Governor Signs Legislation Designed to Speed CEQA Process

By Tom Tunny on October 14, 2011

In the last two weeks, Governor Brown has signed into law three pieces of legislation designed to streamline the CEQA process. Each is discussed below.

1. AB 900

Assemby Bill 900 (Buchanan (D-San Ramon) and Steinberg (D-Sacramento)) adds new Chapter 6.5 (commencing with Section 21178) to Division 13 of the Public Resources Code, which expedites judicial review of projects designated by the Governor and the Legislature as "environmental leadership development projects," if they are legally challenged. To qualify as an environmental leadership development project, the project must be large ($100 million investment upon completion of construction) and fall into one of three categories:

(1) LEED silver or better "infill" projects (residential, commercial, sports, cultural, mixed use, etc.) that reduce vehicle trips by 10 percent as compared to similar existing projects;

(2) Clean, renewable energy projects that generate electricity exclusively through wind or solar, but not including waste incineration or conversion; or

(3) Clean energy manufacturing projects that manufacture products, equipment or components used for renewable energy generation, energy efficiency, or for the production of clean alternative fuel vehicles.

Project applicants must apply to the Governor for certification that the project qualifies as an environmental leadership development project. If the Governor denies certification for a project, then the process ends and the project applicant has no right of appeal. If the Governor grants certification, then the Joint Legislative Budget Committee must review and concur in the certification. If the Committee does not issue a decision within 30 days, then the project is deemed to be certified. The law does not explain what happens if the Committee issues a decision within 30 days disagreeing with the Governor.

The bill expedites judicial review by requiring any CEQA lawsuit challenging a public agency's approval of an environmental leadership development project be filed directly in the applicable Court of Appeal, thereby skipping the local Superior Court. Moreover, the Court of Appeal must issue its

decision in the case within 175 days of the filing of the petition, unless the Court finds good cause for an extension ("good cause" is not defined). The Court may appoint a special master to assist the Court in managing and processing the case, and the project applicant is responsible for the costs of the special master. The new law is scheduled to expire in 2015, unless extended by law.

While its goals of expedited resolution are laudable, one wonders how it will work in practice, and whether project applicants will want to take advantage of its procedures. For example, the law does not impose, and likely cannot (because of constitutional due process protections), any mechanism to enforce the 175-day deadline. Query whether a Court of Appeal could resolve all of the normal pre-trial machinations dealing with the administrative record, demurrers, etc., and then resolve the merits of the case, within 175 days. Courts of Appeal are not designed to manage trials, thereby begging the question if these trials will default to special masters.

The law also effectively takes away the litigants' right to appeal, as the only available appeal is to the California Supreme Court, and the Supreme Court rarely grants Petitions for Review.

2. SB 292

Senate Bill 292 (Padilla (D-Pacoima)) adds Section 21168.6.5 to the Public Resources Code, which streamlines the EIR preparation process, provides for expedited judicial review (similar to that of AB 900), and requires implementation of specific traffic and air quality mitigation measures for a proposed downtown Los Angles football stadium and convention center project.

SB 292 streamlines the EIR preparation process by allowing the lead agency, with certain exceptions, to ignore written comments submitted after the close of the public comment period.

The bill expedites the judicial review process by imposing even shorter timelines than AB 900, and by expediting any appeal to the California Supreme Court (AB 900 does not address appeals to the Supreme Court).

Among the traffic and air quality mitigation measures is a requirement that the project achieve and maintain carbon neutrality by reducing to zero the net emissions of greenhouse gases from private automobile trips to the stadium by the end of the first year that a National Football League team has played at the stadium. No consequence for failure is provided.

3. SB 226

Senate Bill 226 (Simitian (D-Palo Alto)) (which amends Sections 21083.9 and 21084 of, and adds Sections 21080.35, 21094.5, 21094.5.5, and 25500.1 to, the Public Resources Code), streamlines the CEQA process in the following ways:

Creates a new statutory exemption from CEQA review for the installation of a solar energy system on the roof of an existing building or at an existing parking lot under certain conditions.

Requires the Office of Planning and Research, by July 1, 2012, to develop CEQA guidelines that expedite environmental review of certain urban infill development projects by allowing that review to

"tier" off of previous EIRs under certain conditions. Requires the Secretary of the Natural Resources Agency to certify and adopt the guidelines by January 1, 2013.

Provides that a project's greenhouse gas emissions shall not, by themselves, cause a project to be ineligible for a categorical exemption from CEQA review.

Creates a minor procedural efficiency when cities and counties propose to adopt or substantially amend a general plan. Under existing law, the city or county must refer the proposed action to neighboring cities and counties, then conduct a CEQA scoping meeting with those same cities and counties. Neighboring cities and counties have a minimum of 45 days after receiving the referral of the proposed action to provide comments on the proposed action. Under the new law, the city or county adopting or amending its general plan may refer the action to neighboring cities and counties *and* conduct the scoping meeting at the same time, and the neighboring cities and counties may submit any comments on the proposed action at the same scoping meeting.

Under existing law, the certification of a new thermal powerplant is considered a certified regulatory program for purposes of CEQA, and is therefore exempt from certain requirements under CEQA. The new law provides that the certification of certain already-existing thermal powerplants that are proposing to convert the facility from solar thermal technology to photovoltaic technology would qualify for the same certified regulatory program exemption as a new certification.