

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

SB 861 (Dahle)
Version: April 10, 2023
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Fiscal: Yes
Urgency: No
AM

SUBJECT

California Environmental Quality Act: water conveyance or storage projects: judicial review

DIGEST

This bill makes certain water conveyance or storage 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 five specified projects approved by the California Water Commission to be built with Proposition 1 funding.¹ The bill is author sponsored and supported by Valley Ag Water Coalition and the California Farm Bureau Federation. The bill is opposed by the Judicial Council of California, the Sierra Club California, and Silicon Valley Youth Climate Action. The Senate Environmental Quality Committee passed the bill by a vote of 7-0.

¹ Prop. 1 of 2014 was a \$7.5 billion water bond that set aside \$2.7 billion for water storage projects.

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.)²
- 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) Requires both the superior court and the court of appeal to give CEQA lawsuits preference over all other civil actions. Requires, if feasible, the court of appeal to hear a CEQA appeal within one year of filing. (§ 21167.1(a)).
- 4) Establishes the Jobs and Economic Improvement through Environmental Leadership Act of 2021 (SB 7 (Atkins), Ch. 19, Stats. 2021).
 - a) Requires, the Judicial Council, on or before January 1, 2023, to adopt rules of court establishing procedures requiring actions or proceedings seeking judicial review of the certification of an environmental impact report for an environmental leadership development project certified by the Governor under the Act or the granting of any project approvals that require the actions or proceedings, including any appeals to the court of appeal or the Supreme Court, to be resolved, to the extent feasible, within 270 calendar days of the filing of the certified record of proceedings with the court.
 - b) The Act sunsets on January 1, 2026. (§ 21178 et seq.)
- 5) Requires, the Judicial Council, on or before January 1, 2023, to adopt rules of court establishing procedures requiring actions or proceedings seeking judicial review pursuant to CEQA or the granting of project approvals, including any appeals to the court of appeal or the Supreme Court, to be resolved, to the extent feasible, within 365 calendar days of the filing of the certified record of proceedings with the court to an action or proceeding seeking judicial review of the lead agency's action related to an environmental leadership transit project. This provisions sunsets on January 1, 2025. (§ 21168.6.9 et seq.)

² All further references are to the Public Resources Code unless otherwise indicated.

This bill:

- 1) Requires the Judicial Council to adopt a rule of court to establish procedures that require actions or proceedings brought to attack, review, set aside, void, or annul the certification of an environmental impact report for a water conveyance or storage project or the granting of any project approvals that require the actions or proceedings, including any potential appeals to the court of appeal or the 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 a “water conveyance or storage facility” to mean a facility used for the conveyance or storage of water for beneficial uses.
- 3) Defines a “water conveyance or storage project” or “project” to mean a project to repair or expand an existing water conveyance or storage facility or to develop and build a new water conveyance or storage facility.
- 4) Specifies how the preparation and certification of the record of proceedings for a water conveyance or storage project shall be performed.
- 5) Specifies that the above provisions only apply to the following projects approved by the California Water Commission:
 - a) The Chino Basin Conjunctive Use Environmental Water Storage/Exchange Program in the County of San Bernardino;
 - b) The Harvest Water Program in the County of Sacramento;
 - c) The Kern Fan Groundwater Storage Project in the County of Kern;
 - d) The Los Vaqueros Reservoir Expansion Project in the County of Contra Costa; and
 - e) The Willow Springs Water Bank Conjunctive Use Project in the County of Kern.
- 6) States the Legislature finds and declares that a special statute is necessary and a general statute cannot be made applicable within the meaning of Section 16 of Article IV of the California Constitution because of the unique circumstances facing California’s water infrastructure.

