

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 44 (Allen)
Version: April 5, 2021
Hearing Date: April 13, 2021
Fiscal: Yes
Urgency: No
JT

SUBJECT

California Environmental Quality Act: streamlined judicial review: environmental leadership transit projects

DIGEST

This bill makes certain transit projects eligible for expedited administrative and judicial review under the California Environmental Quality Act (CEQA).

EXECUTIVE SUMMARY

For a handful of major projects that meet certain environmental standards, existing law provides for accelerated CEQA review and requires courts, to the extent feasible, to resolve judicial challenges arising from that process within 270 days of the filing of the administrative record. These provisions are intended to expedite beneficial development but entail potential tradeoffs with respect to the sufficiency of environmental review, the burden on courts, and access to justice for other litigants, a concern magnified by the judicial backlog arising from the COVID-19 pandemic.

This bill provides for expedited CEQA administrative and 270-day judicial review, including all appeals, for certain transit projects proposed by a public or private entity that meet specified environmental standards and comply with specified project-labor provisions. The bill is sponsored by the Los Angeles County Metropolitan Transportation Authority and supported by local governments, transit agencies, and labor organizations. The bill is opposed by the Judicial Council of California and Western Electrical Contractors Association (WECA). The Senate Environmental Quality Committee passed the bill by a vote of 7-0.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Requires lead agencies with the principal responsibility for carrying out or approving a proposed discretionary project to prepare a negative declaration, mitigated declaration, or environmental impact report (EIR) for this action, unless the project is exempt from CEQA (CEQA includes various statutory exemptions, as well as categorical exemptions in the CEQA Guidelines). (Pub. Res. Code § 21100 et seq.)¹
- 2) Sets requirements relating to the preparation, review, comment, approval and certification of environmental documents, as well as procedures relating to an action or proceeding to attack, review, set aside, void, or annul various actions of a public agency on the grounds of noncompliance with CEQA. (§ 21165 et seq.)
- 3) Established the Jobs and Economic Improvement through Environmental Leadership Act of 2011 (AB 900, Buchanan, Gordon, Chapter 354, Statutes of 2011), which established CEQA administrative and judicial review procedures for an “environmental leadership” project. The provisions of AB 900 sunset on January 1, 2021. (§ 21178 et seq.)

This bill:

- 1) For CEQA-based challenges to an EIR or approval for “environmental leadership transit projects” (ELTP), requires that the Judicial Council adopt rules of court that require the challenge, including any potential appeals to the Court of Appeal or Supreme Court, to be resolved, to the extent feasible, within 270 days of the filing of the certified record of proceedings with the court.
- 2) Defines an ELTP as a project to construct a guideway and related fixed facilities that meets specified design parameters, environmental standards, local planning requirements, and uses a skilled and trained workforce, except as provided.
- 3) Defines “project applicant” as a public or private entity or its affiliates that proposes an ELTP and its successors, heirs, and assignees.
- 4) Establishes requirements and timeframes for the preparation of an EIR, submission of public comment, the public hearing on the EIR, nonbinding mediation between the lead agency and the commenters, and preparation, certification, and submission to a court in a CEQA lawsuit, of the record of administrative proceedings.

¹ All further references are to the Public Resources Code unless otherwise indicated.

COMMENTS

1. Author's statement

The author writes:

SB 44 makes environmentally beneficial, zero-emission mass transit projects throughout California eligible for expedited Environmental Quality Act (CEQA) review by the Superior Court. The sooner such transformative projects undergo CEQA, are built and begin operating, the faster they will significantly displace less efficient and more pollution-intensive regional trips taken by single passengers in private vehicles.

California statute mandates that CEQA litigation be prioritized over other civil actions. Prior state law – now expired, but proposed to be re-established – created a process providing certain large-scale construction project proponents to apply for certification by the Governor as an “environmental leadership development project”. Certification requires lawsuits challenging a CEQA document be resolved by the Superior Court within 270 days, to the extent feasible.

An identified goal of environmental leadership projects has been to achieve a 15% or greater standard for transportation efficiency. It is vexingly incongruous that the law so far has not and still does not explicitly permit transit projects – which are designed to convey passengers from one place to another in a fast, efficient manner – to be eligible for certification.

The 17 projects designated under prior law for expedited judicial treatment so far – although impressive – cannot deliver the magnitude of environmental benefits to Californians as is possible with a zero-emission transit project.

