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GOVERNOR SCHWARZENEGGER SIGNS TWO BILLS PROVIDING MODERATE CEQA IMPROVEMENTS

By Misty L. Calder

Senate Bill ("SB") 1456, authored by Senator Joe Simitian (D-Palo Alto), and Assembly Bill ("AB") 231, authored by Assembly Member Alyson Huber (D-El Dorado Hills), were signed by Governor Arnold Schwarzenegger on September 29, 2010. As urgency statutes, both bills became effective immediately, and both will sunset as of January 1, 2016.

As set forth below, SB 1456, the broader of the two bills, includes several amendments to the California Environmental Quality Act ("CEQA") intended to discourage frivolous lawsuits and encourage mediation as a method of settling CEQA disputes prior to the filing of a lawsuit. Furthermore, both bills ease the requirements governing cumulative impacts' analyses in certain subsequent environmental impact reports ("EIR"), mitigated negative declarations, and negative declarations.

Tiering and Cumulative Impact Analysis

Both SB 1456 and AB 231 amend the process by which an agency may tier environmental review for a later project from an EIR prepared and certified for an earlier program, plan, policy or ordinance. CEQA currently allows a lead agency to use a tiered EIR when a prior EIR has been prepared and certified for a program, plan, policy, or ordinance and a later project meets certain requirements. (Public Res. Code § 21094.) The tiering procedure allows agencies to reserve detailed evaluation of environmental impacts that are difficult to assess early on to a later environmental review when their severity and the likelihood of occurrence will be more specifically known. (See *In re Bay-Delta Programmatic Envt'l Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1169.)

SB 1456 adds a new subdivision (e) to Public Resources Code section 21094 that gives the lead agency more freedom in choice of subsequent CEQA analysis. It provides that if a lead agency determines that a cumulative effect has been adequately addressed in a prior EIR, in accordance with a specified procedure, that cumulative effect is not required to be examined in a later EIR, mitigated negative declaration, or negative declaration.

AB 231 also incorporates additional amendments to section 21094. It authorizes a lead agency to rely on a

finding of overriding consideration made in a prior EIR for a later project if (1) the lead agency determines that the later project's significant impacts on the environment are no greater than those identified in the prior EIR from which the project is tiered, (2) all applicable mitigation measures identified in the prior EIR are incorporated into the later project, and (3) the prior EIR was certified within three years of the approval of the later project.

Mediation

New CEQA section 21167.10 allows a person intending to file an action alleging a violation of CEQA to first file a notice, within five business days after a lead agency files a Notice of Determination, requesting mediation with the lead agency and real party in interest. The request is deemed denied if the lead agency does not respond within five business days. If the lead agency accepts the request, then the mediation proceeds concurrently with the judicial proceedings, in accordance with sections 66030 et seq. of the Government Code. Subdivision (d) of section 21167.10 provides that all of the limitation periods contained in CEQA are tolled until the mediation is completed.

Expedited Litigation

In addition to encouraging mediation, SB 1456 also encourages expedited briefing schedules. It adds subsection (d) to section 21167.4 of the Public Resources Code, allowing the Attorney General to file a motion with the court seeking an expedited schedule for the resolution of a CEQA case on the ground that it would be in the public interest to do so. This subdivision does not affect the rights under existing law to seek an expedited schedule for resolution of the case.

Frivolous CEQA Actions

SB 1456 also authorizes sanctions for frivolous CEQA claims. Under new CEQA section 21169.11, it provides that at any time after a petition has been filed, but at least 30 days before the hearing on the merits, a party may file a motion for sanctions based on a frivolous claim brought in the course of a CEQA action. "Frivolous claim" is defined as "totally and completely without merit." If the court determines a claim is frivolous, it may impose sanctions on the attorneys, law firms, or parties responsible for the frivolous claim of up to $10,000.

Exhaustion of Administrative Remedies

Finally, SB 1456 amends Public Resources Code section 21177 as to the requirement that a party must exhaust its administrative remedies before it may bring a CEQA claim in court. The bill provides that any organization formed after the approval of a project may bring a claim against a lead agency only if CEQA's

ordinary exhaustion requirements are satisfied and that the grounds for noncompliance were presented directly by a member of the organization or by a member agreeing with or supporting the comments of another person.

Conclusion

As set forth above, SB 1456 and AB 231 provide moderate amendments to CEQA, but do not appear to change the law substantively. For example, existing CEQA law already prescribed a settlement meeting procedure designed to promote settlement of litigation, and imposed sanctions against a party who did not participate. (Pub. Res. Code § 21167.8.) Therefore, the new mediation requirements do not expand significantly on existing CEQA law.

In his signing message, Governor Schwarzenegger said he signed AB 231 because it "allows public entities some relief from the unfair political backlash that often occurs because they are required to override the same potential impact over and over again." Furthermore, he signed SB 1456 because it will "prevent project opponents from piggy-backing off of the comments and arguments of others to establish standing to sue." Nevertheless, Governor Schwarzenegger also said that "[t]hese bills are 99 percent garbage." He said that although the bills go in "the right direction, neither I nor the Legislature should fool ourselves into thinking that these bills even make a dent in the problems caused by CEQA's spaghetti-like requirements." He added, "Next year's crop of state lawmakers, including the next administration, will again face the unique challenge of reining in CEQA abuses in the face of blind opposition determined to maintain an unworkable status quo."

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