SENATE COMMITTEE ON ENVIRONMENTAL QUALITY
Senator Allen, Chair
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SUBJECT: California Environmental Quality Act: housing and land use

DIGEST: This bill makes various changes to the California Environmental Quality Act (CEQA) including, among other things, an exemption for emergency shelters, supportive housing, and transitional housing projects; changes to translation guidelines of CEQA documents; an optional, alternate process for receiving public comments; and requiring a report be submitted to the Attorney General if an action or proceeding is settled and involves the payment of money.

Due to the COVID-19 Pandemic and the unprecedented nature of the 2020 Legislative Session, all Senate Policy Committees are working under a compressed timeline. This timeline does not allow this bill to be referred and heard by more than one committee as a typical timeline would allow. In order to fully vet the contents of this measure for the benefit of Senators and the public, this analysis includes information from the Senate Judiciary Committee.

ANALYSIS:

Existing law:

1) Under the California Environmental Quality Act (CEQA),

   a) 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. CEQA includes various statutory exemptions, as well as categorical exemptions in the CEQA guidelines. (Public Resources Code (PRC) 21000 et seq.).

   b) Specifies certain timeframes for a public review period of a draft EIR and requires the lead agency to consider comments it receives on the draft EIR, proposed ND, or proposed MND during the public review period. Requires the lead agency to evaluate comments on environmental issues and prepare

written responses to those comments. Authorizes a lead agency to respond to comments that are received after the close of the public review period (PRC §21091).

c) Authorizes judicial review of CEQA actions taken by public agencies, following the agency's decision to carry out or approve the project. Challenges alleging improper determinations that a project may have a significant effect on the environment, or alleging an EIR doesn't comply with CEQA, must be filed with the Superior Court within 30 days of filing of the notice of approval (PRC §21167).

   i) In CEQA actions challenging certain affordable housing projects, allows a defendant to motion for a court order requiring the plaintiff to post a bond for costs and damages that may be incurred by the defendant as a result of the prevention or delay of the project. Requires the motion be made on the grounds that the action was brought in bad faith, vexatiously, for purpose of delay, or to thwart the low- or moderate-income nature of the project; and that there is no undue economic hardship on the plaintiff by posting the bond (Code of Civil Procedure (CCP) §529.2).

d) Prohibits an action or proceeding from being brought unless the alleged grounds for noncompliance were presented to the public agency orally or in writing during the public comment period or before the close of the public hearing on the project (PRC §21177).

e) Requires the court to give CEQA actions or proceedings preference over all other civil actions. Requires the court to regulate the briefing schedule so that hearings on an appeal are commenced within one year of the filing of appeal (PRC §21167.1).

f) Requires superior courts with a population of more than 200,000 to designate one or more judges to develop CEQA expertise (PRC §21167.1).

g) Establishes a procedure for preparing and certifying the record of proceedings for an action against a public agency on the grounds of noncompliance with CEQA (PRC §21167).

h) No later than 20 days from the date of service upon a public agency, the public agency must file a notice with the court setting a time and place for

all parties to meet and attempt to settle the litigation. The settlement meeting may be continued from time to time without postponing or otherwise delaying other applicable litigation time limits, and the settlement meeting is intended to be conducted concurrently with any judicial proceeding (PRC §21167.8).

i) Requires the Office of Planning and Research (OPR) to prepare and develop, and the Secretary of Natural Resources to certify and adopt, proposed guidelines for the implementation of CEQA (PRC §21083).

2) Requires a legislative body of a city or county or a district board, if an initiative petition is signed by a specific number of voters, to either adopt the ordinance set forth in the initiative petition, without alteration, at a regular meeting at which the certification of the petition is presented, or within 10 days after it is presented, or submit the ordinance proposed in the petition, without alteration, to the voters for approval.

This bill:

1) Exempts from CEQA certain emergency shelters, supportive housings, and transitional housings that meet specified requirements such as being no more than five acres, substantially surrounded by urban uses, and the site can be adequately served by all required utilities and public services.

2) Authorizes a real party in interest of a CEQA action to move for a court order to require a plaintiff that is challenging an affordable housing project, which under the bill would include any emergency shelter, supportive housing, and transitional housing, to file an undertaking in an amount determined by the court.

3) Authorizes an optional, alternative process for receiving comments on a draft EIR, where the lead agency posts on its website, at least 30 days before the public hearing at which it may approve a project, its responses to public comments received on the draft EIR. Authorizes the lead agency, in this alternative process, to set a deadline to receive written comments and supporting evidence that may be later used as a basis for a challenge at least 10 days before the hearing at which it may approve the project. If this alternative procedure is used, requires the lead agency to still continue to accept oral comments, as specified.

4) At the time an action or proceeding is filed, requires the petitioner to file a notice either requesting the public agency to prepare the record of proceedings

or notifying the public agency that it is electing to prepare the record of proceedings. Authorizes the respondent public agency or real party in interest, within five days of receiving the notice, to elect to transfer the obligation of preparing the record of proceeding to the public agency if the party making the election (1) bears the full costs of preparing and certifying the record, and (2) waives its right to recovery from the petitioner those costs if the party prevails. Requires the party responsible for preparing the record to arrange a meet and confer conference to arrange logistics of preparing the record and to consider the elimination of immaterial documents from inclusion.

5) Requires the public agency, not later than 15 days from the date of service of the petition, to file with the court a notice setting forth the time and place at which parties or their counsel are to meet and discuss procedural issues, timelines associated with the litigation, and potential usefulness of settlement discussions, mediation, or arbitration.

6) Requires a respondent lead agency, within 20 days from the date of service, to request that the court schedule an initial case management conference. Requires the parties to meet and confer at least 10 days before the conference, as specified; and, five days before the conference, to submit either a separate or joint case management conference statement.

7) Requires the public agency, not later than 20 days after the initial case management conference, to file and service a notice of the time and place of a settlement meeting.

8) Requires a court of appeal to regulate the briefing and hearing schedule so that, to the extent feasible in light of the size of the record of proceedings and the number of parties involved, the court issues a decision on the merits of an appeal no more than 15 months from the date of filing the appeal.

9) Requires a petitioner, in the event of settlement of an action or proceeding involving the payment of money directly to a petitioner or petitioner's counsel, other than reasonable attorney's fees and costs, to submit a report to the Attorney General (AG) describing the settlement and final disposition of the case. Authorizes for the imposition of sanctions against the petitioner if the petitioner refuses to file the report after an initial notice of its failure to file or if the petitioner repeatedly fails to comply with these reporting requirements. Authorizes the AG to bring an action against the petitioner if the AG determines the petitioner has filed multiple actions under CEQA that result in primarily monetary settlements that do not further the purposes of CEQA.

10) Requires Judicial Council, on or before July 1, 2021, to compile a list of superior court judges in counties with a population of more than 200,000 that have CEQA expertise and to assess the capacity of various superior court judges in counties with a population of more than 200,000 to absorb CEQA actions or proceedings that may be transferred from superior courts in rural counties. Requires Judicial Council to submit a specified report to the Legislature on the administration of justice and CEQA.

11) Authorizes a superior court in a county with population of 200,000 or less, to order the transfer of the action or proceeding alleging noncompliance with CEQA to the superior court of a county with a population greater than 200,000 or to order the case be heard by a judge with expertise in CEQA assigned by Judicial Council.

12) Requires OPR, by an unspecified date, to prepare and develop, and the secretary to certify and adopt, revisions to the CEQA guidelines for the translation of notices and documents to non-English languages.

13) If an initiative petition containing a proposed ordinance is signed by a specified number of voters and a legislative body of a city or county or a district board determines that the approval of the ordinance would constitute a project for purposes of CEQA had the proposed ordinance been proposed by the legislative body or board rather than by initiative petition, requires the legislative body or board to submit the proposed ordinance to the voters approval.

14) Repeals various obsolete provisions from CEQA, makes conforming changes, and makes various clarifying and nonsubstantive changes.

Background

1) *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 (ND). If the initial study shows that the project may have a significant effect on the environment, the lead agency must prepare an environmental impact report (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. Prior to approving any project that has received environmental review, an agency must make certain findings. If mitigation measures are required or incorporated into a project, the agency must adopt a reporting or monitoring program to ensure compliance with those measures.

2) *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. A study area for a proposed project must not be limited to the footprint of the project because many environmental impacts of a development extend beyond the identified project boundary. Also, CEQA stipulates that the environmental impacts must be measured against existing physical conditions within the project area, not future, allowable conditions.

3) *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). The environmental impact caused by the proposed mitigation measure should be evaluated as well. 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.

Comments

1) *Purpose of Bill.* According to the author, "CEQA is the cornerstone of California environmental policy. Fifty years from when it first came into law, CEQA remains as crucial as ever, if not more so considering the dire climate-related challenges of our time. Yet, despite the value CEQA brings to Californians by ensuring their government makes environmentally balanced decisions, and by providing them with critical information about projects in their communities, CEQA continues to be blamed for project delay in California, despite a growing body of research increasingly indicating otherwise. I believe we should answer concerns about CEQA with the same values that the statute itself embodies: transparency, integrity, and the balancing of interests. This bill seeks to improve CEQA by taking some of the best ideas from practitioners and other experts to bring mutually beneficial reforms to project and judicial review under the statute. This expert-driven approach provides that the bill's several provisions work in relation and in concert with one another, and assures in the bill an overall balance. Additionally, this bill will increase access to project review by communities often disconnected from decisions made in their own backyards. By bringing efficiency and greater access to CEQA, we help ensure this statute remains effective and relevant for all Californians for the next fifty years and beyond."

2) *Will a required report to the Attorney General solve CEQA's perceived standing issues*? Under general standing requirements, a petitioner must be "beneficially interested" in the subject matter of a proceeding and, in CEQA, this can be demonstrated by showing that a petitioner may be affected by the project's environmental impacts or is otherwise adversely impacted by the agency's decision. An exception to this beneficially interested test is when the object is to obtain enforcement of a public duty, known as the "public interest" test.

   There is concern that some groups improperly use CEQA's broad standing to further ulterior motives that are not related to CEQA. Some of those groups, it is said, file a CEQA action and then settle out of court for a monetary payment or other form of redress that has nothing to do with the purposes of CEQA. Focusing on those that settle for a monetary payment, this bill aims to discourage one sector of this behavior by requiring a petitioner to submit a specified report to the AG if the action or proceeding is settled and involves a monetary payment. If, based on those reports, the AG determines that the petitioner has a pattern of filing actions that result primarily in monetary settlements that do not further the purposes of CEQA, the AG is authorized to seek remedies pursuant to California's Unfair Competition Law (UCL).

