
SENATE COMMITTEE ON ENVIRONMENTAL QUALITY

Senator Allen, Chair

2021 - 2022 Regular

Bill No: SB 44
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Urgency: No
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Fiscal: Yes

SUBJECT: California Environmental Quality Act: streamlined judicial review: environmental leadership transit projects

DIGEST: Establishes expedited administrative and judicial review of environmental review and approvals granted for “environmental leadership transit projects” that meet specified requirements.

ANALYSIS:

Existing law:

- 1) Requires lead agencies with the principal responsibility for carrying out or approving a proposed discretionary project to prepare a negative declaration, mitigated 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) Sets requirements relating to the preparation, review, comment, approval and certification of environmental documents, as well as procedures relating to an action or proceeding to attack, review, set aside, void, or annul various actions of a public agency on the grounds of noncompliance with CEQA. (PRC §§21165 et seq.)
- 3) Established the Jobs and Economic Improvement Through Environmental Leadership Act of 2011 (AB 900, Buchanan, Gordon, Chapter 354, Statutes of 2011), which established CEQA administrative and judicial review procedures for an "environmental leadership" project. The provisions of AB 900 sunset on January 1, 2021. (PRC §21178 et seq.)

This bill:

- 1) Defines an “environmental leadership transit project” (ELTP) as a project to construct a fixed guideway and related fixed facilities that meets all of the following:
 - a) The fixed guideway operates at zero-emissions.
 - b) For projects more than 2 miles in length, the project reduces emissions by no less than 400,000 metric tons of greenhouse gases directly in the corridor of the project defined in the applicable environmental document over the useful life of the project, without using offsets.
 - c) For projects no more than 2 miles in length, the project reduces emissions by no less than 50,000 metric tons of greenhouse gases directly in the corridor of the project defined in the applicable environmental document over the useful life of the project, without using offsets.
 - d) The project reduces no less than 30,000 vehicle miles traveled in the corridor of the project defined in the applicable environmental document over the useful life of the project.
 - e) The project is consistent with the applicable sustainable communities strategy or alternative planning strategy.
 - f) The project is consistent with the applicable regional transportation plan.
 - g) The project applicant demonstrates how the applicant has incorporated sustainable infrastructure practices to achieve sustainability, resiliency, and climate change mitigation and adaptation goals in the project.
- 2) Defines “fixed guideway” as how the term is defined by United States Code, which defines it as “a public transportation facility” -
 - a) using and occupying a separate right-of-way for the exclusive use of public transportation,
 - b) using rail,
 - c) using a fixed catenary system,
 - d) for a passenger ferry system, or
 - e) for a bus rapid transit system.
- 3) Requires Judicial Council, on or before April 1, 2022, to adopt rules of court that would apply to an action or proceeding brought to attack, review, set aside, void, or annul the certification of an EIR for an ELTP or the granting of any project approvals, requiring lawsuits and any appeals to be resolved, to the extent feasible, within 270 days of filing the certified record of proceedings.
- 4) Establishes special procedures for public participation in CEQA review of the ELTP that would:

- a) Require the EIR to include a specified notice that the EIR is subject to the provisions of the section added by this bill.
 - b) Require the lead agency to conduct an informational workshop within 10 days of release of the Draft EIR and hold a public hearing within 10 days before close of the public comment period.
 - c) Require the lead agency and applicant to participate in nonbinding mediation with any party who submitted comments on the Draft EIR and requested mediation within 5 days of the close of the public comment period, with the cost to be paid by the applicant. Requires mediation to end within 35 days of the close of the public comment period.
 - d) Require the lead agency to adopt any measures agreed upon in mediation. Prohibits a commenter from raising an issue addressed by that measure in a lawsuit.
 - e) Permit the lead agency to ignore written comments submitted after the close of the public comment period, with specified exceptions for materials addressing new information released after the close of the public comment period.
 - f) Require the lead agency to file a notice of determination within 5 days after the last initial project approval.
- 5) Establishes special procedures for the preparation and certification of the record of proceedings for the ELTP:
- a) Requires the lead agency to make publicly available in electronic format (with the exception of certain copyright-protected documents) the draft EIR and documents relied on by the lead agency within 3 days of releasing the draft EIR, certify the record within 5 days of filing the notice of determination, provide the record to a party upon written request, and provide the record to the superior court within 10 days of the filing of a petition for review.
 - b) Requires a document prepared by the lead agency after the release of the draft EIR that is a part of the record of proceedings to be made available to the public within five business days after the document is released by the lead agency.

