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EFFECTIVENESS & ACCOUNTABILITY INITIATIVE



Senate Select Committee on Infrastructure Streamlining and Workforce Equity

Tuesday, June 27, 2023

Issue:

CEQA Judicial Streamlining as reflected in SB 149.

Summary

SB 149 makes a broad swath of energy, transportation, water, and semiconductor projects eligible for expedited judicial review under the California Environmental Quality Act (CEQA). Projects must meet certain criteria to be eligible for certification. To be eligible for streamlining, projects would need to be certified by the Governor by Jan 1, 2032 and approved by the public agency by Jan 1, 2033. The Office of Planning and Research may create guidelines for the certification process; SB 149 specifies that these guidelines are exempt from the Administrative Procedures Act. The streamlining provisions for certified projects include a 270-day judicial review period for a CEQA case, including all appeals, as feasible, and a requirement that public agencies concurrently prepare the record of proceedings and the administrative process.

Comments

CEQA Process and Timeline

CEQA is designed to (a) make government agencies and the public aware of the environmental impacts of a proposed project, (b) ensure the public can take part in the review process, and (c) identify and implement measures to mitigate or eliminate any negative impact the project may have on the environment. CEQA is a self-executing statute that is enforced by civil lawsuits that can challenge any project's environmental review. Public agencies, as well as private individuals and organizations, can file lawsuits under CEQA.

A lead agency reviewing a project under CEQA takes three progressive steps of environmental review. First, a lead agency looks at the footprint of the project to determine if it can be exempted from CEQA. If it is not exempt, the lead agency then conducts an initial study to look at potential environmental impacts. If there are no significant environmental impacts, or if those impacts can be fully mitigated, the lead agency prepares a Negative Declaration (ND) or Mitigated ND. If there are environmental impacts that cannot be mitigated, the lead agency proceeds with the most extensive level of environmental review: an Environmental Impact Report (EIR). The EIR is a comprehensive document that evaluates all the environmental impacts that a project might have and proposes mitigation measures for impacts that have a significant effect on the environment.

Under CEQA, state and local agencies must complete and adopt a ND in 180 days, and certify an EIR within a year. If there is a compelling circumstance to extend this timeline, agencies may take longer, but only if the project applicant consents. After the environmental review is completed, the case may be subject to litigation. Judicial Council asserts that it takes over six months just for a CEQA case to get a hearing, let alone reach a decision.

To help speed CEQA cases through the court system, current law provides several measures to prioritize CEQA cases and speed up judicial review, including:

- The Superior Court and the Court of Appeal must give CEQA lawsuits preference over all other civil actions;
- If feasible, the Court of Appeal must hear a CEQA appeal within one year of filing;
- Discovery is generally not allowed, as CEQA cases are generally restricted to review of the record; and
- Counties with a population of over 200,000 must designate one or more judges to develop expertise on CEQA and hear CEQA cases.

Expedited Review for Environmental Leadership Projects

In addition to the expediting measures that apply broadly to CEQA cases, certain projects are also eligible for expedited review through Jobs and Economic Improvement through Environmental Leadership Act (Act) (AB 900, Buchannan, Chapter 354, Statutes of 2011). The Act was most recently updated and extended in 2021 with SB 7 (Atkins, Chapter 19, Statutes of 2021).

Under the Act, projects meeting certain criteria can apply to the governor to become certified Environmental Leadership Development Projects (ELDPs) and receive expedited judicial review under CEQA. The Act offers two streamlining provisions to certified projects. Firstly, certified projects are required to prepare the administrative record, the comprehensive document at the heart of CEQA cases, concurrently, rather than sequentially, with the preparation of environmental review documents (the EIR). Secondly, certified projects are given expedited judicial review requiring that the CEQA case be heard in 270 days, including all appeals, as feasible.

Both processes are described in more detail below:

Concurrent Preparation. Preparing the administrative record can take between 60 days (the time required in law, before extensions) to over a year for more complex projects. Given the length of time it takes to prepare the record, doing so while environmental review is ongoing (rather than sequentially) could reduce the CEQA review timeline by months or a year or more. In addition, the concurrent preparation requires that the lead agency prepare the record, rather than the petitioner. This can reduce delays given that the petitioner does not have access to the lead agency's records, may not have the same resources available to compile the record, or may, in some cases, use the record preparation process to delay the case, since there are no time limits for them to prepare the record.

SB 149 specifies that the public agency cannot recover the cost of preparing the administrative record from the plaintiff/petitioner in this concurrent preparation process.