Quick resolution of legal challenges to transit projects could speed up construction by years.

SB 44 provides expedited CEQA judicial review for mass transit projects only if they meet certain conditions, including:

- consistency with a region's sustainable communities strategy and transportation plan;
- zero-emission operation of the transit project itself;
- direct reduction of greenhouse gases emissions, without using offsets;
AND
- reduction through the project of vehicle miles traveled in the corridor in which it operates.

Each additional day roads are congested, and drivers take trips alone in their vehicles, massive quantities of carbon dioxide, NO_x and diesel particulates are emitted throughout our state, often in some of the most polluted air basins in the country.

There is exceptional merit in stipulating that large-scale, transformative regional transit projects be awarded a more certain, truncated timeline to undergo review by California's Superior Court.

2. CEQA

Enacted in 1970, CEQA requires state and local agencies to follow a set protocol to disclose and evaluate the significant environmental impacts of proposed projects and to adopt feasible measures to mitigate those impacts. CEQA itself applies to projects undertaken or requiring approval by public agencies, and, if more than one agency is involved, CEQA requires one of the agencies to be designated as the "lead agency." The environmental review process required by CEQA consists of: (1) determining if the activity is a project; (2) determining if the project is exempt from CEQA; and (3) performing an initial study to identify the environmental impacts and, depending on the findings, preparing either a Negative Declaration (for projects with no significant impacts), a Mitigated Negative Declaration (for projects with significant impacts but that are revised in some form to avoid or mitigate those impacts), or an EIR (for projects with significant impacts).

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. Before approving any project that has received environmental review, an agency must make certain findings pertaining to the project's environmental impact and any associated mitigation measures. If mitigation measures are required or incorporated into a project, the public agency must adopt a reporting or monitoring program to ensure compliance with those measures. To enforce the requirements of CEQA, a civil action may be brought under several code sections to attack, review, set aside, void, or annul the acts or decisions of a public agency for noncompliance with the act.

"CEQA operates, not by dictating proenvironmental outcomes, but rather by mandating that 'decision makers and the public' study the likely environmental effects of contemplated government actions and thus make fully informed decisions regarding those actions. ... In other words, CEQA does not care what decision is made as long as it is an informed one." (*Citizens Coalition Los Angeles v. City of Los Angeles* (2018) 26 Cal. App. 5th 561, 577.)

3. Expedited judicial review under CEQA

Unlike other environmental laws specific to air resources, water resources, or the control of toxic substances, there is no statewide bureaucracy charged with enforcement of CEQA. Rather, it is enforced through citizen participation and litigation if necessary. Arguably, this makes the implementation of CEQA more efficient and expeditious than if a state agency were created to administer the law. Thus, CEQA litigation – which occurs at very low rates² – could more appropriately be characterized as mere enforcement.

Several provisions streamline judicial review of challenges to projects under CEQA, including:

- discovery is generally not allowed, as CEQA cases are generally restricted to review of the record;³
- concurrent preparation of the record of proceedings to enable judicial review to occur sooner;⁴
- counties with a population of over 200,000 must designate one or more judges to develop expertise on CEQA and hear CEQA cases (§ 21167.1 (b));
- both the Superior Court and the Court of Appeal must give CEQA lawsuits preference over all other civil actions (§ 21167.1(a));
- if feasible, the Court of Appeal must hear a CEQA appeal within one year of filing (§ 21167.1(a)); and

Additionally, several bills have provided for a 270-day judicial review period for environmental leadership projects,⁵ as well as for specified stadium projects,⁶ and a San Diego transit and transportation facilities project.⁷

² Although the data are incomplete, three recent studies have found CEQA litigation rates of between one and three percent. BAE Urban Economics, *CEQA in the 21st Century* (Aug. 2016) <https://rosefdn.org/wp-content/uploads/2016/08/CEQA-in-the-21st-Century.pdf> (as of Mar. 1, 2021); *CEQA Survey* (Oct. 2007) Senate Environmental Quality Committee, available at https://senv.senate.ca.gov/sites/senv.senate.ca.gov/files/ceqa_survey_full_report_-_final_12-5-17.pdf (as of Mar. 1, 2021); *Getting it Right: Examining the Local Land Use Entitlement Process to Inform Policy and Process* (2018), available at https://www.law.berkeley.edu/wp-content/uploads/2018/02/Getting_It_Right.pdf (as of Mar. 1, 2021); *Examining the Local Land Use Entitlement Process to Inform Policy and Process* (2019) <https://www.law.berkeley.edu/wp-content/uploads/2019/02/Examining-the-Local-Land-Use-Entitlement-Process-in-California.pdf> (as of Mar. 1, 2021).