Under UCL, consumers are protected from "unlawful, unfair or fraudulent business act[s] or practice[s]." (Bus. & Prof. Code Sec. 17200 et seq.) The law permits courts to award injunctive relief, restitution, and, in certain cases, to assess civil penalties against the violator. (Bus. & Prof. Code Secs. 17203, 17206.)

Okay…but will it work? While well-intentioned, these requirements may create more work on the AG's office than is proportional to the benefit sought.

- *Is the group in question a red herring?* There are other ways a case can be settled that do not involve monetary payment (such as imposing certain conditions on the project), and thus are not subject to the reporting requirements. This bill, instead, focuses on the group that allegedly challenges a project for purposes other than CEQA, and then settles out of court for a monetary amount. Is there evidence of these types of cases being filed? Because settlements are often confidential, it is hard to determine how often this happens, if at all. If there is evidence, is it substantial enough to justify singling out a particular group and creating a reporting process specifically for those types of cases?

- *How do you prove something wasn't to further the purposes of CEQA?* Based on the report filed by the petitioner, the AG would have to determine whether the petitioner has filed multiple actions that do not further the purposes of CEQA. Would it be easy for a crafty petitioner or attorney to structure the settlement or report to give the appearance of furthering CEQA without actually or only minimally doing so? What standards would be used to determine if something does not further CEQA?

Given the above concerns, the committee may wish to amend the bill to remove this reporting requirement.

3) *Addressing concerns about bad faith challenges against housing.* As discussed above, some argue that the CEQA process is abused and used to further purposes unrelated to CEQA. To address this issue with regard to certain housing projects, SB 950 would do two things: (1) expand an existing housing development project statute by permitting a real party in interest to motion for a court order requiring the petitioner to post a bond as security for costs and damages the party incurred as a result of delaying an emergency shelter, supportive housing, and transitional housing project, regardless of whether the

plaintiff will suffer undue economic hardship by posting such bond; and (2) provide a CEQA exemption for these types of projects.

Will an unclear standard have a chilling effect on petitioners? Under this bill, the motion to require a petitioner to post a bond must be on the grounds that the action was brought in bad faith, vexatiously, for the purpose of delay, to thwart the low-income nature of the affordable housing project, or to *reduce the proposed density of the affordable housing project* (the latter being added by SB 950).

How does one show that the purpose of a suit was to reduce the proposed density of the project? On one hand, there is a fear of bad-faith litigants who file a suit for ulterior motives. On the other hand, there is concern that such imprecise language creates an undue risk to good faith petitioners. Is it possible that a project could be consistent with applicable density requirements and still have significant environmental impacts, because of that density? Given that a bond could be required regardless if it would cause undue economic hardship on the petitioner, could this intimidate a good faith petitioner from filing a suit? Although a court *could* consider the balance of hardship, this is a departure from existing law's prohibition that the plaintiff will not suffer undue economic hardship.

Given the unclear legal standard these provisions would impose, potentially discouraging good faith petitioners from filing a claim, the committee may wish to strike these provisions from the bill.

A CEQA exemption for certain housing projects. SB 950 provides a CEQA exemption for emergency shelters, supportive housing, and transitional housing projects in urbanized areas that meet certain environmental-related requirements; similar to those found in other CEQA exemptions. While there is debate on whether including such parameters is an adequate substitution for the environmental review and the information provided under CEQA, these requirements are intended to proactively mitigate or limit a project's potential environmental impacts that would not be analyzed due to the exemption.

What do we lose with an exemption? Often groups will seek a CEQA exemption in order to expedite construction of a particular type of project and reduce costs. Providing an exemption, however, can overlook the benefits of environmental review: to inform decisionmakers and the public about project impacts, identify ways to avoid or significantly reduce environmental damage, prevent environmental damage by requiring feasible alternatives or mitigation measures, disclose to the public reasons why an agency approved a project if

significant environmental effects are involved, and increase public participation in the environmental review and the planning processes.

Even though the ultimate goal is to approve and build emergency shelters, supportive housing, and transitional housing quickly, CEQA ensures that projects are approved in accordance with informed and responsible decisionmaking. It ensures that decisionmakers, project proponents, and the public know of the potential short-term, long-term, and maybe permanent environmental consequences of a particular project before it is approved. CEQA gives local governments and project proponents the opportunity to examine the environmental impacts in context of one another and to mitigate, or avoid if possible, those impacts.

Not like the rest. A local agency's adoption of a general plan or zoning ordinance is subject to CEQA; and the potential environmental impacts of those policy decisions were analyzed and considered before its adoption. With this new exemption, a project could be inconsistent with a jurisdiction's zoning ordinance or general plan if the project is on a site that is identified as suitable or available for very low, low-, or moderate-income households, as specified, and if it is consistent with the jurisdiction's specified housing density. Thus, not only are these projects not subject to environmental review on the project-specific level, the projects could also be in areas whose general plan or zoning ordinance environmental review did not contemplate the environmental impacts of these types of projects on a macro-level.

The committee may wish to amend the bill to require that a project be consistent with the jurisdiction's zoning ordinance or general plan.

Not all emergency shelters are created equal. Having a project be eligible for a CEQA exemption is a benefit for project proponents and any project that qualifies for such benefit should be better than the status quo. In 2016, the Legislature adopted the state's first official housing policy – a "Housing First" approach to address homelessness (Mitchell, Chapter 847, Statutes of 2016) and required state agencies and departments that administer programs that provide housing-based services to people experiencing homelessness or are at risk of homelessness to adopt a Housing First model. Housing First is an evidence-based model that uses housing as a tool, rather than a reward, for recovery that centers on providing or connecting homeless people to permanent housing as quickly as possible. Research has shown that supportive housing with a Housing First Requirement – a stable, affordable place to live with no limit on the stay, along with services that promote housing stability – ends homelessness among people who experience chronic homelessness.

The committee may wish to amend the bill to remove transitional housing and to require that emergency shelters be Housing First Compliant, as described in Welfare and Institutions Code §8255.

AB 1197 (Santiago, Chapter 340, Statutes of 2019). Last year AB 1197 enacted a similar CEQA exemption but was limited to certain emergency shelter and supportive housing projects carried out in the City of Los Angeles and will expire on January 1, 2025. That bill also required a notice of exemption be filed with the Office of Planning and Research (OPR).

Similarly, the committee may wish to amend the bill to require notice of exemptions be filed with OPR, so that the use of the exemptions can be tracked, and adding a sunset of January 1, 2025.

4) *Revising translation guidelines.* SB 950 would require OPR, before an unspecified date, to prepare and adopt revisions to the CEQA Guidelines for the translation into non-English language of CEQA notices and other documents. The revisions, for purposes of promoting environmental justice goals, would be required to, at a minimum, provide mandatory translation into non-English language spoken by a substantial number of people served by the lead agency. Similar to SB 950, AB 543 (Campos, 2013) which, when heard before this committee, also proposed requiring a lead agency to translate specific information into the language spoken by a group of non-English speaking people. Additionally, SB 950 requires the availability of translation equipment and services at any public hearing or meeting, as specified. Although well intended, revising translation guidelines does present some questions.

   Identifying the non-English languages to be translated. Under SB 950, guidelines revision would require mandatory translation into non-English languages spoken by a substantial number of people served by the lead agency, as defined pursuant to the Dymally-Alatorre Bilingual Services Act. Under that act, the "substantial number of non-English-speaking people" is determined differently between state agencies and local agencies. State agencies are given a specific definition, whereas, for local agencies, that determination is made by the local agency. Under CEQA, a lead agency can be either a state agency or a local agency. Would OPR be required to develop different guidelines for when the lead agency is a state versus a local agency? How does OPR develop guidelines for local agencies based on the act when the act itself requires the determination be made by local agencies?

Documents to be translated. SB 950 requires the translation of notices *and other documents prepared pursuant to CEQA*. According to SB 950, these include, *but are not limited to*, a specified list of notices required under CEQA. Other documents that would be required to be translated, but are not specifically listed by SB 950, include environmental impact reports, negative declarations, and mitigated negative declarations.

Lost in Translation: Terms of art and technical, scientific terms. An environmental review can be filled with terms of art and technical, scientific terms that may be difficult to accurately translate into a non-English language.

For example, the word "project" – Merriam-Webster dictionary provides the common definition of "project" as a specific plan or design, a planned undertaking, or a usually public housing development consisting of houses or apartments built and arranged according to a single plan.

However, under CEQA, "project" means "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:

(a) An activity directly undertaken by any public agency.

(b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

(c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." (PRC §21065).

These are very different meanings of the same word and concern is raised about the degree of accuracy in translating CEQA-related documents. The potential for facts and analyses to become lost in translation is very much a possibility with the requirements of SB 950.

Logistics. Unless a public agency has on staff the necessary translator(s), the public agency will likely have to contract for one or more translators depending on the different languages required for translation. How does a public agency know that the CEQA document is translated correctly if there is no one on staff with both the expertise in CEQA (or the approximately 17 environmental factors analyzed) and the proficiency in the language the document is being translated? If more than one language is spoken by a substantial number of

people served by the public agency, the public agency would also be required to provide translation services for each language at each required public hearing or meeting.

Translating CEQA documents is not cheap. CEQA documents can vary in length. The CEQA Guidelines recommend that a summary for an EIR not exceed 15 pages. This is not a requirement, so a summary may very well surpass 15 pages. For example, in 2013, the State Water Resources Control Board was the lead agency for the Bay Delta Conservation Plan (BDCP). The draft BDCP EIR/EIS (an EIS is an environmental impact statement pursuant to NEPA) was approximately 25,000 pages. According to the Assembly Appropriations Committee, at the time AB 543 (Campos, 2013) was heard in that committee, the draft summary was almost 50 pages and still growing. Assuming current translation services charge between $0.12 and $0.40 per word and on average, each page contains about 750 words ($80 to $300 per page), the Assembly Appropriations Committee estimated that translating the executive summary for the BDCP EIR/EIS would have ranged from $4,500 to $24,000 per language. Most of the other notification documents, which would also be required to be translated, are usually one to five pages long and would cost up to $2,000 per notification, per language.