270-day Judicial Review. For contentious projects, judicial review for a CEQA Superior and Appellate court process case can take three to four years. By requiring a 270-day judicial review period, even with the caveat of "as feasible," ELDP projects are likely to move on an accelerated timeline.

Eligible Projects and Criteria for ELDP Certification

Only a few types of projects are eligible for ELDP certification under SB 7, and these projects must meet high environmental and labor criteria.

The project types that are eligible for ELDP certification include:

- Clean renewable energy projects that generate electricity exclusively through wind or solar;
- Clean energy manufacturing projects; and
- Residential, retail, commercial, sports, cultural, entertainment, or recreational use projects on infill sites that would achieve LEED Gold certification and improve transportation efficiency.

To be eligible for ELDP certification, these projects must also meet strong environmental and labor criteria, including:

- Project applicants must have a minimum investment of \$100 million;
- The project creates high-wage, highly skilled jobs that pay prevailing wages and living wages; and
- The project does not result in any net additional emission of greenhouse gases (GHGs), as determined by the State Air Resources Board.

Applicants to the ELDP program are required to enter into an agreement that they will meet all of these criteria to be considered for certification.

Effectiveness of ELDP Streamlining.

A 2019 report by the Senate Office of Research entitled “Review of Environmental Leadership Development Projects” tracked the timeline of ELDP projects from 2011 to 2018. According to the report, 19 projects were submitted for certification during AB 900’s operation. Of those that were selected for certification and moved forward with the project, the report found that no ELDP project was actually reviewed within 270 days. At the time the report was authored, the following projects had been completed in timelines ranging from 352-578 days:

Project	Business Days	Calendar Days
Kings Arena	243	352
Warriors Arena	257	376
8150 Sunset Boulevard	395	578

However, while ELDP projects were not completed within 270 days, the report also found that projects were reviewed under a faster timeline compared to other similar projects. According to the report, the average time for an ELDP-comparable project to wind its way through the judicial review process was 3-5 years, meaning that the 1-2-year timeline for ELDP projects represents significant time savings.

SB 149 Streamlining Expansion: Energy, Water, Transportation and Semiconductors.

SB 149 would expand the list of projects that are eligible to be certified for CEQA judicial streamlining to include certain energy, water, transportation, and semiconductor projects.

This bill establishes new environmental and equity criteria for infrastructure projects subject to judicial streamlining. Actions taken to mitigate environmental impacts in disadvantaged communities must be done in, and directly benefit the affected community. To be eligible for certification, new projects must also be GHG neutral, with the different categories of projects having different criteria for achieving this goal.

In order to be eligible for certification, projects must also meet certain labor standards: the same environmental and labor guardrails imposed on projects in the existing ELDP under SB 7, with the exception of solar photovoltaic and terrestrial wind generation projects with generating capacity less than 20 megawatts (MW), and energy storage projects capable of storing less than 80 megawatt hours (MWh) of electrical energy.

In addition to these criteria, which apply to all new projects, specific categories of projects must meet tailored environmental criteria. These detailed eligibility criteria recognize the Legislature’s continued stance that CEQA streamlining should be reserved for projects that are environmental and labor leaders.

Energy. Eligible energy infrastructure projects include eligible renewable energy resources facilities, transmission, storage, solar and wind facilities and related manufacturing projects.

Electrical Transmission. SB 149 would make electric transmission facility projects eligible for CEQA streamlining, but adds guardrails to reduce potential environmental harm from those transmission projects. This includes specifying that the project will facilitate delivery of electricity from renewable energy resources or zero-carbon resources, and specifies that transmission projects are only eligible if they do not conflict with the jurisdiction of the Coastal Commission if the project is in a coastal zone. SB 149 also makes eligible projects that facilitate delivery of electricity from energy storage projects. Energy storage projects is undefined.

Energy Infrastructure. Energy infrastructure includes not only electrical transmission facilities, but also eligible renewable energy resource projects as defined in Public Utilities Code 399.12, while excluding resources that use biomass fuels and projects that use hydrogen as a fuel.

Energy storage projects. A subset of energy infrastructure projects are energy storage projects. SB 149 includes streamlining for large new energy storage projects that generate more than 20 megawatts and discharge for at least two hours. SB 149 excludes from eligibility pumped hydro facilities, except those with capacity of 500 megawatts or less, that had received state funding before January 1, 2023.

Water. Eligible water projects include certain groundwater recharge, recycled water, contaminant or salt removal (excluding seawater desalination) and canal or conveyance maintenance and repair projects.