³ See *Cadiz Land Co. v. Rail Cycle, LP* (2000) 83 Cal.App.4th 74, 122.

⁴ SB 122 (Jackson, 2015), Ch. 476, Stats. 2016.

⁵ AB 900 (Buchanan, 2011), Ch. 354, Stats. 2011.

⁶ SB 292 (Padilla, 2011), Ch. 353, Stats. 2011; SB 743 (Steinberg, 2013), Ch. 386, Stats. 2013 (see *Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 855-856); AB 734 (Bonta, 2018), Ch. 959, Stats. 2018; AB 987 (Kamlager-Dove, 2018), Ch. 961, Stats. 2018.

⁷ AB 2731 (Gloria, Ch. 291, Stats. 2020).

The principal framework associated with these provisions is AB 900 (§ 21178 et seq.), which establishes procedures for 270-day expedited judicial review for “environmental leadership” projects with a minimum investment of \$100,000,000 that are certified by the Governor and meet specified conditions. Such projects include clean renewable energy projects, clean energy manufacturing projects, and LEED Gold-certified infill site projects with transportation efficiency 15 percent greater than comparable projects and zero net additional GHG emissions. To date, 19 projects have been certified under this process. AB 900 sunset January 1, 2021, but is currently proposed to be renewed under SB 7 (Atkins, 2021) to include housing development projects with a minimum investment of \$15,000,000.

A recent report entitled *Review of Environmental Leadership Development Projects* from the Senate Office of Research reviewed litigation under AB 900 and SB 743 (Steinberg, Ch. 386, Stats. 2013), which provided for 270-day review for the Sacramento Kings arena. The report found the following timelines, which under then-existing law began when the administrative record was certified⁸ and include the trial court, court of appeal, and the Supreme Court’s denial of review, for those cases:

Project	Business days	Calendar days
Kings arena	243	352
Warriors arena	257	376
8150 Sunset Boulevard	395	578

The report concludes that these projects were reviewed under a faster timeline than normally would apply, benefiting the developers and providing upfront financial security. The report also states that “the impacts to the court from such a short timeline also should be taken into consideration when determining how fast the Legislature would like [AB 900] cases resolved,” and suggests a longer timeline may be appropriate.⁹

In this regard, the introduced version of this bill applied to 270 business days. However, “business” was removed in subsequent amendments, meaning this bill requires judicial review, including review by the Court of Appeal and California Supreme Court, to be resolved in 270 calendar days.

⁸ See *id.* at pp. 6-8 (noting some uncertainties in the calculation methodology). Additionally, the current version of AB 900 and this bill’s timelines commence at a later point: the filing of the administrative record with the court, which makes the 270-day period somewhat less onerous for courts.

⁹ *Id.* at p. 15.

4. CEQA streamlining for transit projects

CEQA establishes certain exemptions applicable to transit-priority projects (§ 21155.1).¹⁰ Additionally, CEQA specifically provides for limited-scope environmental review for certain transit-priority projects, and approvals consistent with community-scale environmental planning documents.

In October 2017, the Senate Environmental Quality Committee published the results of a survey it had conducted of state agencies regarding CEQA to gain a better understanding of CEQA compliance and litigation.¹¹ The survey, covering fiscal years 2011–2012 to 2015–2016, included results reported by the Department of Transportation (DOT). Of 3,279 projects, 62 projects required an EIR (about 1.9%). Also within that five-year period, DOT reported 29 CEQA lawsuits being filed. This figure does not account for the fact that multiple lawsuits could have been filed for a single project. Furthermore, DOT reported that almost 90 percent of those projects were exempt and another eight percent required only a negative declaration or a mitigated negative declaration.

5. Substantially similar to SB 757 (Allen, 2020)

Last year's SB 757 was substantially similar bill to SB 44, although it applied only to projects proposed by public agencies and would have been incorporated directly into the AB 900 framework. The bill was vetoed by Governor Newsom, who wrote:

This bill expands the types of environmental leadership projects eligible for streamlined judicial review through the Jobs and Economic Improvement Through Environmental Leadership Act of 2011 (AB 900, Buchanan, Chapter 354, Statutes of 2011) to include zero-emission, public transit projects, provided the lead agency applies for the Governor's certification no later than January 1, 2023 and the project is approved no later than January 1, 2024. The provisions of this bill are contingent on the enactment of Senate Bill 995 by Senator Atkins, which did not successfully pass in the Legislature.

