SENATE COMMITTEE ON ENVIRONMENTAL QUALITY
Senator Allen, Chair
2023 - 2024 Regular

Bill No:	SB 239		
Author:	Dahle		
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Urgency:	No	**Fiscal:**	Yes
Consultant:	Evan Goldberg		

SUBJECT: California Environmental Quality Act (CEQA): housing development projects: judicial proceedings.

DIGEST: This measure limits who can file certain lawsuits under CEQA to the Attorney General and precludes any suits from being filed for non-environmental purposes. It also prohibits a court from halting the construction or operation of a project unless it makes certain findings, prohibits certain CEQA actions if a proceeding has already been instituted against a housing development project, and requires certain suits challenging environmental impact reports (EIR) to be resolved in 365 days where feasible.

ANALYSIS:

Existing law:

1) CEQA requires lead agencies with the principal responsibility for carrying out or approving a project to prepare a negative declaration (ND), mitigated negative declaration (MND), or environmental impact report (EIR) for the project, unless the project is exempt from CEQA. (Public Resources Code (PRC) §21000 et seq.). If a project may have a significant effect on the environment, the lead agency must prepare a draft EIR. (CEQA Guidelines 15064(a)(1), (f)(1))

2) Broadly allows any person to file an action under CEQA as long as they presented the alleged grounds for noncompliance to the public agency during the public comment period or before the close of the public hearing on the project. The requirement to file an action during the public comment period or prior to the close of the public hearing on the project does not apply to the Attorney General. (PRC §21177)

3) Allows actions to be brought against an agency regarding whether a project has a "significant effect on the environment" that was not considered by the agency, as well as whether an agency improperly determined a project did not have a "significant effect on the environment." Actions can also be brought

charging that a completed EIR did not comply with CEQA, that an agency improperly determined a project is not subject to CEQA, and other non-project specific reasons (e.g., timelines were not adhered to, notices were not properly provided, etc.). (PRC §21167)

4) Defines "environment" to mean "…the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (PRC §21060.5)

5) States that if a court finds a public agency reached a determination, finding, or decision not in compliance with CEQA, the court can take one or more of the following actions:

   a) Void – in whole or in part – the determination, finding, or decision by the public agency;
   b) Suspend any project activities that may have taken place until the public agency complies with CEQA; and/or
   c) Require the public agency to take specific action necessary to bring the determination, finding, or decision into compliance with CEQA. (PRC §21168.9)

6) Requires counties with a population of over 200,000 to designate one or more judges to develop expertise on CEQA and hear CEQA cases (PRC §21167.1 (b))

7) Requires both the Superior Court and the Court of Appeal to give CEQA lawsuits preference over all other civil actions (PRC §21167.1(a))

8) Requires, if feasible, the Court of Appeal to hear a CEQA appeal within one year of filing (PRC §21167.1(a)).

This bill:

1) States that only the Attorney General can file a lawsuit alleging that an EIR, ND, or MND does not comply with CEQA.

2) States it is the intent of the Legislature that the Attorney General shall not file a lawsuit under CEQA for non-environmental purposes. "Non-environmental purposes" are defined to include, but are not limited to:

   a) Competing with another business,

b) Delaying a project for reasons unrelated to environmental protection, or
c) Attempting to extract concessions unrelated to the environment from project proponents.

3) Allows any party to file a motion – or the court on its own motion – to determine if the Attorney General is bringing a CEQA case to court for non-environmental purposes. If a court determines a suit was brought for non-environmental purposes, it can take any action it deems appropriate, including dismissing the suit and awarding attorney fees. The court shall only take action if it finds non-environmental purposes are the primary motivation behind the Attorney General's suit.

4) Precludes a court from halting construction or operation of a project – even when the court finds the public agency violated CEQA – unless the court finds:

   a) The continued construction or operation of the project presents an imminent threat to the public health and safety, or
   b) The project location contains unforeseen important Native American artifacts or unforeseen important historical, archaeological, or ecological values that would be materially, permanently, and adversely affected by the continued construction or operation of the project unless the court stays or enjoins the construction or operation of the project.

