities, Orange County
Association of California Water Agencies (ACWA)
Bay Area Council
Bay Planning Coalition
California Association of REALTORS
California Building Industry Association
California Business Properties Association
California Business Roundtable
California Chamber of Commerce
California Construction and Industrial Materials Association
California Realtors Association
Central City Association of Los Angeles
Engineering Contractors' Association

Harbor Association of Industry & Commerce
Humboldt Association of REALTORS
Los Angeles Area Chamber of Commerce
Los Angeles County Economic Development Corporation
National Federation of Independent Business
Orange County Business Council
Pleasanton Chamber of Commerce
San Diego Regional Chamber of Commerce
San Francisco Chamber of Commerce
San Gabriel Valley Economic Partnership
San Mateo County Association of REALTORS
Santa Clara Chamber of Commerce
Santa Clarita Valley Economic Development Corporation
Sonoma County Alliance
Southern California Water Committee
Southwest California Legislative Council
UnitedAg
Valley Industry & Commerce Association (VICA)
West Coast Lumber and Building Materials Association

ARGUMENTS IN SUPPORT:

A coalition of support states, “One concern raised with respect to CEQA is the delay associated with litigation. In our experience preparation of the administrative record is usually the most time consuming part of CEQA litigation in the trial court. Section 1 of the bill would allow project applicants to request preparation of the record concurrent with the administrative review process. Because most environmental documents are already available in an electronic format, this option could be easily implemented and would reduce the time needed to prepare the record if litigation is filed. Although we support the concept of concurrent preparation, because this is an option available at the project applicant’s discretion, the bill should ensure that the cost of such preparation is borne by the project applicant...Section 2 would require electronic posting of notices and environmental documents. This amendment is a critical reform that will modernize CEQA and make the environmental review process more transparent.”

ARGUMENTS IN OPPOSITION: A coalition of opposition states, “Under existing law, it is well-settled that the petitioner must pay the costs of preparing the administrative record during CEQA litigation or claims. SB 122 allows project applicants to request concurrent preparation of the record, but if such request is made, the cost of preparing the administrative record – which could range in the hundreds of thousands – would shift entirely to project applicants as unrecoverable costs. Equally concerning is the provision that would require real-time electronic posting of the contents of the administrative record as they are compiled. The

administrative record contains incomplete documents that inevitably morph into much improved final documents as a result of the iterative process that CEQA requires. This provision would hinder forward progress of the administrative process by allowing the public to submit premature and unnecessary comments and objections to draft documents that have not yet even been corrected, improved, and finalized through the lead agency's internal review process. For these reasons, it is highly unlikely that project proponents or lead agencies would utilize this proposed provision."

-- END --