- c) Requires the lead agency to encourage written comments on the project be submitted in a readily accessible electronic format, and requires the lead agency to make any comment available to the public within five days of its receipt. Requires the lead agency to convert any comment that is not in an electronic format into a readily accessible electronic format and to make it available to the public.
 - d) Provides that documents relied on by the lead agency that were not prepared specifically for the project and are copyright protected are not required to be made readily accessible in an electronic format. Requires the lead agency to make an index of copyright-protected documents, as specified.
 - e) Requires the lead agency to certify the final record of proceedings within five days after filing the notice that the agency has approved or has determined to carry out the project.
 - f) Requires any dispute arising from the record of proceedings be resolved by the superior court. Requires a party disputing the content of the record of proceedings to file a motion to augment the record of proceedings at the time it files its initial brief.
- 6) Requires an ELTP to use a skilled and trained workforce to perform all work that falls within an apprenticeable occupation in the building and construction trades.

Background

- 1) *Overview of CEQA 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 (ND). If the initial study shows that the project may have a significant effect on the environment, the lead agency must prepare an environmental impact report (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 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.

- 2) *Jobs and Economic Improvement Through Environmental Leadership Act of 2011*. Existing law provided a framework for expediting CEQA review of major projects. The Jobs and Economic Improvement Through Environmental Leadership Act of 2011 (hereafter AB 900 or Act), established specified administrative and judicial review procedures for the review of the environmental review documents and public agency approvals granted for designated residential, retail, commercial, sports, cultural, entertainment, or recreational use projects, known as Environmental Leadership Development Projects (ELDP). To qualify as an ELDP, the project must meet specified objective environmental standards. The Act sunset on January 1, 2021.

In addition to ELDPs certified by the governor for expedited review under AB 900, the Legislature has enacted legislation that applies AB 900-like timeframes to specific, specialty projects such as the Golden One Center (SB 743, Steinberg, Chapter 386, Statutes of 2014), a sports and entertainment project in Inglewood (Clippers Arena) (AB 987, Kamlager-Dove, Chapter 961, Statutes of 2018), an Oakland sports and mixed-use project (Bonta, Chapter 959, Statutes of 2018), and a San Diego transit and transportation facilities project (Gloria, Chapter 291, Statutes of 2020).

- 3) *CEQA Survey of State Agencies*. In October 2017, the Senate Environmental Quality Committee conducted a survey of state agencies regarding CEQA in order to gain a better understanding of CEQA compliance and litigation. The survey covered a period of five years, Fiscal Years 2011/12 to 2015/16. State agencies were asked to provide the following:

- The number of projects of which their agency was the lead agency over the five-year time period, and of these, the number that were:
 - Exempt from CEQA through either a categorical exemption or a statutory exemption.
 - Subject to a ND or mitigated ND.
 - Subject to an EIR.
- Of the projects for which an EIR was prepared, how many were also subject to the National Environmental Policy Act (NEPA).
- The number of CEQA lawsuits filed against them. Please note that multiple lawsuits could have been filed for a single project.

According to the results, the Department of Transportation (DOT) reported 3,279 projects. 62 projects of which required an EIR (about 1.9%). Also within that five year period, DOT reported 29 CEQA lawsuits being filed. As stated above, it is noted that multiple lawsuits could have been filed for a single project.

Further breakdown of the DOT results are as follows:

- Categorical exemptions: 2,890 projects (88%)
- Statutory exemptions: 44 projects (1.3%)
- ND/MND: 263 projects (8%)

Comments

- 1) *Purpose of Bill.* According to the author, “SB 44 makes environmentally beneficial, zero-emission mass transit projects throughout California eligible for expedited Environmental Quality Act (CEQA) review by the Superior Court. The sooner such transformative projects undergo CEQA, are built and begin operating, the faster they will significantly displace less efficient and more pollution-intensive regional trips taken by single passengers in private vehicles.

“California statute mandates that CEQA litigation be prioritized over other civil actions. Prior state law—now expired, but proposed to be re-established—created a process providing certain large-scale construction project proponents to apply for certification by the Governor as an “environmental leadership development project”. Certification requires lawsuits challenging a CEQA document be resolved by the Superior Court within 270 days, to the extent feasible.

“An identified goal of environmental leadership projects has been to achieve a 15% or greater standard for transportation efficiency. It is vexingly incongruous that the law so far has not and still does not explicitly permit transit projects—which are designed to convey passengers from one place to another in a fast, efficient manner—to be eligible for certification.

“The 17 projects designated under prior law for expedited judicial treatment so far—although impressive—cannot deliver the magnitude of environmental benefits to Californians as is possible with a zero-emission transit project.