Unintended Consequences. These provisions are well-intentioned but may negatively affect projects with limited funding. For example, a small community water system serving a disadvantaged community receives a grant or loan from the Safe Drinking Water State Revolving Fund to address water contamination problems. The project would likely be required to comply with CEQA. Pursuant to this bill, translating multiple notices and other CEQA documents would add thousands of dollars to the cost of the environmental review for the project, which likely has limited and scarce funding resources.

Potential liability issues. CEQA is meant to inform the public and facilitate public participation in analyzing environmental impacts. However, as noted above, how can a public agency ensure that a CEQA document is translated correctly if there is no one on staff with both the expertise in CEQA as well as a proficiency in one or more non-English languages to know whether the translation of the CEQA document is accurate? Providing inaccurately or incorrectly translated CEQA documents may have the potential for creating additional civil actions against the public agency responsible for the document. Although the bill prohibits minor inaccuracies from being a basis for invalidation, could SB 950 lead to increased litigation due to claims of substantially inaccurate translations?

Given the concerns of scope and costs discussed above, but also recognizing the need for meaningful community participation, the committee may wish to amend the bill to strike the reference to the Bilingual Services Act and limit the required translated documents to notices and statements of overriding consideration. To determine which languages would require translation, the author shall commit to continue to seek an appropriate mechanism to be used by lead agencies.

5) *An optional, alternative for receiving public comments.* After a draft EIR, ND, or MND is completed, the lead agency is required to provide public notice that the draft environmental review document is available for comment and review. During the public comment period, the public may submit comments on the environmental review document to the lead agency or, if a public hearing on the project is held, may present comments before the close of the hearing.

   Exhaustion of administrative remedies. Exhaustion of administrative remedies is a jurisdictional prerequisite to challenging any project approval under CEQA (*Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011), 197 Cal.App.4th 1042). The basic premise of the legal doctrine is that a person or organization may not bring a legal challenge to an agency's decision unless that person or organization has participated in the agency's administrative review process (PRC §21177). A plaintiff must "exhaust" his or her administrative remedies by first raising arguments to the agency during its consideration of the project. As explained by the court in *Coalition for Student Action v City of Fullerton* (1984) 153 CA3d 1194, "[t]he essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review."

   Late comments and document dumping. When a person or organization fails to comment within the time limits provided for an environmental review, the lead agency may assume that the person or agency has no comment (Guidelines §15207). However, this does not mean that the lead agency should ignore late comments. Although CEQA Guidelines and judicial precedent indicate that a lead agency does not need to respond to a late comment in writing, the lead agency does need to exercise discretion because all comments – including late ones- become part of the project's administrative record.

   Sometimes interested parties to a project may submit comments late in the review process, and perhaps in voluminous amounts, as a tactic to delay a project – this is referred to as "document dumping." As mentioned earlier, these comments become a part of the administrative record to which litigants

can refer. The California Supreme Court has stated, "We cannot, of course, overemphasize our disapproval of the tactic of withholding objections … solely for the purpose of obstruction and delay," and stressed that strategically delaying commenting on a project is not a "game to be played by persons who…are chiefly interested in scuttling a particular project." (*Citizens of Goleta Valley v. Board of Supervisors of Santa Barbara County* (1990) 52 Cal.3rd 553, 368).

However, this may not always be the case – interested parties, who submit late comments, may raise genuine significant issues that were not adequately addressed in the environmental review or provide important information that was not available earlier in the process.

Is this the solution? Past legislative efforts have attempted to address this issue by limiting the submission of late comments to new information that was not known or could not have been known during the public comment period. This bill instead attempts to address this tension by offering an optional alternative process for the lead agency. Under this process, the lead agency posts, at least 30 days before the public hearing at which it may approve the project, the written responses to each timely submitted comment on the draft EIR, modifications of the draft EIR, and other documents. If the lead agency posts this information, and provides sufficient notice as specified by the bill, the lead agency may require that written comments and supporting evidence, which may later be used as a basis for an allegation of noncompliance, be submitted at least 10 days before the hearing at which the lead agency may approve the project. Under this alternative, written comments that do not meet the deadline cannot be used as a basis for an action or proceeding alleging noncompliance later. The lead agency, however, would still be required to accept oral comments at any time before the close of the public hearing on the project.

Unknown contact information? This alternative process requires the lead agency to provide notice of the availability of specified posted documents to all persons who commented on the draft EIR. However, what if the necessary contact information was not provided? Is it reasonable to require a lead agency to track down this information?

The committee may wish to amend the bill to require that notice be provided to persons who commented on the draft EIR and provided their contact information.

Will it be utilized? This optional, alternative process requires the lead agency to perform a substantial amount of work on the front end. It is unknown if this

optional alternative will be used by lead agencies. Some agencies may want to use this alternative process in order to avoid late written comments; others may not.

Will this solve the problem of late comments? Some stakeholders say no. Under this optional, alternative process, stakeholders argue that while parties would be precluded from submitting late written comments, a party could still strategically orally exhaust their administrative remedies with lengthy testimony during the public hearing; thus preserving their ability to challenge the project later. Instead, it is argued that the oral comments made at the hearing, which are characterized as "late" comments, should also be excluded from the administrative record. Are lengthy oral comments common for CEQA projects? Isn't the possibility of lengthy public testimony an issue that exists in all aspects of public hearings by all legislative bodies; not just CEQA? Is it appropriate to only disallow public testimony for CEQA projects? As noted above, late comments are not necessarily the result of slick would-be petitioners waiting to submit their concerns so that the agency has no opportunity to respond. Sometimes, the comments include important information that was not known earlier. Should that information be excluded? Should a member of the public be denied the ability to go before their elected public officials during a public hearing and voice their concerns about a decision that would affect them?

Penalty or transparency? If a lead agency elects not to utilize the alternative process, the lead agency is required to post on its internet website, among other items, any written comments on the final EIR that were received in digital form. For some projects, this could mean thousands of comments. Some say that this could be viewed as a penalty for lead agencies that do not utilize the alternative process. According to the author, however, this an attempt to provide as much transparency as possible to the public by making comments that are submitted available and accessible.

6) *Can SB 950 help speed up the litigation process?*

Transferring cases between jurisdictions. Groups will often state that the CEQA process takes too long and causes unnecessary delay to their projects. Current law requires the courts to give CEQA-related cases preference over "all other civil actions… so that the action or proceeding shall be quickly heard and determined" (PRC §21167.1); but even so, CEQA cases can be complex and can take months, or sometimes years, to litigate. SB 950 proposes to authorize CEQA cases filed in smaller jurisdictions be transferred to larger jurisdictions or have Judicial Council assign a judge with CEQA expertise.

These actions can be done upon the courts own motion or the motion of a party if it is determined that the issues in the cases are sufficiently complex that the transfer or assignment would further the state's goals of increasing consistency, certainty, and speed in the administration of justice.

Giving a court or a party the option to move to have the case transferred to another jurisdiction raises many questions: Would this lead to an increased case load for the transferee court? How does that affect the other civil cases that are also on that court's calendar? Could allowing a party to move to have the case transferred allow petitioners to forum shop and have their action heard in a jurisdiction that may be more favorable to their position? Does it make sense to have a local issue resolved in a foreign jurisdiction? Could transferring cases discourage a would-be petitioner from filing a suit due to increased costs? What kind of increased costs are associated with requiring the local governments to litigate and defend a project in a foreign jurisdiction?

Administrative record preparation. Preparation of the record of proceedings, also known as the administrative record, can be time-consuming and expensive. Typically, the respondent public agency will prepare the record. However, because a public agency may use the entire allotted time to prepare the record, the petitioner, to expedite the preparation and reduce costs, will sometimes elect to prepare the record instead, subject to the certification of accuracy by the public agency. In either scenario, the petitioner is responsible for covering the costs of preparing the record; however, a prevailing party who had covered the costs the preparing the record previously is able to later recover those costs.

SB 950 allows the respondent public agency or real party in interest, when the petitioner opts to prepare the record, to instead elect to have the record prepared by the public agency if the party making the election bears all costs of preparing and certifying the record and the party waives its right to recover any costs incurred by the preparation and certification of the record if the party prevails.

According to the author, the purpose of this amendment is to create a more efficient record preparation process; and, according to some stakeholders, having the respondent public agency prepare the record is sometimes preferred. By preparing the record, it allows the public agency to have greater control over the time and costs of preparation. Additionally, it can promote efficiency in the certification process by reducing discussions regarding the contents of the record and what information will be required for the public agency to certify it as complete.

On the other hand, however, there are others who might argue that this process would not allow a petitioner to ensure that the record is complete and accurate, which could lead to increased disputes over the content of the record. Others have expressed concern that a savvy petitioner may force an agency to elect to prepare the record, thereby forfeiting its right to recover costs if the agency prevails.

Adding meetings might improve efficiency, but not confusion. SB 950 makes the following changes to promote efficiency in the pre-trial preparation process:

- Proposed §21167.6(c) requires the party responsible for preparing the administrative record to arrange a meet and confer conference with representatives of all parties to arrange the logistics of preparing the administrative record and to consider the elimination of documents that are immaterial to the action. According to the author's fact sheet, the intent of adding this conference is to enable parties to facilitate expeditious resolution of issues that could delay the timely completion of a sufficient record. This section also modifies the contents of the record to require, among other things, internal e-mails. Stakeholders have expressed concern that this express requirement to include internal emails could create a chilling effect amongst staff, shifting the focus from what is best for the project to what could potentially be subject to discovery.

- Proposed §21167.8 modifies the existing meeting at which parties meet and attempt to settle the litigation and instead splits it into two meetings. At the first meeting, which may be conducted by phone, the parties discuss procedural issues and timelines associated with the litigation and the *potential* usefulness of settlement discussions, mediations, or arbitration. The second meeting, which is to take place no later than 45 days after the case management conference, is the settlement meeting at which parties are required to attempt in good faith to settle the litigation; however, it is unclear if this second meeting is to take place within 45 days of the initial case management conference (described below) or the meet and confer conference described in §21167.6(c). According to the author, it is the former. *The committee should amend the bill to reflect this intent.*

- Proposed §21167.8.5 requires a respondent public agency to file a request that the court schedule an initial case management conference

within 30 days, if feasible, to discuss various procedural issues relating to potential settlement, preparation of the administrative record, document inclusion, and filings of court documents. The parties would also be required to meet and confer 10 days before the initial case management conference, which may be partially satisfied by the meet and confer conference described above.

