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CEQA Reform Highlights the 2011 California Legislative Session

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The California Environmental Quality Act (CEQA) has played a historic role in environmental protection by requiring projects to go through extensive studies to disclose and mitigate environmental impacts. For developers, CEQA can lead to uncertainty, project delays, increased development costs and often frivolous litigation.

For project opponents, CEQA can serve as an effective avenue to modify, delay, and even kill projects. This year, citing the economic recession and high state unemployment, the State Legislature introduced an unprecedented number of CEQA-related bills, many of which were aimed at streamlining the CEQA review and litigation processes to reduce CEQA-related project delays and remove what some view as excessive environmental review for certain projects. The following is a summary of some of the most talked-about CEQA bills this session.

CEQA Streamlining Bills

Three CEQA reform bills were passed by the Legislature on the last day of the session: Assembly Bill 900 and Senate Bills 292 and 226. According to their authors, these bills aim to reduce CEQA-related project delays, development costs, and frivolous litigation that create uncertainty for developers.

AB 900: "Leadership projects" may become eligible for expedited judicial review.

Signed by Governor Brown on September 27, 2011, AB 900 (Buchanan), or the Jobs and Economic Improvement Through Environmental Leadership Act of 2011, was enacted as a short-term approach to spurring the economy and lowering the unemployment rate. It sunsets on January 1, 2015. It allows the Governor to certify certain large projects that meet specific conditions – most notably a minimum investment of $100 million in the State – as being "leadership projects" that would be eligible for expedited judicial review. The Governor's certification is discretionary and not subject to judicial review. Unfortunately, the number of projects that would qualify for these benefits appears to be limited. The law does not apply to projects that already have a draft EIR in circulation, and will apply only to projects with EIRs certified by June 1, 2014.

What is a "leadership project"?

Only projects meeting the following criteria are eligible for consideration as "leadership projects":

- A residential, retail, commercial, sports, cultural, entertainment or recreational use project that is:

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- certified as LEED silver or better;
- achieves a 10% greater standard for transportation efficiency than comparable projects, where applicable;
- located on an infill site; and
- consistent with any applicable sustainable communities strategy or an alternative planning strategy and its goals to achieve greenhouse gas (GHG) emissions reduction targets.

- A clean, renewable wind or solar energy project.
- A clean manufacturing project that manufactures products, equipment, or components used for renewable energy generation, energy efficiency, or for the production of clean alternative fuel vehicles.

Proponents wishing to obtain “leadership project” certification must apply to the Governor for certification and must notify the lead agency prior to the release of the draft EIR for public comment. In order to be certified, the project must satisfy the following conditions:

1. The project will result in a minimum investment of $100 million in California upon completion of construction.

2. The project must create high-wage, highly skilled jobs that pay prevailing and living wages and provide construction and permanent jobs for Californians, and help reduce unemployment.

3. The project must not result in any net additional emission of GHGs, including GHG emissions from employee transportation.

4. The applicant has agreed to enter into an agreement that all mitigation measures required pursuant to the Act shall be conditions of approval of the project.

5. The applicant must agree to pay the costs of the Court of Appeal in hearing and deciding any case challenging the project.

6. The applicant must agree to pay the costs of preparing the administrative record.

How is litigation streamlined for leadership projects?
Litigation challenging the land use approvals and environmental review of certified “leadership projects” would skip the superior court proceedings and be heard directly by the Court of Appeal. The Court of Appeal will be required to rule on the litigation within 175 days after the litigation is filed (most CEQA litigation can take anywhere from 9 to 18 months or more to reach judgment), unless the Court of Appeal decides it has “good cause” to approve an extension of time to review the project. Because of the expedited judicial review, AB 900 provides for greater public availability of the entitlement documents, including a requirement that all documents and other materials placed in the administrative record be made available in electronic format and posted on the Internet. This could include all interagency correspondence, and communications with the project applicant and consultants.

***SB 292:* Expedited judicial review of AEG's proposed football stadium in Los Angeles.**

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SB 292 (Padilla), also signed into law by the Governor on September 27, 2011, was enacted for the benefit of one project – AEG's Los Angeles Convention Center Modernization and Farmers Field Project. Unlike the stadium proposed in the City of Industry, which was granted a full exemption from CEQA, SB 292 still requires the downtown stadium to undergo intense environmental review; however, special streamlined procedures for the administrative and judicial review of approvals are established for AEG's project. In exchange for the streamlining benefits, it requires the lead agency and applicant to implement specified measures as a condition of approval of the project to minimize traffic congestion and air quality impacts that may result from spectators driving to the stadium.

Expediting and streamlining benefits include the following:

- *Expedited Litigation.* Litigation challenging the land use approvals and environmental review of the project would go directly to the Court of Appeal. The Court of Appeal will be required to rule in the litigation within 60 days after the last brief is filed, unless "good cause" to approve an extension is established.
- *Streamlined Environmental Review Process.* Time frames are established for the submission of public comments on EIRs, public hearings on the draft EIRs, and nonbinding mediation is established to address public comments. The draft EIRs, all documents submitted to or relied on by the lead agency, and all comments must be made available in a readily accessible electronic format and made available to the public within strict time frames.
- *Agreed-Upon Mitigation Measures Barred From Legal Challenges.* The lead agency is required to adopt, as a condition of approval, any measures agreed upon by the lead agency, the applicant, and any commenter who requested mediation. The commenter who agrees to a measure pursuant to the mediation process agrees not to raise the issue addressed by that measure as a basis for a petition for writ of mandate challenging the lead agency's decision to certify the EIR or approve the project.
- *Limitations on Comments.* In an effort to avoid the "late hits" and data dumps favored by many project opponents, SB 292 imposes limits on the comments that the lead agency is required to consider after the close of the draft EIR comment period to only (1) new issues raised in response to comments by the lead agency; (2) new information released by the public agency subsequent to the release of the DEIR; (3) changes made to the project after the close of the public comment period; (4) proposed conditions of approval, mitigation measures, or proposed findings or a proposed reporting and monitoring program released after the release of the DEIR; or (5) new information that was not reasonably known or could not have been reasonably known during the public comment period.