   If the court finds (a) or (b) have been satisfied, it cannot stop the whole project. Rather, it can only halt the specific activities that present an imminent threat to public health and safety or that materially, permanently, and adversely affect unforeseen important Native American artifacts or unforeseen important historical, archaeological, or ecological values.

5) States if a CEQA action is taken against a housing development project, and a trial court finds the agency violated CEQA, no additional or subsequent legal action or proceeding under CEQA can be taken against the project.

   Any claims regarding the lead agency's noncompliance with CEQA must be raised during the public comment period and must be limited to the adequacy of the lead agency's efforts to correct its CEQA violation.

   Issues, claims, or complaints under CEQA not raised in the original suit against the public agency and any claims not resolved by the trial court in favor of the petitioners in the original action shall not be considered by a court in determining whether the public agency has subsequently complied with CEQA pursuant to the court's order.

6) States if an action or proceeding under CEQA has previously been instituted against a housing development project, and a court has entered a final judgment in that case, no new proceeding under CEQA can be instituted against that project.

7) Requires any action – including appeals to the Court of Appeal or the Supreme Court – challenging the decision of the lead agency to certify the project EIR or grant project approvals in violation of CEQA to be resolved, to the extent feasible, within 365 days of the filing of the record of proceedings with the court. This time limit does not apply if the court finds:

   a) The continued construction or operation of the project presents an imminent threat to the public health and safety, or
   b) The project location contains unforeseen important Native American artifacts or unforeseen important historical, archaeological, or ecological values that would be materially, permanently, and adversely affected by the continued construction or operation of the project unless the court stays or enjoins the construction or operation of the project.

   The Judicial Council is required to implement this requirement and it shall be repealed on January 1, 2030.

8) Creates the following definitions:

   a) "Commercial project" means a project, either commercial or industrial, located in a community that has an unemployment rate that is higher than the state's median unemployment rate at the time that the environmental impact report is certified or in a disadvantaged community.
   b) "Housing project" means a project consisting of a residential project or a mixed-use project with not less than two-thirds of the square footage designated for residential use. This does not include a project located on a single-family residential lot.
   c) "Project" means a commercial, housing, or public works project that addresses longstanding critical needs in the project area.
   d) "Public works project" means a project carried out by a public agency.

Background

1) *The A, B, C's of CEQA.* CEQA was enacted by the Legislature and signed into law by Governor Ronald Reagan in 1970. While it has evolved into a very complex Act over the past 53 years, at its core the basic principles of CEQA are relatively simple.

   It 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 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.

2) *Standing To Sue & Reasons For Suing – CEQA vs. NEPA.* The National Environmental Policy Act (NEPA) was created by Congress in 1969 and signed into law by former President Richard Nixon in 1970. CEQA, enacted in California later that same year, was based in large part on NEPA, but there are some differences in the laws, two of which are worth noting for the purposes of this bill.

   First, under CEQA and court decisions rendered since the law's enactment, it is relatively easy for a purpose or entity to achieve standing to file a lawsuit. That is because the standard to achieve standing is to show either the person has a "beneficial interest" in the project and will be harmed if it goes forward, or that there is a "public interest" in bringing the suit because the greater public interest would suffer if the suit isn't brought. One of the most significant cases expanding the right to sue was *Save the Plastic Bag Coalition v. City of Manhattan Beach, 52 Cal.4th 155 (2011),* where the state Supreme Court allowed corporate entities to file a CEQA action without having to meet a higher bar imposed by previous court decisions. The Court noted in its ruling that "Absent compelling policy reasons to the contrary, it would seem that corporate entities should be as free as natural persons to litigate in the public interest."

   By contrast, NEPA requires someone looking to sue to show they have suffered or will suffer some type of concrete harm that has been or will be caused by the alleged NEPA violation.

Second, under CEQA and court decisions rendered since the law's enactment, there is no true restriction on the reasons for which a suit may be filed. This too was expanded by *Save the Plastic Bag Coalition v. City of Manhattan Beach, 52 Cal.4th 155 (2011)*. Here, the state Supreme Court ruled a plastic bag industry group did have standing to sue the City of Manhattan Beach for enacting a ban on the use of plastic bags, noting "The ordinance's ban on plastic bags would have a severe and immediate effect on their business in the city. Clearly, they have a 'particular right to be preserved or protected over and above the interest held in common with the public at large.'" While the industry group did achieve standing, the Court ruled in favor of the City of Manhattan Beach on the merits of the case.