While the additional meeting opportunities are aimed at facilitating a smoother and more efficient litigation process, the new procedural requirements may be perceived as overly-complicated and may cause unnecessary confusion; especially since the timing required of one event is triggered by the occurrence of another. Under SB 950, there would be 5 meetings: (1) a meet and confer conference, (2) an initial meeting to discuss the potential for settlement discussions, (3) a settlement meeting, (4) an initial case management conference, and (5) another meet and confer meeting 10 days before the initial case management conference. The multiple meetings appear to have overlapping topics and similar names, potentially increasing the likelihood of confusion.

The author should commit to seek ways to simplify these requirements and continue to work on the language to ensure that it is clearly written and does not lead to confusion.

7) *Closes a CEQA loophole in the Initiative Process*. This bill closes a loophole in statute that allows a local governing body to bypass CEQA review through directly adopting a proposed local initiative.

Background. In 1911, California voters amended the state constitution to reserve to themselves the powers of initiative and referendum. While the basic procedures governing the state initiative process are found in the state constitution, Article II, Section 11 of the California Constitution generally tasks the state Legislature with establishing procedures that govern the local initiative process. Unlike the state initiative process, where there is no formal procedure for an initiative to be directly adopted by the Legislature, the local initiative process generally gives the local governing body the authority to adopt a proposed initiative measure without alteration, thereby avoiding the necessity of a public vote on the initiative.

When CEQA was enacted by the Legislature in 1970 through the passage of AB 2045 (Select Committee on Environmental Quality, Chapter 1433, Statutes of 1970), it did not expressly address its applicability to measures proposed or adopted through the initiative process. Subsequent court cases, however, have

held that the provisions of CEQA do not apply to initiatives proposed by voters and adopted at an election. In *Stein v. City of Santa Monica* (1980), 110 Cal. App. 3d 458, the California 2nd District Court of Appeals found that CEQA did not apply to a rent control charter amendment submitted to the voters of the City of Santa Monica through a voter-proposed initiative. In its decision, the court noted that the adoption of the measure "involved no discretionary activity directly undertaken by the city," but instead "was an activity undertaken by the electorate and did not require the approval of the governing body." The court further noted that "[t]he acts of placing the issue on the ballot and certifying the result as a charter amendment qualifies as a nondiscretionary ministerial act not contemplated by CEQA." Subsequent court decisions reached the same conclusion—namely, that measures submitted to (and approved by) voters through a voter-proposed initiative are not subject to CEQA. In addition, CEQA guidelines specifically provide that voter-proposed initiatives are not subject to environmental review.

Even when a local governing body takes a discretionary action to approve a measure that was first proposed though an initiative, however, the California Supreme Court has ruled that the governing body is not first required to comply with CEQA. When a local initiative petition is submitted that has a sufficient number of signatures, the local governing body generally has the option of adopting that initiative measure outright, rather than submitting the measure to the voters for their consideration. Notwithstanding the fact that the decision to adopt a voter-proposed initiative measure is a discretionary decision, rather than a ministerial one, the California Supreme Court ruled in *Tuolumne Jobs & Small Business Alliance v. The Superior Court of Tuolumne County* (2014), 59 Cal. 4th 1029, that when a city council adopts a voter-proposed initiative in accordance with the state law, rather than submitting that measure to the voters for their consideration, the city council does not need to comply with CEQA before adopting the measure. In reaching that conclusion, the court noted that the provisions of the Elections Code allowing for a local governing body to adopt a voter-proposed initiative and the timelines for taking such an action are inconsistent with the timelines and procedures for review of a proposed project under CEQA.

When the California Supreme Court reached its decision in *Tuolumne Jobs & Small Business Alliance*, it acknowledged concerns that the initiative process could be used as a tool to evade CEQA review. Nonetheless, the Court declared that "those concerns are appropriately addressed to the Legislature."

The ability for a local governing body to directly adopt a proposed local initiative creates the potential for a project to bypass CEQA reviews. This bill,

by amending those initiative provisions, instead requires that the proposed local initiative be subject to voter approval.

Some stakeholders contend that this change would reduce citizen access to the ballot by not allowing voter-sponsored initiatives to be approved directly by the legislative body. However, while SB 950 would prohibit legislative bodies from directly approving such initiatives; SB 950 would also require that the initiative be sent to the voters for voter approval. Since voters would be the ultimate decider on if the initiative is passed, arguably, SB 950 would give citizens more access to the ballot, not less.

Staff notes, under existing law, a legislative body could directly adopt an initiative, that would otherwise be considered a project under CEQA, if the petition is signed by 10% of voters of the votes cast for the respective jurisdiction in the last gubernatorial election. This compares to SB 950's proposal, where a majority is required to approve an initiative; arguably giving the public greater ability to participate in deciding what projects are built in their communities.

Request from the Chair. Recognizing the Senate's commitment to addressing the state's housing crisis, the Chair of the Senate Environmental Quality Committee would like a commitment from the author to work with the appropriate stakeholders to exempt housing projects that meet specified baseline environmental standards, as would be determined, from the changes that this bill makes to these local initiative provisions.

8) Comments from Senate Judiciary Committee.

This bill is within the Judiciary Committee's jurisdiction, primarily because it streamlines judicial and administrative procedures under CEQA. The bill also adds provisions that promote inclusivity, public participation, and environmental justice.

The Judiciary Committee has historically favored consensus-based efforts to create process efficiencies that maintain CEQA's integrity, such as the author's SB 122 (Stats. 2015, Ch. 476), which provided for a public database of certain documents and provided for the concurrent preparation of the administrative record. Despite CEQA's low litigation rates,[1] some project applicants argue that the risk of litigation and abusive tactics add uncertainty and delay to

[1] *Just the Facts: An Evidence-Based Look at CEQA Streamlining and CEQA's Role in Development*, Senate Judiciary Committee and Environmental Quality Committee Informational Hearing Background Paper (2019) pp. 10-12, available at https://sjud.senate.ca.gov/sites/sjud.senate.ca.gov/files/march_12_ceqa_hearing_background_paper.pdf.

development projects. There appears to be broad consensus that many of CEQA's procedural provisions should be updated to better facilitate efficient resolution of claims and reduce the potential for abuse, but there is little agreement as to how to accomplish that.

Arguably, one reason that a negative perception of CEQA persists is that legislation is typically sponsored by a discrete set of stakeholders who target a particular aspect of CEQA that affects their interests, leading to piecemeal changes that have caused the statute to become ungainly in some respects. This bill represents a departure from that paradigm. It is the product of the collaboration of a diverse coalition of stakeholders who adopted a holistic approach that necessitates compromise in the service of improving the statute's overall functioning.

9) *Pending policy questions*. As this bill moves forward, the author will need to work with committee staff to ensure the policy concerns are addressed.

Related Legislation

AB 3279 (Friedman) revises CEQA litigation procedures by (1) reducing the deadline for a court to commence hearings from one year to 270 days, (2) providing that a lead agency may decide whether a plaintiff prepares the administrative record, and (3) authorizing a court to issue an interlocutory remand. AB 3279 has been referred to the Assembly Appropriations Committee.

SOURCE:

Planning and Conservation League (sponsor)

SUPPORT:

Council of Infill Builders

OPPOSITION:

American Council of Engineering Companies, California
Associated General Contractors
Association of California Water Agencies (ACWA)

Brea Chamber of Commerce
Building Owners and Managers Association of California
California Apartment Association
California Association of Realtors
California Building Industry Association
California Business Properties Association
California Chamber of Commerce
California Construction & Industrial Materials Association
California Council for Affordable Housing
California Farm Bureau Federation
California Forestry Association
California Retailers Association
Chino Valley Chamber of Commerce
Folsom Chamber of Commerce
Fontana Chamber of Commerce
Gilroy Chamber of Commerce
Greater Riverside Chambers of Commerce
Industrial Environmental Association
International Council of Shopping Centers
Laguna Niguel Chamber of Commerce
League of California Cities
Lodi Chamber of Commerce
Long Beach Area Chamber of Commerce
Murrieta Wildomar Chamber of Commerce
Naiop of California
North Orange County Chamber of Commerce
North San Diego Business Chamber
Oceanside Chamber of Commerce
Orange County Business Council
Pleasanton Chamber of Commerce
Rural County Representatives of California
San Diego Regional Chamber of Commerce
San Gabriel Valley Economic Partnership
San Marcos Chamber of Commerce
Santa Maria Valley Chamber of Commerce
Santa Rosa Metro Chamber of Commerce
Southwest California Legislative Council
State Building and Construction Trades Council of Ca
The Silicon Valley Organization
The Two Hundred
Torrance Area Chamber of Commerce
Tulare Chamber of Commerce

West Coast Lumber & Building Material Association
Western Growers Association
Western States Petroleum Association
Western United Diaries

-- END --

SENATE COMMITTEE ON ENVIRONMENTAL QUALITY
Senator Allen, Chair
2019 - 2020 Regular

Bill No:	SB 974		
Author:	Hurtado		
Version:	3/24/2020	**Hearing Date:**	5/29/2020
Urgency:	No	**Fiscal:**	Yes
Consultant:	Genevieve M. Wong		

SUBJECT: California Environmental Quality Act: small community water system: exemption

DIGEST: Exempts from CEQA projects that primarily benefit a small disadvantaged community water system, as defined by the bill, by improving the water system's water quality, water supply, or water supply reliability; by encouraging water conservation; or by providing drinking water service to existing residences within a disadvantaged community where there is evidence of contaminated or depleted drinking water wells.

ANALYSIS:

Existing law:

1) Under the California Environmental Quality Act (CEQA) (Public Resources Code (PRC) 21000 et seq.):

    a) Requires lead agencies with 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. CEQA includes various statutory exemptions as well as categorical exemptions in the CEQA guidelines (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)).

2) Existing federal law: the federal Safe Drinking Water Act (SDWA), authorizes the United States Environmental Protection Agency (U.S. EPA) to set standards for drinking water quality, known as maximum contaminant levels

(MCLs) and to oversee the states, localities, and water suppliers who implement those standards (42 United States Code §§300f et seq.).