In exchange for the expediting benefits, the project is required to achieve carbon neutrality by reducing to zero the net emissions of greenhouse gases from private automobile trips to the stadium, and must achieve and maintain a trip ratio that is no more than 90 percent of the trip ratio at any other stadium used by the National Football League.

Senate Bill 226: **CEQA streamlining for solar energy projects and**

infill projects; scoping meetings; use of categorical exemptions for projects with GHG emissions impacts.

SB 226 (Simitian and Vargas), on the Governor's desk but not yet signed, offers several limited CEQA streamlining measures in the following four areas: (1) it creates a new CEQA exemption for solar energy systems; (2) it allows initial CEQA scoping meetings to occur concurrently with requirements in instances where a planning agency is adopting or amending a general plan; (3) it revises CEQA's provisions on categorical exemptions to prohibit a project's greenhouse gas emissions from automatically removing otherwise applicable categorical exemptions; and (4) it limits required environmental review of certain "infill" projects. If signed by the Governor, it would provide the following CEQA reforms.

CEQA exemption for solar energy systems.

SB 226 creates a new statutory exemption under CEQA for the installation of solar energy systems and associated equipment on the roof of an existing building or an existing parking lot. The exemption is limited, however, as it does not apply if the installation would result in sensitive natural resource impacts (e.g., require an individual Section 404 permit under the Clean Water Act or waste discharge requirement under the Porter-Cologne Water Quality Control Act; an individual take permit under the federal or state Endangered Species Acts; or a streambed alteration agreement pursuant to the Fish and Game Code). The exemption does not apply to any transmission or distribution facility or connection.

Scoping meeting requirements combined with planning and zoning law consultation.

CEQA currently requires that lead agencies conduct scoping meetings for projects of statewide, regional, or areawide significance, and projects that may affect highways or other facilities controlled by the Department of Transportation, if requested. State Planning and Zoning law requires planning agencies to refer projects that need new or amended general plans to adjacent cities and counties to obtain comments on the proposed project. SB 226 amends CEQA by allowing the meetings required by the Planning and Zoning law in connection with General Plan adoption or amendments to be held concurrently with the CEQA scoping meetings, and allowing adjacent cities or counties to submit their comments at the scoping meeting.

Effect of greenhouse gas emissions on otherwise categorically exempt projects.

If a project is already subject to a categorical exemption under CEQA, SB 226 would prohibit the project's greenhouse gas emissions, in and of themselves, from automatically removing that exemption, provided that the project complies with all applicable regulations or requirements adopted to implement statewide, regional, or local plans consistent with the GHG emission provisions of the CEQA Guidelines.

Limited environmental analysis for previously analyzed infill projects.

SB 226 streamlines the CEQA process for "urban infill" projects that meet very specific requirements in order to avoid duplicative review, unless the project raises genuinely new issues. The bill provides that if

an EIR was certified for a planning level decision of a city or county (such as the adoption or amendment of a general plan or specific plan), the environmental review for an infill project may be limited to the effects on the environment that are either (1) specific to the project or project site that were not addressed as significant effects in the prior EIR; or (2) substantial new information that shows the effects of the proposed project will be more significant than described in the prior EIR. However, such review would not be required if (1) the previous EIR did not consider the effect to be significant; or (2) the lead agency makes a finding that uniformly applicable development policies or standards adopted by the lead agency apply to the project and will substantially mitigate the identified effect. Further, even if environmental review is required, such analysis would not need to include an analysis of growth-inducing impacts, alternative locations, densities, and building intensities.

Other CEQA Bills of Note

In addition to the three CEQA streamlining bills, the Legislature also enacted several other CEQA amendments.

AB 209 (Ammiano) was signed into law in August and requires a lead agency preparing an EIR or negative declaration to include in the notice of availability a description of how the draft EIR or draft negative declaration will be provided in electronic format.

AB 320 (Hill), on the Governor's desk but not yet signed, amends CEQA to prevent a CEQA lawsuit from being dismissed if the petitioner fails to name an indispensible party, as long as the petition names all real parties in interest that were identified in the lead agency's Notice of Determination (NOD) or Notice of Exemption (NOE). If no notice is filed, the petitioner must reference persons named in the definition of the "project" as reflected in the lead agency's record of proceedings. Under current law, the failure to name a recipient of an approval can result in the dismissal of the litigation. The bill was enacted to address the fact that otherwise valid CEQA lawsuits could be dismissed if petitioners failed to name an indispensible party or parties. This has been fatal to CEQA lawsuits because CEQA's short (30-day) statute of limitations makes it difficult for petitioners to timely cure the deficiency.

SB 267 (Rubio), on the Governor's desk but not yet signed, excludes certain renewable energy projects from the requirement of preparing water supply assessments. The new law exempts solar photovoltaic and wind projects from this requirement since they tend to require very little water to operate. The statute exempts all solar photovoltaic and wind projects that need no more than 75 acre-feet of water each year from the water supply assessment analysis. The Legislature purposefully omitted solar thermal and geothermal power plants because they tend to require much more water to operate.

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