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**SENATE COMMITTEE ON ENVIRONMENTAL QUALITY**

**Senator Allen, Chair**

**2021 - 2022 Regular**

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**Bill No:** SB 37  
**Author:** Cortese  
**Version:** 4/13/2021                      **Hearing Date:** 4/26/2021  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** Gabrielle Meindl, Genevieve M. Wong

**SUBJECT:** Contaminated sites: the Hazardous Waste Site Cleanup and Safety Act

**DIGEST:** Enacts the Contaminated Site Cleanup and Safety Act and prohibits a project from being exempt from CEQA pursuant to the “common sense” exemption if the project site is included on a specific list of contaminated sites.

**ANALYSIS:**

Existing law:

- 1) Requires the Department of Toxic Substances Control (DTSC) to compile, update at least annually, and submit to the Secretary for Environmental Protection (Secretary), a list of hazardous waste facilities subject to corrective action, land designated as hazardous waste property, hazardous waste disposals on public property, hazardous substance release sites, and sites included in the Abandoned Site Assessment Program. (Government Code (GOV) § 65962.5)
- 2) Requires the State Department of Health Services (now the State Water Board) to compile, update at least annually, and submit to the Secretary, a list of all public drinking water wells that contain detectable levels of organic contaminants and that are subject to water analysis by local health officers. (GOV § 65962.5)
- 3) Requires the State Water Board to compile, update at least annually, and submit to the Secretary, a list of underground storage tanks with an unauthorized release report, solid waste disposal facilities with migration of hazardous waste, and cease and desist orders regarding certain hazardous materials discharges. (GOV § 65962.5)
- 4) Requires local enforcement agencies (LEAs) to compile, update at least annually, and submit to the Department of Resources Recycling and Recovery (CalRecycle) a list of solid waste disposal facilities with a known migration of hazardous waste. CalRecycle must compile these lists into a statewide list and

submit the list to the Secretary to be available to any person who requests the information. (GOV § 65962.5)

- 5) Requires the Secretary to consolidate the above information, and distribute it to each city and county with sites on the list and to any person upon request. (GOV § 65962.5)
- 6) Under CEQA, requires lead agencies with the principal responsibility for carrying out or approving a proposed discretionary project to prepare a negative declaration (ND), mitigated negative declaration (MND), or environmental impact report (EIR) for this action, unless the project is exempt from CEQA. (Public Resources Code §21000 et seq.). If there is substantial evidence, in light of the whole record before a lead agency, that 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))
- 7) Requires the Office of Planning and Research (OPR) to prepare and develop proposed guidelines for the implementation of CEQA by public agencies, then transmit those guidelines to the Secretary of the Natural Resources Agency, who must certify and adopt the guidelines. Requires OPR to, at least once every two years, review the guidelines and recommend proposed changes or amendments to the Secretary of the Natural Resources Agency. (PRC §21082.4)
- 8) Requires the guidelines to include a list of classes of projects that have been determined not to have a significant effect on the environment and that are exempt from CEQA (categorical exemptions). Specifically prohibits a project located on a site that is included on the consolidated list distributed by the Secretary from being exempt from CEQA as a categorical exemption. (PRC §21084)
- 9) Does not make CEQA categorical exemptions absolute and subjects the exemptions to exceptions that ensure the project does not have a significant effect on the environment, including when cumulative impacts of successive projects of the same type and same place over time may be significant or if there is a reasonable possibility that a project will have a significant environmental effect due to unusual circumstances. (Guidelines §15300.2)
- 10) Exempts from CEQA projects where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment (common sense exemption). (CEQA Guidelines (Guidelines) §15061(b)(3))

This bill:

- 1) Enacts the Contaminated Site Cleanup and Safety Act and would recodify and make technical changes to the above-described “Cortese List” provisions, including shifting the reporting duties under the statute related to public drinking water wells from the State Department of Health Services to the State Water Board and requiring the Secretary to post the information on the California Environmental Protection Agency’s (CalEPA) internet website.
- 2) Prohibits a project located on a site included on the consolidated list that is posted by the Secretary from being exempt from CEQA pursuant to the “common sense” exemption.
- 3) Makes several conforming changes.