“Quick resolution of legal challenges to transit projects could speed up construction by years.

“SB 44 provides expedited CEQA judicial review for mass transit projects only if they meet certain conditions, including:

- consistency with a region’s sustainable communities strategy and transportation plan;
- zero-emission operation of the transit project itself;
- direct reduction of greenhouse gases emissions, without using offsets;
- AND
- reduction through the project of vehicle miles traveled in the corridor in which it operates.

“Each additional day roads are congested, and drivers take trips alone in their vehicles, massive quantities of carbon dioxide, NOx and diesel particulates are emitted throughout our state, often in some of the most polluted air basins in the country.

“There is exceptional merit in stipulating that large-scale, transformative regional transit projects be awarded a more certain, truncated timeline to undergo review by California’s Superior Court.”

- 2) *Many transit projects are already subject to a CEQA exemption.* According to the 2017 CEQA survey of state agencies, DOT reported that only 1.9% of its projects required an EIR be completed and that almost 90% of its projects qualified for either a categorical or statutory exemption. Further, only 29 lawsuits were filed against projects (multiple lawsuits can be filed against a single project, so the number of projects challenged may actually be lower). Given the high percentage of transit projects that are subject to an exemption and the low rate of litigation of transit projects, one may question whether expedited review is necessary.

However, categorical exemptions are not absolute and can be subject to CEQA if it falls within “an exception to the exemption.” Exceptions to the exemptions include considerations of location, cumulative impact, or significant effect of the project. Additionally, categorical exemptions cannot be used on projects that may result in damage to scenic resources, projects that are located on certain hazardous waste sites, and projects that may cause a substantial adverse change to the significance of a historical resource. Thus, this bill will capture and apply expedited review to those projects that are eligible for a categorical exemption but fall within the “exception to the exemptions” and those projects that required an EIR, providing those projects with more judicial certainty.

- 3) *Guaranteed time frames.* Current law requires the courts to give CEQA-related cases preference over “all other civil actions... so that the action or proceeding shall be quickly heard and determined” (PRC §21167.1). In addition to this existing mandate, the expedited process under this bill provides that the courts, to the extent feasible, must complete the judicial review process in a given time frame for certain CEQA-related actions or proceedings. As a consequence, such mandates on a court delay access for other, unknown cases such as medical malpractice suits, wrongful death suits, or contract disputes, as well as potentially exacerbating a court’s backlog on civil documents such as filing a new civil complaint, processing answers and cross complaints, or processing a demurrer or summary judgement. Calendar preferences and guaranteed time frames create additional demands and burdens on our courts that have very limited resources and a never-ending supply of cases to hear.
- 4) *Guaranteed time frames.....are not always guaranteed: AB 900 lawsuits.* An expedited judicial review does not guarantee that a challenge to a project will be resolved within 270 days, as demonstrated by: (1) the Sacramento Kings Arena (Adriana Gianturco Saltonstall et al. v. City of Sacramento), (2) the Golden State Warriors Arena (Mission Bay Alliance et al. v. Office of Community Investment and Infrastructure and a separate non-CEQA lawsuit), and (3) 8150 Sunset Boulevard Mixed Use Development which had 4 CEQA challenges to the project (Los Angeles Conservancy v. City of Los Angeles; Fix the City, Inc. v. City of Los Angeles; JDR Crescent v. City of Los Angeles; and Manners v. City of Los Angeles). These cases demonstrated that cases can take longer to resolve due to, among other reasons, (1) ambiguity if the 270 days applies to business days or calendar days and if it includes appeals to the Supreme Court, (2) non-CEQA related actions which are not subject to the 270 day timeframe that are filed in addition to CEQA actions, or (3) consolidation of many, and sometimes complicated, actions.
- 5) *Can the expedited judicial review be applied to non-CEQA challenges?* It has been suggested that the phrase “or the granting of any approval” in expedited judicial review bills could be read to include challenges to land-use approvals that are not related to CEQA. Consequently, it has been argued that such language applies the expedited review provisions to non-CEQA claims against eligible projects when paired with a CEQA claim. This interpretation, however, is not consistent with the principles of statutory construction, and ignores the statutory context in which the provision is situated. Such an interpretation would also imply that provisions outside of CEQA have been indirectly amended, which is at tension with another rule of statutory construction: that interpretations that imply an amendment to other sections are to be avoided. Finally, according to the Judicial Council, the court in the 8150 Sunset project

under AB 900 separated CEQA claims and non-CEQA claims, resolving the latter on a normal timeline. This indicates that the court did not view the expedited review provision as applying to non-CEQA related land use approvals.