COMMENTS

1. Stated need for the bill

The author writes:

California’s drought is only worsened by our own water policies. In recent years, we have prioritized using less water rather than saving and storing more water. Given

the high demand for both commercial and residential uses, California needs to start focusing on storing as much water as possible. This accomplishes two major things: it protects water reliability and access in the future and it also allows the state to be more flexible with the release of water - depending on drought and flood conditions, to ensure the health and safety of our natural waterways. When we receive historic levels of rain and snowfall like we have been getting since early January 2023, California must be able to capture and store some of that water for future use. Streamlining the environmental review process for water projects is essential to securing reliable and consistent access to water for all Californians. As our climate continues to change, California water policy must change with it. We need to be smarter with our water and the first step in that process is clearing the way for more water storage to be built throughout the state.

2. CEQA generally

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, prepare 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

There are several existing statutes that provide for a 270-day judicial review period, if feasible, for environmental leadership projects,³ for environmental leadership transit projects,⁴ as well as for specified stadium projects.⁵

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 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;⁶
- concurrent preparation of the record of proceedings to enable judicial review to occur sooner;⁷
- 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,⁸ as well as for specified stadium projects,⁹ and a San Diego transit and transportation facilities project.¹⁰ The principal framework associated with these provisions is AB 900 (§ 21178 et seq.), which established procedures for 270-

³ AB 900 (Buchanan, Ch. 354, Stats. 2011); SB 7 (Atkins, Ch. 19, Stats. 2021).

⁴ SB 44 (Allen, Ch. 44, Stats. 2021).

⁵ SB 292 (Padilla, Ch. 353, Stats. 2011); SB 743 (Steinberg, Ch. 386, Stats. 2013) (see *Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 855-856); AB 734 (Bonta, Ch. 959, Stats. 2018); AB 987 (Kamlager-Dove, Ch. 961, Stats. 2018).

⁶ See *Cadiz Land Co. v. Rail Cycle, LP* (2000) 83 Cal.App.4th 74, 122.

⁷ SB 122 (Jackson, Ch. 476, Stats. 2016).

⁸ AB 900 (Buchanan, 2011), Ch. 354, Stats. 2011.

⁹ SB 292 (Padilla, Ch. 353, Stats. 2011); SB 743 (Steinberg, Ch. 386, Stats. 2013); (see *Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 855-856); AB 734 (Bonta, Ch. 959, Stats. 2018) AB 987 (Kamlager-Dove, Ch. 961, Stats. 2018).

¹⁰ AB 2731 (Gloria, Ch. 291, Stats. 2020).

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 was renewed under SB 7 (Atkins, Ch. 19, Stats. 2021) to include housing development projects with a minimum investment of \$15,000,000.

A 2019 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 certified¹¹ 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.¹²

4. Expedited judicial review for certain water conveyance or storage projects

This bill would provide for expedited review for five specified water conveyance or storage projects approved by the California Water Commission to be built with Proposition 1 funding:

- a) the Chino Basin Conjunctive Use Environmental Water Storage/Exchange Program in the County of San Bernardino;
- b) the Harvest Water Program in the County of Sacramento;
- c) the Kern Fan Groundwater Storage Project in the County of Kern;

¹¹ *Review of Environmental Leadership Development Projects*, Cal. Sen. Office of Research (Apr. 2019) at pp. 6-8 (noting some uncertainties in the calculation methodology).

¹² *Id.* at p. 15.

- d) the Los Vaqueros Reservoir Expansion Project in the County of Contra Costa; and
- e) the Willow Springs Water Bank Conjunctive Use Project in the County of Kern.

As the Senate Environmental Quality Committee analysis notes:

Voters overwhelmingly approved Proposition 1 in 2014, a \$7.5 billion water bond that set aside \$2.7 billion for water storage projects. However, because state money can be used only for “public benefits” such as salmon protection, recreation and flood control, the balance of the funding has to come from water users, such as farmers, homeowners, and businesses.

To date, seven water storage projects that could store an estimated 2.77 million acre-feet of water have been approved by the California Water Commission (CWC) for Proposition 1 funding. The projects are led by local – not state – agencies and permitting is required at the local, state, and federal levels. [...] According to the CWC’s website, the Kern Fan Groundwater Storage Project is the first of those seven projects that will break ground sometime this year, with full operations beginning in mid-2029.