3) Existing state law:

   a) Declares it to be established state policy that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes (Water Code §106.3)

   b) Under the California Safe Drinking Water Act (SDWA):

      i) Requires the State Water Resources Control Board (SWRCB) to adopt drinking water standards for contaminants in drinking water that are consistent with those standards set by the U.S. EPA, as specified (Health and Safety Code (HSC) §116365).

      ii) Requires SWRCB to encourage the consolidation of small community water systems that serve disadvantaged communities when consolidation will be help the affected agencies and the state meet specific goals (HSC §116326).

      iii) Authorizes SWRCB, in the following circumstances, to order consolidation with a receiving water system:

         a) When a public water system or a state small water system, serving a disadvantaged community, consistently fails to provide an adequate supply of safe drinking water.

         b) When a disadvantaged community is substantially reliant on domestic wells that consistently fail to provide an adequate supply of safe drinking water (HSC §116682).

      iv) Authorizes SWRCB to order extension of service to an area within a disadvantaged community that does not have access to safe drinking water as long as the extension of service is an interim extension in preparation for consolidation (HSC §116682).

      v) Defines "community water system" as a public water system that serves at least 15 service connections used by yearlong residents or regularly services at least 25 of the same persons over six months per year.

vi) Defines "disadvantaged community" as a community with an annual median household income that is less than 80 percent of the statewide annual median household income (HSC §116681(f), WAT §79505.5).

vii) Defines "small community water system" as a community water system that serves no more than 3,300 service connections or a yearlong population of no more than 10,000 persons.

This bill:

1) Exempts from CEQA projects that primarily benefit a small disadvantaged community water system by:

   - improving the small disadvantaged community water system's water quality, water supply, or water supply reliability;
   - encouraging water conservation; or
   - providing drinking water service to existing residences within a disadvantaged community where there is evidence of contaminated or depleted drinking water wells.

   a) Does not apply to facilities that are constructed primarily to serve future growth and facilities that are used to dam, divert, convey surface water.

2) Defines "small disadvantaged community water system" to mean either of the following:
   a) A small community water system that serves one or more disadvantaged communities.
      i) Defines "small community water system" as a community water system that serves no more than 3,300 service connections or a yearlong population of no more than 10,000 persons.
      ii) Defines "community water system" to mean a public water system that serves at least 15 service connections used by yearlong residents or regularly serves at least 25 yearlong residents within the area served by the public water system.
   b) A nontransient noncommunity water system that primarily serves one or more schools that serve one or more disadvantaged communities.
      i) Defines "nontransient noncommunity water system" as a public water system that is not a community water system and that regularly serves at least 25 of the same persons more than six months per year.

3) Defines "disadvantaged community" as a community with an annual median household income that is less than 80 percent of the statewide annual median household income.

Background

1) Background on CEQA

   a) *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. Prior to approving a project that has received environmental review, an agency must make certain findings. If mitigations measures are required or incorporated into a project, the agency must adopt a reporting or monitoring program to ensure compliance with those measures.

   b) *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, 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. A study area for a proposed project must not be limited to the footprint of the project because many environmental impacts of a development extend beyond the identified project boundary. Also, CEQA stipulates that the environmental

impacts must be measured against existing physical conditions within the project area, not future, allowable conditions.

c) *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 or tribal cultural resource). The environmental impact caused by the proposed mitigation measure should be evaluated as well. 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.

2) *California's Safe Drinking Water Program*. The federal Safe Drinking Water Act requires the U.S. EPA to establish mandatory nationwide drinking water standards. It also requires water systems to monitor public water supplies to ensure drinking water standards are met and report to consumers if the standards are not met.

The California Safe Drinking Water Act (SDWA) generally provides for the operation of public water systems and enforces the federal act. And, as required by the federal act, the state's drinking water program must set drinking water standards that are at least as stringent as the U.S. EPA's standards. Each community water system also must monitor for a specified list of contaminants, and the findings must be reported to SWRCB.

In 2012, California became the first state to enact a Human Right to Water law (AB 685, Eng, Chapter 524, Statutes of 2012), declaring that every human has a right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitation.

As of June 2019, there were 7,410 public water systems in California classified into three different categories: 2,894 community water systems serving communities with full-time residents; 1,488 non-transient non-community water systems serving the same non-residents at least six months per year (e.g., schools places of work, and prisons); and 3,028 transient non-community water

systems serving nonresident at least 180 days per year (e.g., parks, motels, restaurants, and campgrounds).

3) *Contaminated levels in drinking water.* Under the federal SDWA, the U.S. EPA sets national maximum contaminant levels (MCLs) in drinking water for human consumption to protect the health of its users. Under California SDWA, SWRCB can set MCLs that are more restrictive than those set by the US EPA and can set MCLs for those contaminants not covered by the US EPA.

   When larger systems exceed MCLs, those problems are usually corrected promptly. In contrast, over time, small water systems because of their small base of rate payers, are much less able to remain compliant with state drinking water standards. This is especially true when water system users include disadvantaged communities. Because domestic wells and state small water systems are not subject to SDWA, there is no data on the compliance levels of these sources of water.

   According to SWRCB Division of Drinking Water's 2018 Compliance Report, of the 7,410 public water systems, 366 public water systems had one or more violations of an MCL or of treatment procedures of contaminated waters in 2018. Of these, 90% are smaller public water systems, such as community water systems having less than 500 service connections and noncommunity water systems.

4) *CEQA and drinking water.* CEQA provides various exemptions for drinking water-related projects that meet certain criteria. These include:

   - Emergency repairs to public service facilities necessary to maintain service (PRC 21080(b)(2). Under CEQA Guidelines 15269(b), this exemption applies to repairs to publicly or privately owned facilities necessary to maintain service essential to the public health, safety, or welfare, including repairs that require a reasonable amount of planning in order to address an anticipated emergency.
   - Projects that are less than one mile in length within a public street or highway or any other public right-of-way for the installation of a new pipeline or the maintenance, repair, restoration, reconditioning, relocation, replacement, or demolition of an existing pipeline (PRC 21080.21).
   - Operation, repair, maintenance, permitting, leasing, licensing, or minor alternation of existing public or private structures, facilities, mechanical equipment, or topographical features. This exemption is limited to activities that involve "negligible" or "no expansion of

previous use beyond that existing at the time of the lead agency's determination." (CEQA Guidelines §15301)

- Replacement or reconstruction of existing structures or facilities. New structures must be located on the same site and have substantially the same purpose and capacity as the replaced structure; size of the project is irrelevant (CEQA Guidelines §15302).

5) *Prior interim drought relief measures issued by the state.* In 2015, SB 88 (Chapter 27, Stats, 2015) included three interim CEQA exemptions in response to the drought emergency declared by the Governor in January 2014. SB 88 provided that CEQA did not apply to any project approved or carried out by a public agency to mitigate drought conditions involving construction or expansion of recycled water pipelines, directly related infrastructure within existing rights of way, and directly related groundwater replenishment. To qualify for these exemptions, projects must not affect wetlands or sensitive habitat, and construction impacts must be fully mitigated consistent with "applicable law." These exemptions remained in effect until January 1, 2017. The end of the drought emergency was declared by then-Governor Brown on April 7, 2017.

Comments

1) *Purpose of Bill.* According to the author, "There are more than 1 million Californians without safe drinking water, and low-income communities and communities of color are more likely to be exposed to contaminated drinking water. Severely disadvantaged communities are particularly suffering under failed water distribution systems, facing water outages, and lack potable water. Whether on private domestic wells of community water systems, low-income communities have historically had fewer resources to upgrade infrastructure. Consequently, an insufficient water supply means deciding whether to shower or wash clothes. Although California was the first state in the nation to recognize a comprehensive Human Right to Water in 2012, that promise remains unfilled.

"SB 974 creates a narrow exemption from CEQA for drinking water systems serving a disadvantaged community with fewer than ten thousand people as well as projects owned and operated by schools that serve a disadvantaged community. SB 974 helps the community seek necessary infrastructure to address their water supply needs by avoiding the timely and costly burden of CEQA."

2) *What do we lose with a CEQA exemption?* Often groups will seek a CEQA exemption in order to expedite construction of a particular type of project and reduce costs. In this case, a CEQA exemption is sought to avoid costs and delays associated with the environmental review process. According to Self Help, one of the co-sponsors,

"In cases where an existing exemption does not apply, Mitigated Negative Declarations ("MNDs") are prepared for small disadvantaged community drinking water projects. Environmental Impact Reports are unheard of for projects at this small scale. Still, MNDs can take a year to draft (and review and revisions from the SWRCB can add as much as another year), and regularly cost about $40,000 to prepare. However, the costs can be much higher; a particularly challenging recent project's CEQA process totaled $84,500."

Providing an exemption, however, can overlook the benefits of environmental review: to inform decisionmakers and the public about project impacts, identify ways to avoid or significantly reduce environmental damage, prevent environmental damage by requiring feasible alternatives or mitigation measures, disclose to the public reasons why an agency approved a project if significant environmental effects are involved, involve public agencies in the process, and increase public participation in the environmental review and the planning processes. If a project is exempt from CEQA, certain issues will not be considered nor addressed.

Even though the ultimate goal is to provide drinking water to disadvantaged communities quickly, and not have projects to be delayed by the environmental review process, CEQA ensures that projects are approved in accordance with informed and responsible decisionmaking. It ensures that decisionmakers, project proponents, and the public know of the potential short-term, long-term, and maybe permanent environmental consequences of a particular project before the project is approved. CEQA gives local governments and project proponents the opportunity to mitigate, or avoid if possible, those impacts associated with a particular water project.

3) *Is environmental review too expensive?* As discussed above, sponsors point to costs associated with conducting an environmental review and say that the extensive review delays the construction of necessary water projects. Do those revisions help mitigate or avoid any identified environmental impacts? What type of feedback and revisions did SWRCB provide? Did the feedback and revisions result in a better project?

4) *Exempting an extremely broad category of projects*. Projects exempted under SB 974 are those that "primarily benefit a small disadvantaged community water system by improving the small disadvantaged community water system's water quality, water supply, or water supply reliability; by encouraging water conservation; or by providing drinking water service to existing residences within a disadvantaged community where there is evidence of contaminated or depleted drinking water wells," with two exceptions. This broad language covers a wide range of projects, each of which would not be subject to any type of environmental review. According to information provided by stakeholders, this broad exemption is necessary because the drinking water solutions for disadvantaged communities and schools are varied. Some common elements of project solutions include, but are not limited to: water wells that provide water that meet drinking water standards; storage tanks and booster pumps; underground pipelines to improve storage operations; connecting public water systems together or service homes previously on contaminated or depleted private wells; treatment process packages; and water system accessories including meters, fire hydrants, water quality sampling stations, valves, and air releases.

