

CEQA Reform for Large Projects with Environmental Benefits

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On September 27, 2011, Governor Brown signed AB 900 into law. The bill was intended to streamline CEQA litigation that delays large, job-creating projects that include or implement significant environmental benefits.

The law defines an "Environmental Leadership Development Project" or "Leadership Project" that qualifies for the law's benefits, as a large development (residential, retail, commercial, entertainment or recreational) to be located on an infill site and certified LEED Silver or better by the U.S. Green Building Council. To qualify, the project must be an infill project, achieve 10% or greater transportation efficiency than comparable projects, a clean renewable energy project or a clean energy manufacturing project. The project applicants initiate the process for qualifying their project by requesting that the Governor certify it as eligible for the streamlining benefits the Act provides.

The Governor is authorized to certify a project for CEQA litigation streamlining benefits if he finds that upon completion it will result in a minimum of \$100 million investment in California, create high wage, highly-skilled jobs, both construction and permanent, not result in additional greenhouse gas emissions and meet certain other requirements.

Significantly, the bill provides that the Governor's certification findings are not subject to judicial review. They are, however, subject to submission to a Joint Legislative Budget Committee for an expedited concurrence or nonconcurrence determination. The statute does not spell out the effect of nonconcurrence, however, setting up the possibility for political and legal controversy.

The bill further authorizes the Governor to issue guidelines (not subject to the rule-making provisions of the Administrative Procedure Act) that will control the application and certification of Leadership Projects.

CEQA cases challenging the EIR for a certified Leadership Project must be filed initially in the Court of Appeal with geographic jurisdiction. The plaintiff must also file concurrently in the same litigation any other land use violation claims it has against the project or the approving agency that arise out of the same approval.

The Court of Appeal is then required to issue its decision within 175 days of commencement of the action. The legislation authorizes the Court to appoint a Special Master to assist in its case management, limiting extensions of time to only those for which good cause is shown. This is a critical provision as the Courts of Appeal are not set up to supervise and manage the procedural preliminaries of a CEQA action.

To facilitate review, the lead agency is required to prepare the Administrative Record concurrently while the administrative proceeding is in process, placing the contents on a downloadable internet website maintained for the purpose. The lead agency must certify the Administrative Record within five days of project approval. This will be a potential source of controversy as it does not allow time for the typical arguments over the contents of the Administrative Record, what it should contain and what it should not.

Finally, the legislation requires the Judicial Council to adopt implementing Rules of Court for litigation concerning Leadership Projects by not later than July 1, 2012.

This bill could effectively expedite resolution of issues that arise in most major project approval processes and represents both a positive element in reaching conclusions on these matters (that otherwise often drag out for many years) and provides a fitting expression of Governor Brown's oft-expressed frustration with CEQA. How the Courts of Appeal will handle these cases in practice remains to be seen.



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