The bill sets up a nearly identical program for water conveyance and water storage facilities as for environmental leadership development projects, including requiring the lead agency for the project to prepare the record of proceedings under CEQA concurrently with the administrative process and requiring any dispute arising from the record of proceedings to be resolved by the superior court. Unless the superior court directs otherwise, a party disputing the content of the record must file a motion to augment the record at the time it files its initial brief.

5. Statements in support

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

California has consistently struggled with droughts, including significant multi-year droughts in the last two decades from 2007-2009 and from 2012-2016. California must prepare for such droughts; to do so requires significant investments in the development of water storage projects. Recently, California received historic amounts of rain and snow. It is necessary to take advantage of the record snowpack and build necessary water storage to capture that water before it flows needlessly into the ocean. Proposition 1 of 2014 dedicated \$2.7 billion for investments in water storage projects. Unfortunately, those funds have not been efficiently allocated to allow for the construction of these projects.

VAWC supports SB 861 as the bill seeks to streamline the approval process by requiring the Judicial Council to adopt rules of court applicable to actions or proceedings brought to attack, review, set aside, void, or annul the certification or adoption of an environmental impact report for water conveyance or storage projects, or the granting of project approvals, including any appeals to the court of appeal or the Supreme Court, to be resolved, to the extent feasible, within 270 days. Expediting judicial review would not exempt projects from CEQA standards; however, streamlining the timeline for review keeps court costs low, prevents delays, and ensures these necessary projects meet their deadlines for approval.

6. Statements in opposition

The Sierra Club California writes in opposition stating:

Water storage and conveyance projects are not harmless and applying this framework to them is inappropriate. New proposals, including construction of Sites Reservoir or the Delta Conveyance Project, are likely to reduce freshwater flows, significantly impact endangered and threatened species, and have not demonstrated that they can provide reliable water supplies under changing climate conditions without negative impacts to the environment. Attempting to rush the planning and environmental review process for these projects will result in poorly thought out projects with potentially significant implications for California's water future.

Water storage and conveyance projects have significant impacts and must undergo full and robust CEQA review, including the full judicial review process.

The Judicial Council of California writes in opposition to the bill unless amended to remove the 270-day expedited review provision and the related rulemaking requirement. They note that their concerns are limited solely to its impacts on the courts and express no views to the underlying merits of any potential projects covered by the bill. They write:

The requirement in SB 861 to ensure a water conveyance or storage project challenged under CEQA be resolved in 270 days, to the extent feasible, including appeals to the Court of Appeal and the Supreme Court is problematic. CEQA actions are already entitled under current law to calendar preference "over all other civil actions" in both the superior courts and the Courts of Appeal pursuant to section 21167.1(a) of the Public Resources Code. Imposing a 270-day timeline for review, on top of existing CEQA calendar preferences, even with language that references "to the extent feasible," is an arbitrary and unrealistically short timeframe for California's trial courts to address all the issues each CEQA case is likely to present.

They further elaborate that reasons why this expedited time frame is not feasible are:

- CEQA cases are complex and time-consuming;
- active CEQA cases often include ancillary administrative and non-CEQA judicial causes of action; and
- expediting CEQA cases means further delays for other cases

7. Proposed amendments

The author may wish to amend the bill to remove references to water conveyance of storage facility and water conveyance or storage project as they are superfluous now that the bill only applies to five specified projects.

SUPPORT

California Farm Bureau Federation
Valley Ag Water Coalition

OPPOSITION

Judicial Council of California
Sierra Club California
Silicon Valley Youth Climate

RELATED LEGISLATION

Pending Legislation:

AB 1488 (Wallis and Fong, 2023) would extend the Jobs and Economic Improvement Through Environmental Leadership Act of 2021 to water storage projects, water conveyance projects, and groundwater recharge projects that provide public benefits and drought preparedness. This bill is currently pending in the Assembly Committee on Natural Resources.

Prior Legislation: *See comment 3.*

PRIOR VOTES:

Senate Environmental Quality Committee (Ayes 7, Noes 0)