   Broad language such as "improving….water quality, water supply, or water reliability," "encouraging water conservation" and "evidence of contaminated or depleted drinking water wells," gives the bill an expansive scope. Does this include the construction of desalination plants as a way to improve water supply or water reliability? While desalination plants have many positive aspects, critics of such projects have concern that desalination plants require a lot of energy to process, more than any other water supply or demand management option (implying further concerns for dependence on fossil fuels); produce high amounts of greenhouse gas emissions; and, depending on the location and decision of the plant, have a risk of introducing biological or chemical contaminants into the water supply. What types of projects would be considered "encouraging water conservation" and what types of projects would not? Is there a threshold for what would be considered "water conservation"? What does it mean to have a contaminated drinking water well? Is it a well that is still in compliance with MCLs but has trace amounts of contamination or is it when contamination levels exceed MCLs? Given the broad language, it is hard to imagine what wouldn't be included in the exemption.

   Not knowing what projects could potentially qualify for SB 974's exemption makes it difficult to be able to foresee the associated environmental impacts. Could a project that is exempt from SB 974 actually be more detrimental to a community because of those unknown associated environmental impacts? Would it be prudent for decisionmakers to move forward with a project without

being fully informed or without looking for ways to mitigate or avoid those impacts? For example, for a project that consolidates two water systems by connecting the pipelines – could it affect a historical resource? Is there a right of way that the pipeline could be constructed along in order to minimize the environmental impacts? Could it be going through a hazardous materials site? Under this bill, answers to these questions, and more, will not be considered or even known, and neither will their potential mitigation measures or available alternatives.

While providing safe and affordable drinking water to California's disadvantaged communities is certainly a priority, so is ensuring that those disadvantaged communities are not being exposed to detrimental environmental impacts - things that would normally be covered during the environmental review process. While well-intentioned, such a sweeping exemption could be a "blank check" for any type of water project that would purport to improve water quality, supply, or reliability for a small disadvantaged community water system.

5) *Committee amendments*. To address the concerns addressed in this analysis, the following amendments are suggested:

   a) Make facilities that are used to desalinate seawater or brackish surface water ineligible for the exemption.
   b) Specify that, for projects that provide drinking water service to existing residences within a disadvantaged community, there is evidence that the water exceeds maximum contaminant levels for primary or secondary drinking water standards or where the drinking water well is no longer able to produce an adequate supply of safe drinking water.
   c) Limit the exemption to projects that consists solely of the installation, repair, or reconstruction of any of the following:
      i) Drinking water groundwater wells having a maximum flowrate of up to 250 gallons per minute.
      ii) Drinking water treatment facilities having a footprint of less than 2,500 square feet in areas that are not located in an environmentally sensitive area.
      iii) Drinking water storage tanks having a capacity of up to 250,000 gallons.
      iv) Booster pumps and hydro-pneumatic tanks.
      v) Pipelines less than one mile in length in a road right of way or up to seven miles in length in a road right of way when the project is required to address threatened or current drinking water violations.
      vi) Water service lines.

vii) Minor drinking water system accessories including, but not limited to, system and service meters, fire hydrants, water quality sampling stations, valves, air releases and vacuum break valves, emergency generators, backflow prevention devices, and accessory enclosures.

d) Subject a project to all of the following:
   i) Does not affect wetlands or sensitive habitat.
   ii) Unusual circumstances do not exist that would cause a significant effect on the environment.
   iii) Is not located on a hazardous waste site which in included on any list compiled pursuant to Government Code Section 65962.5.
   iv) Does not have the potential to cause a substantial adverse change in the significance of a historical resource.
   v) The construction impacts are fully mitigated consistent with applicable law.
   vi) The cumulative impact of successive reasonably anticipated projects of the same type as the project, in the same place, over time, is not significant.

Related/Prior Legislation

AB 2050 (Caballero, 2018) would have enacted the Small System Water Authority Act of 2018, which authorizes the creation of a small system water authority and requires consolidation of failing water systems into an Authority. AB 2050 was vetoed.

AB 2501 (Chu, Chapter 871, Statutes of 2018) expanded SWRCB's authority to order the consolidation of, and appoint an administrator for, drinking water systems that serve a disadvantaged community and that consistently fail to provide safe, affordable drinking water.

SB 552 (Wolk, Chapter 773, Statutes of 2016) authorized SWRCB to contract with an administrator to provide administrative and managerial services to a designated public water system to assist with the provision of an adequate and affordable supply of safe drinking water.

SB 1263 (Wieckowski, Chapter 843, Statutes of 2016) requires a person submitting an application for a permit for a proposed new public water system to first submit a. Preliminary technical report to SWRCB. Authorizes SWRCB to deny a permit for a new public water system if it determines that it is reasonably foreseeable that the proposed new public water system will be unable to provide affordable, safe drinking water.

SB 88 (Committee on Budget and Fiscal Review, Chapter 27, Statutes of 2015) included three interim CEQA exemptions in response to the drought emergency declared by the Governor in January 2014. SB 88 exempted from CEQA, until January 1, 2017, any project approved or carried out by a public agency to mitigate drought conditions involving construction or expansion of recycled water pipelines, directly related infrastructure within existing rights of way, and directly related groundwater replenishment. To qualify for these exemptions, projects must not affect wetlands or sensitive habitat, and construction impacts must be fully mitigated consistent with "applicable law." SB 88 also authorizes SWRCB to order consolidation with a receiving water system where a public water system within a disadvantaged community consistently fails to provide an adequate supply of safe drinking water.

SOURCE: Self-Help Enterprises and Rural Community Assistance Corporation (Co-sponsors)

SUPPORT:

Allensworth Community Services District
California Association of Realtors
East Orosi Community Services District
Hardwick Water Company
Lanare Community Services District
Lemon Cove Sanitary District
Plainview Mutual Water Company
Richgrove Community Services District
Rural County Representatives of California
Sultana Community Services District
Yettem-seville Community Services District

OPPOSITION:

State Building and Construction Trades Council of CA

-- END --

SENATE COMMITTEE ON ENVIRONMENTAL QUALITY
Senator Allen, Chair
2019 - 2020 Regular

Bill No:	SB 995		
Author:	Atkins		
Version:	5/19/2020	**Hearing Date:**	5/29/2020
Urgency:	No	**Fiscal:**	Yes
Consultant:	Genevieve M. Wong		

SUBJECT: Environmental quality: Jobs and Economic Improvement Through Environmental Leadership Act of 2011: housing projects

DIGEST: Extends for four years the Jobs and Economic Improvement Through Environmental Leadership Act of 2011 until 2025; and makes housing projects that meet certain requirements, including specified affordable housing requirements, eligible for certification under the Act.

ANALYSIS:

Existing law, under the California Environmental Quality Act (CEQA):

1) 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 (CEQA includes various statutory exemptions, as well as categorical exemptions in the CEQA guidelines). (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)).

2) Allows lead agencies to prepare master environmental impact reports (master EIRs) for specified projects that include smaller, individual subsequent projects. Proscribes information included in a master EIR, including a description of anticipated projects that would be within the scope of the master EIR and a description of potential impacts of the anticipated subsequent projects (PRC §21157).

3) 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 (PRC §§21165 et seq.) .

4) Establishes the Jobs and Economic Improvement Through Environmental Leadership Act of 2011 (AB 900, Buchanan, Gordon, Chapter 354, Statutes of 2011), which establishes CEQA administrative and judicial review procedures for an "environmental leadership" project. Among the provisions of AB 900 (PRC §21178 et seq.):

   a) Establishes procedures for expedited judicial review (i.e. requiring the courts to resolve lawsuits within 270 days) for "environmental leadership" projects certified by the Governor and meeting specified conditions.

   b) Defines "environmental leadership" project as a CEQA project that is one of the following:

      i) A residential, retail, commercial, sports, cultural, entertainment, or recreational use project that is certified as LEED gold or better by the United States Green Building Council, that is located on an infill site, and, where applicable, that achieves a 15% greater standard for transportation efficiency than for comparable projects.

         a) Requires a project that is within a metropolitan planning organization for which a sustainable communities strategy (SCS) or alternative planning strategy (APS) is in effect, to be consistent with specified policies in either the SCS or APS, which, if implemented, would achieve greenhouse gas (GHG) emission reduction targets.

      ii) A clean renewable energy project that generates electricity exclusively through wind or solar, but not including waste incineration or conversion.

      iii) A clean energy manufacturing project that manufactures products, equipment, or components used for renewable energy generation, energy efficiency, or for the production of clean alternative fuel vehicles.

   c) Allows a person proposing to construct a leadership project to apply to the Governor for certification that the leadership project is eligible for streamlining.

   d) Authorizes the Governor to certify a leadership project if the Governor finds the project meets all of the following conditions:

i) The project will result in a minimum investment of $100 million in California upon completion of construction.

ii) The project creates high-wage, highly skilled jobs that pay prevailing wages and living wages, provides construction jobs and permanent jobs for Californians, and helps reduce unemployment.

iii) The project does not result in any net additional GHG emissions, including emissions from employee transportation, as determined by the Air Resources Board pursuant to the California Global Warming Solutions Act of 2006.

iv) The project applicant has entered into a binding and enforceable agreement that all mitigation measures required under CEQA shall be conditions of approval of the project, and those conditions will be fully enforceable by the lead agency or another agency designated by the lead agency. In the case of environmental mitigation measures, the applicant agrees, as an ongoing obligation, that those measures will be monitored and enforced by the lead agency for the life of the obligation.

v) The project applicant agrees to pay the costs of the Court of Appeal in hearing and deciding any case.

vi) The project applicant agrees to pay the costs of preparing the administrative record for the project concurrent with review and consideration of the project pursuant to CEQA, in a form and manner specified by the lead agency for the project.

e) Requires the Judicial Council to adopt a rule of court to establish procedures that require resolution within 270 days, including any appeals, of a lawsuit challenging the certification of the EIR or any project approvals for a certified environmental leadership project.

f) Sets requirements for preparation and certification of the administrative record for a leadership project certified by the Governor.

g) Required the Judicial Council to report to the Legislature on or before January 1, 2017, on the effects of AB 900 on the administration of justice.

This bill:

1) Requires a lead agency to prepare a master EIR for a general plan, plan amendment, plan element, or specific plan for housing projects where the state has provided funding for the preparation of the master EIR.

2) Extends the Governor's authority to certify a leadership project to January 1, 2024, and repeals AB 900 January 1, 2025.

3) Makes housing projects that meet certain requirements eligible for certification, including:

   a) The project is located on an infill site.

   b) For a project located within a metropolitan planning organization for which a sustainable communities strategy or alternative planning strategy is in effect, the project is consistent with the general use designation, density, building intensity, and applicable policies specified in either a sustainable communities strategies or an alternative planning strategy, as specified.

   c) The project will result in a minimum investment of $15 million in California upon completion.

   d) At least 15 percent of the housing project is affordable housing.