- 6) *Diminishing returns.* In the almost 10 years that AB 900 was operative, 19 ELDPs were certified. It is difficult to estimate how many projects could ultimately qualify as an ELTP, but if numerous projects are fast-tracked to the front of judicial calendars, courts may be forced to repeatedly miss the 270 day deadline. In a sense, adding more categories of projects that could be subject to expedited judicial review could be a victim of its own success: at some point, the more projects that are eligible to benefit from accelerated judicial review, the smaller the impact of that benefit.

However, according to the CEQA survey (see above), over the span of 5 years, only 29 CEQA challenges were brought against a DOT project (the actual number of projects challenged could be less than 29 since multiple CEQA challenges can be brought against one project). Therefore, given the low rate of litigation reported by DOT, and the high number of projects that are subject to an exemption, the number of CEQA challenges brought against an ELTP and therefore subject to the expedited review will likely be low.

- 7) *Ambiguity for the courts.* In 2019 the Senate Office of Research (SOR) released a report on AB 900 projects and projects given similar expedited review through specific legislation. That report explored various aspects of the program and contained a discussion of various court cases that were not resolved within the 270 days, despite the directive that judicial review be completed within that time frame. The report also had a number of recommendations, including specifying whether judicial review is to be completed within 270 business days or calendar days

As introduced, this bill provided that judicial review was to be completed within 270 business days. Recent amendments remove the reference to business days, making it ambiguous if the judicial review period and other timeframes are in business days, calendar days, or court days.

- 8) *Senate Bill 757 (Allen, 2020).* Last year SB 757, a substantially similar bill to SB 44, was vetoed by Governor Newsom. In his veto message, Governor Newsom wrote:

“This bill expands the types of environmental leadership projects eligible for streamlined judicial review through the Jobs and Economic Improvement

Through Environmental Leadership Act of 2011 (AB 900, Buchanan, Chapter 354, Statutes of 2011) to include zero-emission, public transit projects, provided the lead agency applies for the Governor's certification no later than January 1, 2023 and the project is approved no later than January 1, 2024. The provisions of this bill are contingent on the enactment of Senate Bill 995 by Senator Atkins, which did not successfully pass in the Legislature.

“While I support efforts to accelerate transit projects that reduce greenhouse gas emissions and reduce miles traveled, enactment of this bill is contingent on the successful statutory extension of the AB 900 statute by SB 995, which unfortunately failed passage in the Legislature.”

Unlike SB 757, SB 44 is not contingent on the passage of another bill and would operate independently of AB 900.

DOUBLE REFERRAL: If this measure is approved by the Senate Environmental Quality Committee, the do pass motion must include the action to re-refer the bill to the Senate Judiciary Committee.

Related/Prior Legislation

SB 7 (Atkins) reenacts the Jobs and Economic Improvement Through Environmental Leadership Act and expands eligibility of the Act to include smaller housing projects. SB 7 was heard in this committee on February 22, 2021, and passed out of committee with a vote of 5-0. This bill is currently in the Assembly pending referral.

SB 288 (Chapter 200, Statutes of 2020, Wiener) exempts from CEQA, until 2023, various transit and transit-related projects.

SB 757 (Allen, 2020) expands project eligibility for the Jobs and Economic Improvement Through Environmental Leadership Act to include transit projects that meet specified requirements. SB 757 was vetoed by the Governor.

SB 995 (Atkins, 2020) extends for four years the expedited California Environmental Quality Act (CEQA) administrative and judicial review procedures established by the Jobs and Economic Improvement Through Environmental Leadership Act [AB 900 (Buchanan), Chapter 354, Statutes of 2011] for “environmental leadership development projects” (ELDPs). Expands AB 900 eligibility to include smaller housing projects. SB 995 died on the Senate Floor on concurrence.

SB 1 (Beall, Chapter 5, Statutes of 2017) increased several taxes and fees to raise the equivalent of roughly \$52.4 billion over ten years in new transportation revenues and makes adjustments for inflation every year; directed the funding to be used towards deferred maintenance on the state highways and local streets and roads, and to improve the state's trade corridors, transit, and active transportation facilities.

SOURCE: Author

SUPPORT:

Bay Area Council
Los Angeles County Metropolitan Transportation Authority
Peninsula Corridor Joint Powers Board (CALTRAIN)
San Mateo County Transit District (SAMTRANS)
Silicon Valley Leadership Group
Solano Transportation Authority
Southern California Association of Governments (SCAG) Peninsula Corridor Joint Powers Board (CALTRAIN)

OPPOSITION:

None received

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