While I support efforts to accelerate transit projects that reduce greenhouse gas emissions and reduce miles traveled, enactment of this bill is contingent on the successful statutory extension of the AB 900 statute by SB 995, which unfortunately failed passage in the Legislature.

Unlike SB 757, SB 44 is not contingent on the passage of another bill and would operate independently of AB 900.

¹⁰ SB 375 (Steinberg), Ch. 728, Stats. 2008.

¹¹ *CEQA Survey* (Oct. 2007) Senate Environmental Quality Committee, available at https://senv.senate.ca.gov/sites/senv.senate.ca.gov/files/ceqa_survey_full_report_-_final_12-5-17.pdf (as of Mar. 1, 2021).

6. Support

The bill's sponsor, Los Angeles County Metropolitan Transportation Authority, writes:

SB 44 seeks to apply a streamlined judicial review process to transit projects that have a high level of environmental benefit to the state. In Los Angeles County, SB 44 would benefit Metro's Four Pillar projects - the Green Line light rail extension to Torrance, the West Santa Ana Branch light rail project, the Eastside Gold Line light rail extension, and the Sepulveda Transit Corridor Project. The Four Pillar projects serve as clean-transit alternatives and connectors to regional mobility for commuters throughout Los Angeles County - the most congested region in the nation.

The four transit infrastructure projects that would directly benefit from the passage of this bill are not only integral to this plan they are key to meeting the region's and state's aggressive air quality goals. These projects would all produce significant environmental benefits to the County and region, including congestion reduction, reduction in vehicle miles traveled, and greenhouse gas emissions reduction. Los Angeles County communities served by these core transit projects are of the state's most impacted regions as designated by the Cal-Enviro screen.

SB 44 creates an important precedent for transit projects that directly align with the State's clean air goals. Any efforts to expedite these transformative transit projects, including through SB 44, would bring the region closer to these anticipated benefits and will also help the state to achieve its aggressive clean-air goals established in the region's Sustainable Communities Strategy.

Metro understands that ensuring equity, improving air quality and providing environmental mitigations and robust public outreach are essential tools to successful transit project delivery. Unfortunately, costly litigation delays project environmental review and approval - delaying project delivery, stalling regional air quality improvements and increasing project cost. Metro believes that if environmental streamlining is provided to large facilities such as stadia, which are attractors of large populations, it is reasonable and fair to provide that same streamlining to transit, which brings people to those facilities in an environmentally sustainable manner.

The Southern California Association of Governments writes: "Transit projects are essential for meeting our regional and statewide greenhouse gas emissions reduction targets, reducing congestion, and providing increased access to educational and employment centers. Transit projects also transform and revitalize local economies and can accelerate the state's economic recovery from the pandemic."

A joint letter from California State Association of Electrical Workers, California State Pipe Trades Council, and Western States Council of Sheet Metal Workers states: “Using contractors who are signatory to a project labor agreement or having binding agreements with project applicants to use skilled and trained workers are key to constructing these projects on-time, safely and under budget.”

7. Opposition

Under separation of powers principles, the Legislature cannot constitutionally mandate that courts resolve cases on any particular timeframe. (*See Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 855-856 [upholding a similar 270-day expedited review provision for the Sacramento Kings arena only because it contained a “to the extent feasible” proviso].) Writing in opposition, the Judicial Council argues that compliance with the 270-day review provision is not feasible, stating:

- *CEQA cases are complex and time-consuming.* Under normal circumstances and assuming the unrealistic context in which no extensions of time are requested or granted for any aspect of a case, CEQA cases take, on average, an estimated six months to get to hearing, much less to a decision. So, even if the court was able to issue its decision within six months (approximately 180 days), that would leave only three months (the remaining 90 days) for proceedings in the court of appeal, which is impracticable. And, of course, it is more than likely that one or more parties will request, if not stipulate to, continuances, delays, or other procedural extensions. Given these common requests and stipulated delays, a 270-day timeframe is not feasible.
- *Active CEQA cases often include ancillary administrative and non-CEQA judicial causes of action.* Providing expedited judicial review for the projects that may fall under SB 44 is even more unworkable in light of the common occurrence that CEQA cases involve ancillary motions, administrative review, other causes of action, and other civil actions and appeals in the middle of the CEQA action. These actions proceed under administrative (local governmental) and civil procedure (non-CEQA courtroom) timelines, often resulting in temporary stays or delays in the principal CEQA action. In other words, even if CEQA-specific procedures could be limited to 270 days for one or more of the projects, other, non-CEQA procedures related to the same cases that would occur in non-CEQA courtrooms and administrative hearings cannot be concluded in that same timeframe. These ancillary hearings and procedures make the 270-day goal not feasible.