Background

1) *California's housing shortage.* California is in the midst of a serious housing crisis. California is home to 21 of the 30 most expensive rental housing markets in the country, which has had a disproportionate impact on the middle class and the working poor. Housing units affordable to low-income earners, if available, are often in serious states of disrepair. The Department of Housing and Community Development (HCD) estimates that approximately 2.7 million lower-income households are rent-burdened (meaning they spend at least 30% of their income on rent), 1.7 million of which are severely rent-burdened (spending at least 50% of their income on rent). Not a single county in the state has an adequate supply of affordable homes. According to a 2015 study by the California Housing Partnership Corporation, California has a shortfall of 1.5 million affordable homes and 13 of the 14 least affordable metropolitan areas in the country.

A major factor in this crisis is the state's housing shortage. From 1954-1989, California constructed an average of more than 200,000 new homes annually, with multifamily housing accounting for the largest share of housing production. Since then, however, construction has dropped significantly. HCD estimates that approximately 1.8 million new housing units – 180,000 new homes per year, are needed to meet the state's projected population and housing growth by 2025.

2) *Jobs and Economic Improvement Through Environmental Leadership Act of 2011.* Existing law provides a framework for expediting CEQA review of major projects. The Jobs and Economic Improvement Through Environmental Leadership Act of 2011 (hereafter AB 900 or Act), established specified administrative and judicial review procedures for the review of the environmental review documents and public agency approvals granted for designated residential, retail, commercial, sports, cultural, entertainment, or recreational use projects, known as Environmental Leadership Development Projects (ELDP). To qualify as an ELDP, the project must meet specified objective environmental standards. The Legislature has also applied similar expedited frameworks for specific sports stadiums that meet certain objective environmental standards.

3) *ELDP Projects to Date.* According to the Office of Planning and Research, the following projects have had AB 900 applications submitted:

- McCoy Solar Energy Project (January 12, 2012);
- Apple Campus 2 (April 19, 2012);
- Soitec Solar Energy Project (January 7, 2013);
- 8150 Sunset Boulevard (January 31, 2014);
- Event Center and Mixed-Use Development at Mission Bay Blocks (The Golden State Warriors Arena) (February 17, 2014);
- Qualcomm Stadium Reconstruction Project (August 25, 2015);
- Crossroads Hollywood (August 29, 2016);
- 6220 West Yucca Project (April 17, 2017);
- 1045 Olive Street Project (December 19, 2017);
- Hollywood Center Project (May 2, 2018);
- Potrero Power Station Mixed-use Project (July 18, 2018);
- 10 Van Ness Avenue Mixed-Use Project (August 8, 2018);
- 3333 California Street Project (August 24, 2018);
- Inglewood Basketball and Entertainment Center (AB 987) (January 3, 2019);
- Hollywood & Wilcox Mixed-Use Project (February 5, 2019);

- Oakland Sports and Mixed-Use Project at Howard Terminal (March 20, 2019 – *not yet certified*);
- Balboa Reserve (June 25, 2019);
- Downtown West Mixed Use Plan (September 3, 2019);
- California Northstate University Medical Center Project (September 24, 2019).

This does not include specified projects to which the Legislature has applied AB 900-like procedures. These projects are:

- SB 292 (Padilla, Chapter 353, Statutes of 2011) which proposed a downtown Los Angeles football stadium and convention center that would achieve specified traffic and air quality mitigations. This project has not proceeded.

- SB 743 (Steinberg, Chapter 386, Statutes of 2013) established special CEQA procedures modeled after SB 292 for the Sacramento Kings arena project and included specified traffic and air quality mitigations.

- AB 734 (Bonta, Chapter 959, Statutes of 2018) established special CEQA procedures modeled after AB 900 for the Oakland Sports and Mixed-Use Project. Unlike AB 900, AB 734 required that 50% of the GHG emissions reductions necessary to achieve the zero-net additional GHG emissions requirement be from on-site and local reduction measures, limited the type of GHG offset credits that can be purchased to achieve the other 50% of the necessary GHG emissions reductions, and required a transportation demand management plan that achieves a 20% reduction in vehicle trips.

- AB 987 (Kamlager-Dove, Chapter 961, Statutes of 2018) was similar to AB 734 but applied to a proposed basketball arena for the Los Angeles Clippers in Inglewood. AB 987 required a transportation demand management plan that achieves 15% reduction in vehicle trips by 2030 and additional reductions in local criteria pollutants.

4) *Review of ELDPs*. In April 2019, the Senate Office of Research (SOR) released a report describing projects that have qualified for expedited CEQA judicial review pursuant to AB 900 and statutes similar to AB 900. In addition to analyzing the estimated benefits derived from ELDPs, the report also examined the legal challenges faced by three projects: the Sacramento Kings Arena, the

Golden State Warriors arena, and the 8150 Sunset Boulevard mixed-use development project; each discussed in more detail below. The report also included some recommendations to the Legislature that would provide clarity to the act, increase reporting requirements, and strengthen environmental attributes of the ELDPs.

5) *ELDPs and housing.* According to the SOR report, 10 of the 19 ELDPs have included a housing component. As of the date of the SOR report, none of the projects have been completed. Below is a summary of housing projects and their proposed housing units.

Project Name	**Description**	***Proposed* Housing Units**
8150 Sunset Boulevard	Residential housing, retail, and restaurant redevelopment on a 2.56-acre site	249 residential units, 28 of which will be affordable housing (approx. 11%)
Crossroads Hollywood	Residential housing units and hotel rooms	950 residential
6220 West Yucca	Residential housing and hotel redevelopment on a 1.16-acre site	210 residential
Potrero Power Station	Covert a closed power station to housing, commercial, community facilities, and entertainment/assembly uses on a 29-acre lot	2,400 to 3,000 residential
Hollywood Center	Residential housing and usable open space development on a 4.46-acre site	872 residential, 133 of which will be affordable senior housing (approx. 15%)
1045 Olive Street	Residential housing and commercial redevelopment on a 0.96-acre site	974 residential
10 South Van Ness Avenue	Residential housing, public space, and business redevelopment on a 1.17-acre site	980 residential
Hollywood & Wilcox	Develop a mixed-use project composed of multifamily residential dwelling units and retail, office, and restaurant uses.	260 multifamily residential, up to 10% of which would be workforce housing
3333 California Street	Create new residential housing and retail, office, and childcare uses	558 residential, some of which would be affordable housing
Oakland Athletics Stadium (AB 734)	Baseball stadium, residential housing, hotel, entertainment, office, retail, and open space redevelopment on a 55-acre site	3,000 residential

Comments

1) *AB 900 lawsuits.* Of the projects that have been subject to AB 900, or similar expedited judicial review, four projects have been challenged under CEQA. Expedited judicial review does not always guarantee a 270 day timeframe and cases can take longer to resolve due to, among other reasons, (1) ambiguity if the 270 days applies to business days or calendar days and if it includes appeals to the Supreme Court, (2) non-CEQA related actions which are not subject to the 270 day timeframe that are filed in addition to CEQA actions, or (3) consolidation of many, and sometimes complicated, actions.

   a) *Sacramento Kings Arena.* Several CEQA lawsuits were filed against the Sacramento Kings Arena and were consolidated into *Adriana Gianturco Saltonstall et al. v. City of Sacramento.* The overarching claim was that the city prematurely approved the arena project because the EIR process (1) did not study an alternative area that would have involved remodeling an existing arena, (2) was deficient in analyzing traffic congestion on an interstate freeway, and (3) misrepresented the size of crowds inside and around the downtown area. The Sacramento Kings Arena was not certified pursuant to AB 900, but SB 743, which authorized the streamlining of the Arena, required that any CEQA-related judicial review, including appeals, be resolved within 270 days from the certification of the administrative record.

      The City of Sacramento certified the administrative record on June 2, 2014. On October 17, 2014, the trial court in Sacramento issued a decision denying all of the CEQA challenges. The Court of Appeal affirmed the trial court's decision on February 18, 2015, and the petition for review by the California Supreme Court was denied May 20, 2015.

      The SOR report notes that neither AB 900 nor SB 743 specified whether the 270 day limitation applies to calendar days or business days. Additionally, it is unclear whether appeals to the Supreme Court are included in timeframe. When including the appeal to the Supreme Court, the timeline between certification of the record and the Supreme Court denial for the Sacramento Kings Arena was 243 business days or 352 calendar days.

   b) *Golden State Warriors Arena and two lawsuits.* The AB 900 process cannot expedite or insulate a project from non-CEQA-related litigation and cannot ensure that a project will be completed faster.

In *Mission Bay Alliance et al. v. Office of Community Investment and Infrastructure,* Mission Bay Alliance, which is a coalition of University of California, San Francisco (UCSF) stakeholders, donors, faculty, and physicians, argued that (1) the 18,500-seat arena would congest area streets with traffic, slowing down access to the UCSF Medical Center at Mission Bay, which is located across the street from the proposed arena and (2) the arena is at odds with the life science research and health care facilities that have been built in the neighborhood.

The case was initially filed on January 7, 2016, in Sacramento County Superior Court. The Golden State Warriors moved for a change of venue which was granted. The CEQA case was received and filed in the San Francisco County Superior Court and on July 18, 2016, a trial court ruled in favor of the project sponsor, the Warriors. On November 29, 2016, the Court of Appeal issued its decision on the case, 225 business days or 327 calendar days after the petition was initially filed. The decision was appealed; and ultimately, in January 2017, the California Supreme Court declined to hear the case.

