

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 69 (Cortese)
Version: March 16, 2023
Hearing Date: April 11, 2023
Fiscal: Yes
Urgency: No
AM

SUBJECT

California Environmental Quality Act: judicial and administrative proceedings:
limitations

DIGEST

This bill would toll the limitations periods to institute an action or proceeding to attack, review, set aside, void, or annul specified acts or decisions of a public agency under the California Environmental Quality Act (CEQA) until the date on which the public agency provides a requestor a copy of the requested notice of determination or exemption, as specified, or the date the public agency posts the notice on a specified website. The bill requires all public agencies to post a notice of determination or notice of exemption for all projects on a specified website within 5 days of its action on the project and requires the county clerk to post the notice in the clerk's office and on the county clerk's website within 24 hours of receipt.

EXECUTIVE SUMMARY

The court stated that it could not extend the existing limitations periods to commence an action under CEQA when a public agency fails to provide a person notice that they timely requested, even though the public agency is required to provide such notice under the law, because CEQA does not provide a statutory remedy for this scenario. This bill seeks to create such a statutory remedy by tolling the 30 and 35 day limitations periods to commence an action when a person makes a timely written request for a copy of a notice and the public agency fails to timely provide the notice until the earlier of either: (1) the date that the public agency provides the requested notice, or (2) the date on which the public agency submits the notice to a specified website. The bill also makes various other changes such as allowing the requested notice to be provided by email, and specifying that the notice provisions also apply to any subsequent amended, corrected, or revised notices. The bill is sponsored by the California State Council of Laborers and supported by various environmental organizations and labor associations. There is no known opposition. The bill passed the Senate Environmental Equality Committee on a vote of 5 to 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
 - a) If a state agency moves ahead with a project, it has to file a notice with the Governor's Office of Planning & Research (OPR) Statewide Clearinghouse providing certain information about the project. The notices are made available to the public via OPR's website for a minimum of 12 months. (§ 21108.)
 - b) If a local agency moves ahead with a project, it has to file a notice with the county clerk of each county where the project will be located within five working days after the approval or determination becomes final. The notice must be made available for public inspection or be put on the agency's website within 24 hours of being received and must remain posted for 30 days. The local agency shall also retain the notice for a minimum of 12 months. (§ 21152.)
- 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) Authorizes judicial review of CEQA actions taken by public agencies, following the agency's decision to carry out or approve the project, and specifies certain time periods in which an action must be instituted depending on the type of claim alleged. (§ 21167.)
 - a) Challenges alleging improper determinations that a project may have a significant effect on the environment, or alleging that an EIR does not comply with CEQA, must be filed with the Superior Court within 30 days of filing of the notice of approval. (§ 21167(b) & (c).)
 - b) Challenges alleging that a public agency is carrying out or has approved a project that may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment must be commenced within 180 days from the date of the public agency's decision to carry out or approve the project, or, if a project is

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

- undertaken without a formal decision by the public agency, within 180 days from the date of commencement of the project. (§ 21167(a).)
- c) Challenges alleging improper determinations that a project is not subject to CEQA must be commenced within 35 days of the date of the filing by the public agency. If the notice has not been filed, the action or proceeding must be commenced within 180 days from the date of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days from the date of commencement of the project. (§ 21167(d).)
 - d) Challenges alleging that another act or omission of a public agency does not comply with CEQA must be commenced within 30 days from the date of the filing of a specified notice. (§ 21167(e).)
- 4) Requires a public agency to mail a written copy of a specified notice to a person who has made a written request to the agency for a copy of the notice before the date on which the agency approves or determines to carry out the project. The date upon which the notice is mailed does not affect the time periods for instituting a challenge described in 3)(a)-(d) above (§ 21167(f).)