These concerns are compounded by the congestion courts have experienced as a result of the COVID-19 pandemic, leaving some litigants without access to justice. This Committee recently held a joint hearing with the Assembly Judiciary Committee that sought to address this crisis. The background paper for the hearing stated: “For many of

these litigants, their cases arise from critical needs and interests, such as eviction, domestic violence, child custody disputes, health care, and debt collection.”¹² The Judicial Council, in opposition, points out that expedited review provisions such as the one in this bill may entail zero-sum tradeoffs that could further delay justice for some:

[...] placing CEQA cases at the front of the line means that other cases, including cases that have statutorily mandated calendar preferences, such as juvenile cases, criminal cases, and civil cases in which a party is at risk of dying, as well as wage theft cases, unlawful detainer and foreclosures cases, and other important cases on the courts’ dockets, will take longer to decide.”¹³

WECA, a self-styled “Merit Shop Employer Association,” opposes provisions in the bill related to project labor agreements. WECA writes:

Public Contract Code §2600 et. seq. establishes substantial financial penalties and possible debarment for failure to use a skilled and trained workforce. Language in [SB 724] gives contractors “a pass” under a PLA from these penalties. WECA believes §2600 should apply irrespective of a PLA.

Historically, project labor agreements include discriminatory hiring requirements that give preference to certain construction contractors and force employer contributions to trust funds. The covered employee may never vest – resulting in “wage theft” from these workers. Also, numerous studies have shown that PLAs increase construction costs by as much as 20%.

[SB 724] also prohibits the State Labor Commissioner from enforcing the labor code on PLA projects and allows contractors under a PLA to hide their wages and benefits by precluding the completion of certified payroll records. WECA cannot understand why the Legislature would enact legislation that denies workers the California Labor Commissioner’s protection!

WECA is a Merit Shop Employer Associations. Merit Shop is a way of doing business in which companies reward employees based on performance and

¹² Joint Informational Hearing of Assembly and Senate Committees on Judiciary: *COVID and the Courts: Assessing the Impact on Access to Justice, Identifying Best Practices, and Plotting the Path Forward* (Feb. 23, 2021) Background Paper, <https://sjud.senate.ca.gov/content/2020-21-informationaloversight-hearings> (as of Mar. 21, 2021).

¹³ Under existing law, certain parties are entitled to calendar preference, including a party that is at least 70 years old and in ill health, a party in a personal injury or wrongful death matter who is under the age of 14, or a party that is unlikely to survive beyond another six months. (Code of Civ. Proc. § 36). Additionally, certain actions receive calendar preference, including appeals in probate proceedings, contested election cases, and actions for libel or slander by a person who holds any elective public office or a candidate for any such office alleged to have occurred during the course of an election campaign. (Code of Civ. Proc. § 44.) In fact, existing law already provides that both the Superior Court and the Court of Appeal must give CEQA lawsuits preference over all other civil actions. (§ 21167.1(a).)

encourage them to reach their highest level of achievement. Contracts are awarded based on safety, quality, and value, regardless of labor affiliation.

SUPPORT

Los Angeles County Metropolitan Transportation Authority (sponsor)
Bay Area Council
California State Association of Electrical Workers,
California State Pipe Trades Council
California Transit Association
Los Angeles County Business Federation
Peninsula Corridor Joint Powers Board
San Francisco Bay Area Planning and Urban Research Association
San Mateo County Transit District
Silicon Valley Leadership Group
Solano Transportation Authority
Southern California Association of Governments
Southern California Regional Rail Authority
Western States Council of Sheet Metal Workers

OPPOSITION

Judicial Council of California
Western Electrical Contractors Association

RELATED LEGISLATION

Pending Legislation: *See* Comment 3.

Prior Legislation: *See* Comment 5.

PRIOR VOTES:

Senate Environmental Quality Committee (Ayes 7, Noes 0)