## Background

- 1) *The “Cortese List.”* Established in 1985, the Hazardous Waste and Substances Sites List, also known as the “Cortese List” (named after the Legislator, Dominic Cortese, who authored the legislation that enacted it), refers to a consolidated list of contaminated sites in the state. It is used to provide interested parties, primarily local governments making land use decisions, with information about the location of hazardous material release sites.

The Department of Toxic Substances Control (DTSC) is responsible for a portion of the information contained in the “Cortese List.” Other State and local government agencies, including State Water Board and CalRecycle, are required to provide additional hazardous material release information for the “Cortese List.” The “Cortese List” is required to be updated annually.

The “Cortese List,” or a site’s presence on the List, has bearing on the local permitting process as well as on compliance with CEQA. Because this statute was enacted over twenty years ago, some of the provisions refer to agency activities that were conducted many years ago and are no longer being implemented and, in some cases, the information to be included in the “Cortese List” does not exist. Further, rather than preparation of a “list,” the information is now largely available on the internet websites of the responsible boards or departments. SB 37 recodifies these provisions, as well as makes a number of needed updates and non-substantive, conforming changes to the statute.

- 2) *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. If the initial study shows that the project may have a significant effect on the environment, the lead agency must prepare an 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.

- 3) *What is analyzed in an environmental review?* An environmental review analyzes the significant direct and indirect environmental impacts of a proposed project and may include water quality, surface and subsurface hydrology, land use and agricultural resources, transportation and circulation, air quality and greenhouse gas emissions, terrestrial and aquatic biological resources, aesthetics, geology and soils, recreation, public services and utilities such as water supply and wastewater disposal, and cultural resources. The analysis must also evaluate the cumulative impacts of any past, present, and reasonably foreseeable projects/activities within study areas that are applicable to the resources being evaluated.
- 4) *CEQA provides hub for multi-disciplinary regulatory process.* An environmental review provides a forum for all the described issue areas to be considered together rather than siloed from one another. It provides a comprehensive review of the project, considering all applicable environmental laws and how those laws interact with one another. For example, it would be prudent for a lead agency to know that a proposal to mitigate a significant impact (i.e. alleviate temporary traffic congestion, due to construction of a development project, by detouring traffic to an alternative route) may trigger a new significant impact (i.e. the detour may redirect the impact onto a sensitive resource, such as a habitat of an endangered species). CEQA provides the opportunity to analyze a broad spectrum of a project's potential environmental impacts and how each impact may intertwine with one another.
- 5) *What is a categorical exemption?* A categorical exemption is an exemption for a class of projects that the Natural Resources Agency has determined not to

have a significant effect on the environment. It is different than other exemptions (e.g. statutory or emergency) because if an exception to a categorical exemption applies, then the project cannot be exempt. One example of an “exception to the exemption” is the Cortese list exception. Under this exception, if a project is located on a site that is on the Cortese list, it is not eligible for a categorical exemption. Other exceptions include cumulative impacts, unique circumstances, and location/particularly sensitive environment.

- 6) *The common-sense exemption.* Another uncodified CEQA exemption is the common-sense exemption, which is different from a categorical exemption. The common sense exemption provides that CEQA does not apply to a project that the lead agency determines “with certainty that there is no possibility that the activity in question may have a significant effect on the environment.” (CEQA Guidelines 15061(b)(3))

The common sense exemption was adopted to guard against the possibility that an “obviously exempt” type of project not listed in the categorical exemptions “might be required needlessly to comply with the requirements of CEQA.” *Myers v Board of Supervisors* (1976) 58 CA3d 413, 4325. The exemption is based on the idea that CEQA applies jurisdictionally only to activities that have potential for causing environmental effects.