This bill:

- 1) Requires a public agency to submit a notice of determination or notice of exemption for all projects to the OPR State Clearinghouse within five days of its action on the project.
- 2) Provides that if a public agency files an amended, corrected, or revised notice more than five days after its action on the project, then within five days of that filing, the agency must deposit a written copy of the notice addressed to a person who made a written request to receive a notice in the United States mail, first-class postage prepaid.
- 3) Provides that if the public agency offers to provide a notice by email, a person may ask in their written request that the notice be provided to them by email. If a person requests within the specified timeframes to receive a notice by email the public agency is required to provide to that person by email a copy of the notice, including any subsequent amended, corrected, or revised notice, no later than five days from the date of the public agency's action.
 - a) If the public agency files an amended, corrected, or revised notice more than five days after its action on the project, then within five days of that filing, the agency must provide to the requesting person by email a copy of the notice.
- 4) Revises the time periods for instituting a challenge on actions taken by public agencies under CEQA when a person makes a timely written request for a copy of a

notice and the public agency fails to timely provide the notice to commence on the earlier of either:

- a) the date that the public agency provides notice in the specified manner including any subsequent amended, corrected, or revised notices; or
 - b) the date on which the public agency submits the notice to the State Clearinghouse the notice.
- 5) Specifies that the revised time periods for instituting a challenge in 4) above only apply to the person requesting a copy of the notice who is not timely sent a copy of the notice.

COMMENTS

1. Stated need for the bill

The author writes:

SB 69 adds transparency to the CEQA notification process. Under current law, only state agencies are required to post CEQA notices of determination or exemption on the State Clearinghouse website. This bill would require all public agencies to do so. This ensures timely and uniform online access to notices.

Additionally, stakeholders are already entitled to written notice regarding the approval of a project if they request it, but there is no remedy for a violation of this notice requirement. SB 69 addresses this issue by clarifying that any statute of limitations associated with CEQA projects will not begin to run until the earlier of the following actions by the respective local agency: 1) provide written notice to anyone who has requested such notice prior to project approval or 2) submit the notice to the State Clearinghouse. This ensures there is still public notice if the respective agency fails to provide direct written notice while also preventing projects from being delayed significantly. The statute of limitations is reset if the notice is amended, corrected, or revised. Members of the public deserve transparency and accountability in the environmental review process. Timely notice provides an opportunity for the public to comment on projects. SB 69 improves the notification process to provide that transparency.

2. No remedy under CEQA if public agency fails to provide timely requested notice

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. If a local agency approves or determines to carry out a project the must file a notice of determination with the county clerk of each county in which the project will be located within five working days after the approval or determination becomes final. Existing law provides that if a person has made a written request to a public agency for a notice of determination or exemption before the date on which the agency approves or determines to carry out a project, then the public agency is required to provide that notice no later than five days from the date of the public agency's action via first class mail.

To enforce the requirements of CEQA, a civil action may be brought to attack, review, set aside, void, or annul the acts or decisions of a public agency for noncompliance with the act. There are limitations periods on when an action or proceeding to attack, review, set aside, void, or annul specified actions of a public agency may be commenced. An action or proceeding alleging that a public agency has improperly determined whether a project may have a significant effect on the environment, that an environmental impact report does not comply with CEQA, or that another act or omission of a public agency does not comply with CEQA has to be commenced within 30 days of the filing of a notice of determination. An action or proceeding alleging that a public agency has improperly determined that a project is not subject to CEQA must be commenced within 35 days from the filing of the notice of exemption. As a fall back, CEQA provides that any action or proceeding alleging that a public agency is carrying out or has approved a project that may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment must be commenced within 180 days from the date of the public agency's decision to carry out or approve the project or, if a project is undertaken without a formal decision by the public agency, within 180 days from the date of commencement of the project.