Groundwater. To be eligible for streamlining, SB 149 requires groundwater water projects be approved or managed by a Groundwater Sustainability Agency (GSA), Department of Water Resources, or the State Water Board and comply with the Sustainable Groundwater Management Act (SGMA). SGMA was created in 2014 to better manage California's underground water resources. Among its many provisions is a requirement that GSAs adopt Groundwater Sustainability Plans (GSPs) to reduce pumping to sustainable levels by 2040. Streamlining these types of projects aligns with Legislation currently moving this year (SB 651, Grove, 2023).

Delta Conveyance Projects. SB 149 specifies that the Delta Conveyance Project is not eligible for certification under this program.

Proposition 1 Water Storage Projects. SB149 would make water storage projects funded by the California Water Commission eligible for CEQA streamlining, under certain conditions. To address environmental concerns regarding the impacts of water storage projects on wildlife, SB 149 specifies that projects will only be eligible for streamlining if they demonstrate that they will minimize intake of water except during times of surplus water, and prioritize the discharge of water for ecological benefits or to mitigate an emergency, including, but not limited to, dam repair, levee repair, wetland

restoration, marshland restoration, or habitat preservation, or other public benefits described in Section 79753 of the Water Code.

Transportation. Under SB 149, up to 10 local and 10 state-level projects, identified by the Department of Transportation, that meet at least one goal identified in the Climate Action Plan for Transportation Infrastructure (CAPTI) and do not conflict with any specified CAPTI goals, would be eligible for judicial streamlining. CAPTI develops a plan for the future of transportation that is focused on reducing GHGs and other polluting emissions. The plan outlines transportation projects that would maximize community benefits, integrate assessments of physical climate risk, and protect natural and working lands, among other goals. Even with the above parameters, the definition of transportation projects could capture any rail project, including High Speed Rail, and roadway projects that add new High-Occupancy Vehicle (HOV) lanes. Furthermore, because CAPTI is a non-binding document, subject to change at the discretion of the Governor or administration officials, the scope of transportation projects eligible for streamlining under this statute is potentially open-ended.

The Governor will certify projects, and this certification is not subject to judicial review. The Office of Planning and Research can develop guidance on the certification process, which is not subject to the Administrative Procedures Act (APA).

To be eligible for CEQA streamlining, projects would need to be certified by the relevant state entity by Jan 1, 2032 and approved by the public agency by Jan 1, 2033.

If Everyone Gets Streamlining, No One Does.

By adding a large number of projects to the front of the queue for judicial review, SB 149 may result in longer judicial review times for existing projects. When so many projects are “first in line”, that designation becomes less meaningful to all the projects in the queue. Judicial review for ELDP-certified projects already takes longer than 270 days, and, to date, there have been only a small number of projects that are eligible for this streamlining. By pushing more CEQA cases through the expedited judicial review without changing the capacity of the courts to support this expedited review, this proposal may not significantly decrease the amount of time it takes for judicial review of ELDPs.

Motivation for Streamlining: Moving Fast and Incentivizing Good Projects

The Administration’s impetus to expand CEQA streamlining to an array of energy, water, transportation, and semiconductor projects is primarily to make California more competitive for funding from the federal Inflation Reduction Act (approximately \$239 billion for energy and climate change projects), the Creating Helpful Incentives to Produce Semiconductors Act of 2022 (Public Law 117-167), commonly known as the CHIPS and Science Act (\$280 billion), and the Infrastructure Investment and Jobs Act of 2021, also known as the Bipartisan Infrastructure Law. According to the administration:

“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. These investments will lead to the development of numerous transportation, clean-energy, and water-related facilities across the state that would further California's commitments to reducing greenhouse gas emissions and protecting its people from the worst extremes of climate change. These projects will be publicly financed in whole or in part and will result in substantial public benefits, including generation of full-time jobs during construction and additional jobs once the projects are constructed and operating. 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, without sacrificing the public's ability to participate fully in those processes and while preserving all appropriate environmental protections."

In addition to attracting federal dollars, offering CEQA streamlining to projects that meet high environmental and labor standards gives these types of projects a competitive edge. This in turn can tip the balance in favor of projects that align with the state's environmental, climate, and labor goals.

SB 149 and Resources for Judicial Council

SB 149 makes a significant number of new projects eligible for ELDP certification and streamlined judicial review. This could result in additional strain on the courts, as they strive to meet the abbreviated 270-day judicial review time for these certified projects. Reviewing CEQA cases is timely and requires technical expertise. Recognizing the additional strain that this will put on the courts, SB 149 includes a million-dollar appropriation from the General Fund for Judicial Council to train officers to implement this act.