By contrast, NEPA requires a plaintiff to show the harm claimed falls within the "zone of interests" that NEPA seeks to protect. In other words, a plaintiff has to show a harm to the environment before they can achieve full standing to file a suit because the "zone of interest" NEPA is designed to protect its environmental values. A person cannot rely on economic or other harms to establish standing to sue.

3) *Greenmailing.* As noted above, CEQA and subsequent court decisions place limited restrictions on who can file a lawsuit alleging a violation of the law or the grounds upon which a lawsuit can be filed. This has, in part, led to a practice known as "greenmailing," where a person or entity files – or threatens to file – a lawsuit against a project under CEQA for the express purpose of extracting concessions from the project proponent. Some examples of the practice include businesses using the law to try and keep out competitors, unions using the law to call for the use of union labor and project labor agreements, and local governments and neighborhood groups using it to get developers to build parks or additional facilities. However, those reasons are not generally cited in the lawsuits themselves. Rather, the lawsuits filed generally cite an environmental-related concern as a basis for the suit.

Comments

1) *Purpose of Bill.* According to the author, "California's housing crisis is a top priority and the state's sky high housing prices are driving people away so we must take a look at the root causes of the issue. California's extensive regulations drive up the cost of building new housing developments, making it difficult to keep up with the demand for housing while keeping consumer costs low. SB 239 will streamline the CEQA approval process which has become a massive obstacle to new housing projects throughout California.

"If we as a legislative body and as a state care about providing sufficient housing for our constituents, we need to make substantive changes to how we do things and we must take significant steps towards providing for them. This bill does not get rid of CEQA's environmental regulations. It simply makes it easier for housing projects to be approved by reserving the power to bring forth lawsuits against projects to the Attorney General and by limiting lawsuits to only those brought forth for environmental reasons. This ensures that only those projects that merit significant environmental concern are delayed or denied. Securing more affordable housing is crucial for our state. This is just one small piece of the puzzle but it will be a huge step forward."

2) *Limiting Who Can File A CEQA Lawsuit To The Attorney General.* CEQA makes it very easy for people to establish standing to file a lawsuit alleging violations of the law. SB 239 seeks to eliminate the public's right to sue under CEQA and instead only allow the state Attorney General to file a CEQA lawsuit.

   The Attorney General does have a role in CEQA today. He or she can file and intervene in lawsuits, file public comment letters alerting local agencies to potential violations of CEQA, enter into settlements, and submit "friend of the court" briefs in significant appellate cases. According to the Attorney General's website, 6 comment letters were filed in 2022, 5 comment letters were filed in 2021, and 21 comment letters were filed in 2020.

   Current law requires every party filing a CEQA lawsuit to report to the Attorney General. According to a 2021 report compiled by The Housing Workshop, the number of CEQA lawsuits filed each year has averaged 195 between 2002 and 2019 – with a high of 247 in 2008 and a low of 118 in 2005 (according to the Attorney General, 192 CEQA lawsuits were filed in 2020 and 211 were filed in 2021). The same report found the rate of litigation for challenges to projects alleging noncompliance with CEQA is also very low, with lawsuits filed for 2 out of every 100 projects. The estimated rate of litigation for all CEQA projects requiring an EIR, a MND, or an ND was 2% for the seven-year period from 2013 to 2019.

   Limiting the ability to file a CEQA lawsuit to only the Attorney General is a significant departure from one of the core tenants of CEQA, which was designed to allow the public to help enforce the state's environmental laws by allowing citizens to establish standing and file a CEQA-related lawsuit. As such, *the author and committee may wish to consider* whether:

- Eliminating the ability of the public to file CEQA-related lawsuits will reduce enforcement of and compliance with California's environmental laws.
- The focus and/or political views and/or ideology of a particular Attorney General will impact the degree to which California's environmental laws will be enforced.
- The Attorney General's office has the expertise and capacity necessary to determine whether a potential CEQA violation has occurred in any given area of the state and whether a CEQA lawsuit should be filed.