The lead agency may consider whether a common-sense exemption applies to a particular project; and, according to the California Supreme Court in *Muzzy Ranch Co. v Solano County Airport Land Use Comm’n* (2007) 41 C4th 372, 386, “whether a particular activity qualifies for the common sense exemption presents an issue of fact, and the agency invoking the exemption has the burden of demonstrating that it applies.” Thus, the application of the exemption is to be based on whether the record evidence supports the decision. When a lead agency can determine, based on record evidence, that it is certain that the activity cannot have a significant effect on the environment, the common sense exemption applies, and no further evaluation by the lead agency is necessary.

## Comments

- 1) *Purpose of Bill.* According to the author, "The Cortese List must be updated to reflect our current priorities regarding the preservation of public health while upholding the integrity of the law as it was written. We cannot continue to allow projects to bypass integral CEQA requirements and pose serious health risks to those involved, whether it be laborers on the construction site or

tenants moving into a property. SB 37 achieves this goal by making a technical fix that prohibits common sense exemptions from being given to active Cortese List sites, thereby promoting increased public awareness and safeguarding public health."

- 2) *Need for bill.* Existing law prohibits a project that is located on a Cortese List site from being exempt from CEQA by applying a categorical exemption. Some local jurisdictions, however, have instead by-passed the CEQA process by approving projects pursuant to the common-sense exemption. The common-sense exemption is only intended to apply to projects where there is no possibility that the project will have a significant effect on the environment. By statutorily excluding the application of a categorical exemption to a Cortese List site, the Legislature indicated that those sites did not meet the standard of not having a significant effect on the environment. To apply the common sense exemption to those same project sites is in juxtaposition to the very purpose those sites were excluded from being eligible for categorical exemptions. Thus, it would make sense to explicitly exclude these sites from being eligible for applying the common sense exemption.

### **Related/Prior Legislation**

AB 1183 (Committee on Budget, Chapter 758, Statutes of 2008) would have updated requirements for the Cortese List. These provisions were deleted from the bill on the Senate Floor.

SB 1497 (Committee on Health and Human Services, Chapter 1023, Statutes of 1996), a reorganization of the Health and Safety Code, revised a cross reference in the Cortese list provision.

AB 869 (Farr, Chapter 1212, Statutes of 1991), referenced Secretary of Environmental Protection rather than Secretary of Environmental Affairs, required DTSC to provide certain information rather than DHS, established the "hazardous waste and substances statement" with certain information requirements, and required the local lead agency to notify the applicant if the site is included on the list, but not included on that statement. AB 869 also revised the CEQA to require a lead agency to consult the Cortese List to determine whether the project and any alternatives is included on the list, require that information to be included on certain CEQA notices, and if the lead agency did not accurately specify or did not specify that information then the California Environmental Protection Agency must notify the lead agency when it receives notice of the project (Public Resources Code §21092.6). This bill also prohibited a project located on a site that

is included on the list from being exempt from CEQA (Public Resources Code §21084(c)).

AB 3676 (Cortese, Chapter 537, Statutes of 1990), shifted the responsibility for consolidating the information from OPR to the Secretary of Environmental Affairs, required the Secretary to distribute the information to any person upon request, and made technical amendments.

AB 3750 (Cortese, Chapter 1048, Statutes of 1986), established the list of sites to be compiled by DHS, SWRCB, and LEAs (this list was subsequently referred to as the “Cortese list.” This bill also required the Office of Planning and Research (OPR) to consolidate the information and make the lists available to local governments, and required a project applicant to consult the lists and submit a signed statement indicating whether the site was included on the list.

**SOURCE:** California State Council of Laborers

**SUPPORT:**

California League of Conservation Voters  
California State Council of Laborers  
Natural Resources Defense Council  
San Diego Green Building Council

**OPPOSITION:**

None received

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