A recent appellate district court case held that even though a public agency failed to send a requested notice of determination to a person who timely requested it as

required by CEQA, the failure of the public agency to send that notice did not change the limitations periods for instituting a challenge. (*Organizacion Comunidad de Alviso v. City of San Jose* (2021) 60 Cal.App.5th 783.) The plaintiff in the case filed their action after the 30 days limitation period but argued to the court that since the public agency failed to provide the notice of determination to the plaintiff who had timely requested it the 30 days limitation period should be extended or tolled. (*Id.* at 792-93.) The court rejected plaintiff's argument and held that under CEQA it is the issuance of the notice of determination by the public agency that triggers the limitations period and stated "it is not properly our role to create [a remedy for the city's violation] where the Legislature has not." (*Ibid.*)

This bill seeks to address this issue by providing a statutory remedy for when a public agency fails to provide notice to those who have timely requested it. The bill does this by tolling the 30 and 35 day limitations periods if a person makes a timely written request for a copy of a notice and the public agency fails to timely provide the notice until the earlier of either the date that the public agency provides the requested notice or the date on which the public agency submits the notice to the OPR State Clearinghouse. The bill makes it clear that this remedy only applies to the person who requested a copy of a notice and was not timely sent a copy. The bill does not change the 180 day fall back limitations period under CEQA. The bill specifies that the notice provisions additionally apply to any subsequent amended, corrected, or revised notices as well.

The bill also makes several other changes. It requires local agencies to post notices to the OPR State Clearinghouse within five days of its action on the project, which is required by state agencies under existing law. It authorizes a public agency to provide notice to a requester via email, as specified. The bill also requires a notice of determination or notice or exemption issued by a local agency to be posted within 24 hours of receipt in the office of the county clerk and on the county clerk's website, instead of in either place.

3. Statements in support:

The California State Council of Laborers, sponsor of the bill, writes in support stating:

Public notices provide an opportunity to comment and are critical to an open and transparent government. Despite this requirement found in CEQA, there is currently no remedy in place for a violation. Unfortunately, a growing number of local agencies have been failing to provide the proper notice to stakeholders. Subsequent legal actions associated with these violations have been barred by statute of limitations.

As an organization comprised of 70,000 members statewide that work in the heavy construction industry, including critical transportation and water

infrastructure projects subject to CEQA, the Laborers often engage in the public stakeholder process to address concerns, identify opportunities, and negotiate terms pertaining to proposed projects. SB 69 will strengthen the transparency within this process and add protections for stakeholders, should local agencies fail to comply.

For these reasons we strongly support SB 69 and urge your "AYE" vote when it is heard in your committee.

4. Statements in opposition

The Valley Ag Water Coalition (VAWC) writes in opposition stating:

SB 69 would require a public agency to provide both the notice and any subsequent amended, corrected, or revised notice, in response to a written request for the notice, regardless of the delivery method. This legislation would toll, except as provided, the limitations periods applicable to specified actions or proceedings to attack, review, set aside, void, or annul specified acts or decisions of a public agency until (1) the date on which the public agency deposits in the mail or sends by email to the requestor a copy of the notice, including any subsequent amended, corrected, or revised notice, or (2) the date on which the public agency submits the notice to the State Clearinghouse.

VAWC is a lobbying coalition representing several local agencies, mutual water companies and ditch companies that deliver farm water supplies in the San Joaquin Valley. The Coalition opposes SB 69 as the procedural requirements related to CEQA are already complex. This bill increases a lead agency's litigation risk for a procedural error.

SUPPORT

California State Council of Laborers (sponsor)
Alviso in Action
California Labor Federation
California Environmental Voters
California-Nevada Conference International Union of Operating Engineers
Center for Biological Diversity
Citizens for Environmental and Economic Justice
District Council of Iron Workers of the State of California and Vicinity
Leadership Council for Justice and Accountability

OPPOSITION

Valley Ag Water Coalition

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: AB 819 (Levine, Ch. 97, Stats. 2021) required lead agencies at the state level to post CEQA-related documents and notices on their website and to file them with OPR's Statewide Clearinghouse.

PRIOR VOTES:

Senate Environmental Equality Committee (Ayes 5, Noes 0)