3) *Limiting The Purposes For Which A CEQA Lawsuit Can Be Filed.* Current law allows a CEQA lawsuit to be filed for a wide variety of reasons, but generally speaking, a suit must somehow relate to an environmental impact a proposed project may have. PRC §21060.5 defines "environment" to mean "…the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance."

   This bill seeks to ban lawsuits that are filed for "non-environmental purposes," which the bill defines as including, but "is not limited to, competing with another business, delaying a project for reasons unrelated to environmental protection, or attempting to extract concessions unrelated to the environment from project proponents."

   The effect of this is likely that courts will be asked to determine – on a case-by-case basis – whether a lawsuit is being filed for an environmental or a non-environmental purpose. That is, in some ways, the exact position the courts are put in today in terms of determining what is or is not a violation of CEQA.

   Perhaps more challenging, the bill in a sense asks the court to determine if the environmental reasons or objections stated in a lawsuit are indeed the actual reasons why a lawsuit is being filed. For example, in *Save the Plastic Bag Coalition v. City of Manhattan Beach, 52 Cal.4th 155 (2011)*, the plaintiff did not state it was filing the lawsuit because its member companies feared a loss of business in Manhattan Beach. Rather, it alleged the City had not considered the environmental impact of the increased use of paper and reusable bags if the plastic bag ban were to take effect. *The author and committee may wish to consider* whether asking courts to determine whether a lawsuit is filed for non-environmental purposes and then banning such suits is appropriate.

4) *Limiting When A Project Can Be Halted.* Today, when a court rules a public agency approved a project in violation of CEQA, it has the option to freeze any and all work on a project until the CEQA violation is rectified.

   This bill says the court can only stop construction or operations in cases where (1) there is an imminent threat to public health and safety, or (2) when there are important Native American artifacts or important historical, archaeological, or ecological values that would be materially, permanently, and adversely affected. Even if such a finding is made, the court can only stop construction or operation on the part of the project where (1) or (2) would come into play.

   Missing from this list is the very thing CEQA was created to prevent – damage to the environment. While the bill does permit construction or operations to be halted if it finds "ecological values" would be damaged, generally speaking, ecological is a subset of larger environmental concerns and issues. *The author and committee may wish to consider* whether the limitation imposed by this bill is appropriate.

5) *Limiting The Number Of CEQA Lawsuits That Can Be Filed On Housing Projects.* In the case of a housing development, Section 4 of this bill effectively limits the number of CEQA-related lawsuits that can be filed to one.

   The impact of this provision may in large part depend upon who is the Attorney General. Since only one suit can be filed, one incentive would be to file the largest suit possible and hope one of the arguments is accepted by the court.

   On the other hand, since the bill precludes anyone but the Attorney General from filing a CEQA-related lawsuit, depending on who the Attorney General is at the time, there may be no incentive to file any suit at all.

6) *Limiting The Court's Review Time.* The bill requires any action related to a public agency's decision to certify an EIR of certain commercial, housing, or public works projects, as defined by Section 5 of the bill, to be resolved by the court – to the extent feasible – within 365 days of the case being filed.

   It's difficult to assess what, if any, impact this will have on the court system. As noted in Comment 2, a 2021 report by The Housing Workshop found the number of CEQA lawsuits filed each year has averaged 195 between 2002 and 2019 and that the estimated rate of litigation for all CEQA projects requiring an EIR, a MND, or an ND was 2% for the seven-year period from 2013 to 2019.

At a minimum though, to the extent CEQA cases are required to be resolved within a time-certain (if feasible), it will serve to delay other cases filed in courts.

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

AB 978 (Joe Patterson) of 2023 requires anyone seeking judicial review of the decision of a lead agency made pursuant to CEQA to carry out or approve a housing project to post a bond of $500,000 to cover the costs and damages to the housing project incurred by the project sponsor. AB 978 is pending in the Assembly Natural Resources Committee.

AB 1700 (Hoover) of 2023 states that population growth, in and of itself, resulting from a housing project and noise impacts of a housing project are not an effect on the environment for purposes of CEQA. AB 1700 is pending in the Assembly Rules Committee.

SB 861 (Dahle) of 2023 requires the Judicial Council to adopt rules of court applicable to actions or proceedings brought to attack, review, set aside, void, or annul the certification or adoption of an EIR for water conveyance or storage projects or the granting of project approvals, including any appeals to the court of appeal or the Supreme Court, to be resolved, to the extent feasible, within 270 days if feasible. SB 861 is pending in the Senate Environmental Quality Committee.

SB 1302 (Morrell) of 2020 contained one provision that is in SB 239. It sought to, in the case of CEQA suits filed against housing development projects, limit subsequent suits against public agencies in cases where the court finds the agency did violate CEQA. SB 1302 was assigned to the Senate Environmental Quality Committee but was not presented to the committee and no vote was ever taken on the measure.

SB 25 (Caballero) of 2019 sought to create expedited administrative and judicial review procedures under CEQA for projects located in six specified counties financed in a certain fashion, requiring the courts to resolve lawsuits within 270 days, to the extent feasible. SB 25 was held in the Assembly Natural Resources Committee where it died without a hearing.

SB 621 (Glazer) of 2019 sought to establish expedited judicial review procedures for housing projects that include at least 30% affordable units and meet other specified conditions, requiring the courts to resolve lawsuits within 270 days, to the extent feasible. SB 621 was held in the Assembly Natural Resources Committee where it died without a hearing.

SB 7 (Atkins), Chapter 19, Statutes of 2021, re-enacted and revised the expedited CEQA administrative and judicial review procedures for "environmental leadership development projects." For these projects, a 270-day judicial review deadline would apply and includes appeals to the Court of Appeal and the Supreme Court. It also extended eligibility to housing projects that will result in an investment of $15-$100 million, provided at least 15% of the project is affordable to lower income households and the project is not used as a short-term rental.

SB 1456 (Simitian), Chapter 496, Statutes of 2010, was a multi-part CEQA bill that, among other things, required the use of mediation in certain circumstances and authorized a court to impose a $10,000 penalty on anyone making a "frivolous" claim in a CEQA lawsuit. This measure sunset on January 1, 2016.

SOURCE: Author

SUPPORT:

California Apartment Association

OPPOSITION:

California Environmental Voters (formerly CLCV)
California Labor Federation, AFL-CIO
Center for Biological Diversity
Earthjustice
New Livable California Dba Livable California
State Building and Construction Trades Council of California

ARGUMENTS IN SUPPORT: The California Apartment Association writes in support of this measure:

"CEQA was codified to provide a process to identify and address potential environmental impacts of proposed development and provide a method to mitigate

those impacts. Unfortunately, CEQA has morphed into a litigation tool anti-housing advocates use simply to prevent much needed housing in this state. SB 239 will address this nefarious use of CEQA by ending the practices of chilling competing business interests, delaying a project for reasons unrelated to environmental protection, or attempting to extract concessions unrelated to the environment from project proponents.

"The California Apartment Association is the largest statewide rental housing trade association in the country, representing over 50,000 single family and multi-family apartment owners and property managers who are responsible for over 2 million affordable and market rental units throughout the State of California. Thank you for your work on this important measure."

ARGUMENTS IN OPPOSITION: The Center for Biological Diversity writes in opposition:

"The bill would allow only the Attorney General's office to bring cases seeking judicial relief—and even then, a court would be forbidden from temporarily blocking a project that violates CEQA unless the project falls within extremely narrow exceptions. These provisions would undermine the ability of communities to have a voice in local decision-making and result in the approval of poorly planned or risky projects without adequate environmental review.

"If SB 239 became law, public agencies would generally not be required to set aside project approvals, revise the environmental analysis or mitigation measures, or suspend construction activities when a court has found a clear violation of CEQA. This would render CEQA no more than an administrative afterthought and provide agencies with no incentive to meaningfully address CEQA violations identified by a court, or even develop a legally sufficient CEQA document in the first place."

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