In the second lawsuit, the plaintiffs sought to invalidate an agreement between UCSF and the Warriors, which included a $10 million Mission Bay Transportation Improvement Fund for controlling traffic flow in the area. Although the CEQA case had concluded as of January, 2017, the second, non-CEQA-related case in Alameda was still pending at that time. The Warriors team has stated that the lawsuits delayed the opening of the arena by one year, to 2019. One lawsuit had special, fast-tracking CEQA-related litigation privileges and the other did not. Although AB 900 expedited the litigation process for the CEQA case, the second lawsuit demonstrates that CEQA is not the only body of law subject to civil litigation and that AB 900 does not guarantee a project from being litigation-free after 270 days.

c) *8150 Sunset Boulevard Mixed-Use Development.* Four separate CEQA cases were filed on December 1, 2016, challenging approval of the 8150 Sunset Boulevard project: *Los Angeles Conservancy v. City of Los Angeles*; *Fix the City, Inc. v. City of Los Angeles*; *JDR Crescent v. City of Los Angeles*; and *Manners v. City of Los Angeles*. The trial court ordered the four cases to coordinate and consolidate their arguments as much as possible, delaying initial hearing of the case. The Los Angeles Conservancy (LAC) petitioned the Superior Court to prevent the destruction of a bank building (the Lytton Building) that it stipulated had historical significance, while the other petitioners presented 24 allegations

of CEQA noncompliance. The trial court granted the LAC's petition in full on July 21, 2017, while denying the claims of the other parties on all other issues. The decision allowed the project to proceed but barred the proposed destruction of the Lytton Building. The subsequent Court of Appeal ruling was issued on March 23, 2018, with a modified opinion and denial of the request for a rehearing finalized on April 19, 2018. The Court of Appeal agreed with the city's claim that the trial court erred in finding it failed to comply with CEQA and rejected all cross-appeals from the petitioners except for one related to the conversion of a traffic lane. An appeal to the Supreme Court was denied on June 13, 2018.

Because the project was certified as an AB 900 project , it had a required judicial review timeline, including any appeals, of 270 days from certification of the administrative record. When excluding the appeal to the Supreme Court, the timeline between the administrative record certification and the final Court of Appeal's modified decision was 357 business days or 523 calendar days. When including the appeal to the Supreme Court, the timeline was 395 business days or 578 calendar days.

d) *Los Angeles Clippers Arena.* In January 2020, a petition was filed challenging the certification of a proposed Los Angeles Clippers basketball arena in Inglewood (*Saulo Eber Chan; MSG Forum, LLC v. Gavin C. Newsom; Joint Legislative Budget Committee*). Similar to the Sacramento Kings Arena, AB 987 required that any CEQA-related judicial review of the Los Angeles Clippers Arena, including appeals, be resolved within 270 days from certification of the administrative record. In its complaint, the petitioners allege that AB 987 violates the California Constitution because (1) it is invalid "special legislation," (2) it grants the Legislature power reserved for the executive and judicial branches, and (3) it curtails the judiciary's constitutional jurisdiction to review executive action in favor of review by a single legislative committee, violating the Constitution's separation of powers. This case is still pending.

2) *Guaranteed Time Frames.* Current law requires the courts to give CEQA-related cases preference over "all other civil actions… so that the action or proceeding shall be quickly heard and determined" (PRC §21167.1). In addition to this existing mandate, the AB 900 process provides that the courts, to the extent feasible, must complete the judicial review process in a given time frame for certain CEQA-related actions or proceedings. As a consequence, such mandates on a court delay access for other, unknown cases such as medical malpractice suits, wrongful death suits, or contract disputes, as well as potentially exacerbating a court's backlog on civil documents such as filing a

new civil complaint, processing answers and cross complaints, or processing a demurrer or summary judgement. Calendar preferences and guaranteed time frames create additional demands and burden on our courts that have very limited resources and a never-ending supply of cases to hear.

3) *Ensuring the "Leadership" in Environmental Leadership Development Project.* As originally enacted in 2011, AB 900 required ELDPs to, among other things, be certified as LEED silver or better, achieve a 10 percent greater standard for transportation efficiency for comparable projects, and not result in any net additional emission of greenhouse gases. Over the last nine years, those environmental standards have been strengthened to require LEED Gold certification and increase the transportation efficiency to 15 percent. As society continues to battle environmental impacts such as climate change, the standard of what is considered to be environmental leadership should also progress. Providing an expedited judicial review is a substantial benefit for developers and the environmental standards required should ensure that these projects are exemplary examples of environmental leadership and deserving of the preferential treatment they would receive in the judicial system.

   The Committee may wish to amend the bill to modernize and strengthen the environmental protections in the following ways:
   a) *Require LEED Platinum instead of LEED Gold.*
   b) *Require Tier 1 energy efficiency, as described in California Green Building Standards Code.*
   c) *Replace the 15% transportation efficiency requirement with a requirement that the project achieves 20% reduction in vehicle miles traveled per capita compared to existing development, as determined by the Governor's Office of Planning and Research.*

4) *ELDPs and affordable housing.* SB 995 adds a new category of projects that could qualify for AB 900 certification - affordable housing projects. To qualify, the project must, among other things, be located on an infill site, be consistent with a sustainable communities strategy or alternative planning strategy, have at least 15% of the project be dedicated to affordable housing, and must result in a minimum investment of $15 million in California. In comparison, ELDP residential projects currently are subject to LEED Gold, do not have a minimum affordable housing requirement, and are required to result in $100 million investment in California. By lowering the investment requirement, removing the LEED component, and imposing a minimum affordable housing requirement, SB 995 provides an incentive for the development of affordable housing projects.

As the bill proceeds, the author may want to consider the following:

- Specifying what percentage of a project shall be dedicated to housing for a project be to be considered a "housing project" and eligible for AB 900 certification. Current CEQA exemptions for residential housing projects vary for the minimum amount of housing a project can have – the affordable housing exemption (§21159.23) prohibits retail services from exceeding 15% of the total floor area of a project; whereas the exemption for infill projects prohibits retail uses from exceeding 25%. Under the Government Code, projects that are at least two-thirds residential are considered residential projects.

- Requiring the project applicant to report the actual number of housing units created once the project is completed, as recommended by the SOR report. This will help the Legislature better understand the benefits provided by ELDPs.

5) *Diminishing returns.* In the almost 10 years since the enactment of AB 900, 19 ELDPs have been certified. Presumptively, this is because the high standards a project must meet in order to qualify, such as resulting in a $100 million dollar investment in California and LEED-Gold certification. The new proposed category for affordable housing has a considerably lower threshold to meet - $15 million investment and no LEED certification requirement. The intent of adding these projects as a new category eligible for certification is to provide incentive for the construction of these projects and to increase housing in California.

   Although it is difficult to estimate how many projects could ultimately qualify under this new category, if numerous projects are fast-tracked to the front of judicial calendars, courts may be forced to repeatedly miss the 270 day deadline. In a sense, adding this new category could be a victim of its own success: at some point, the more projects that are eligible to benefit from accelerated judicial review, the smaller the impact of that benefit.

6) *Impact on the administration of justice*. AB 900 required Judicial Council, by January 1, 2017, to submit a report to the Legislature on the impact of AB 900 on the administration of justice. At the time of the report, only eight projects had been certified, one of which had resulted in a court case subject to the timeframes of AB 900 – the Golden State Warriors Arena (described above). In its report, Judicial Council noted that "because there has been only one case subject to the requirements of [AB 900], at [that] time Judicial Council [was]

unable to draw any general conclusions about the impact of [AB 900] on the administration of justice." Since the report's publication, 10 additional projects have been certified or made subject to AB 900-like timeframes and one project is pending certification.

Because AB 900 and similar timeframes continue to be a concern for its impact on the administration of justice, the committee may wish to amend the bill to require Judicial Council to submit another report, by January 1, 2024, on that issue, which would give the Legislature time to review the report before the repeal of AB 900 in 2025.

7) *Let's be clear.* The SOR report brought to light some ambiguities in the AB 900 process – (1) whether the 270 day timeframe was to be counted in calendar days or business days and (2) whether the 270 day timeframe included appeals to the Supreme Court.

The committee may wish to amend the bill to clarify that the 270 timeframe is business days and that timeframe also includes any appeals to the Supreme Court.

8) *Adding co-authors.* The author would like to add the following Senators as joint authors, principal co-authors, and co-authors, as specified:

- Joint authors: Senators Caballero and Rubio
- Principal co-authors: Senators L. Gonzalez, Hill, and McGuire
- Co-author: Senator Roth

Related/Prior Legislation

AB 2991 (Santiago) extends the Jobs and Economic Improvement Through Environmental Leadership Act for five years, and makes various changes to the requirements of the Act. AB 2991 is in the Assembly Appropriations Committee.

SB 25 (Caballero, 2019) provides qualified projects, which includes housing projects that will obtain LEED Gold certification and with a minimum 40% affordable housing, with expedited judicial review. SB 25 is in the Assembly Natural Resources Committee.

SB 621 (Glazer, 2019) provides affordable housing projects that meet certain requirements, including LEED Gold certification and a minimum 30% of the housing units be affordable housing, with expedited judicial review. SB 621 is in the Assembly Natural Resources Committee.

See above, Background

SOURCE:

Author

SUPPORT:

1hwy1
Bay Area Council
California Association of Realtors
City of San Diego
Council President Georgette Gómez, City of San Diego
Downtown San Diego Partnership
Los Angeles Business Council
Riley Realty, LP
San Diego Board of Supervisors, 4th District, Nathan Fletcher
San Diego County Board of Supervisors, Greg Cox, Chairman
San Diego Regional Economic Development Corporation
San Francisco Bay Area Planning and Urban Research Association (SPUR)
Schneider Electric

-- END --

SENATE COMMITTEE ON ENVIRONMENTAL QUALITY
Senator Allen, Chair
2019 - 2020 Regular

Bill No:	SB 1044		
Author:	Allen		
Version:	5/18/2020	**Hearing Date:**	5/29/2020
Urgency:	No	**Fiscal:**	Yes
Consultant:	Gabrielle Meindl		

SUBJECT: Firefighting equipment and foam: PFAS chemicals

DIGEST: Prohibits the use of firefighting foam containing PFAS chemicals, except where federally required, and requires notification of the presence of PFAS in the protective equipment of firefighters.

Due to the COVID-19 Pandemic and the unprecedented nature of the 2020 Legislative Session, all Senate Policy Committees are working under a compressed timeline. This timeline does not allow this bill to be referred and heard by more than one committee as a typical timeline would allow. In order to fully vet the contents of this measure for the benefit of Senators and the public, this analysis includes information from the Senate Judiciary Committee.

ANALYSIS:

Existing law:

1) Authorizes the State Fire Marshal to make such changes as may be necessary to standardize all existing fire protective equipment throughout the state and requires the State Fire Marshal to notify industrial establishments and property owners having equipment for fire protective purposes of the changes necessary to bring their equipment into conformity with standard requirements. (Health and Safety Code (HSC) §13026-13027)

2) Authorizes the State Water Resources Control Board (SWRCB) to order a public water system to monitor for perfluoroalkyl substances and polyfluoroalkyl substances, requires community water systems to report detections, and where a detected level of these substances exceeds the response level, to take a water source out of use or provide a prescribed public notification. (HSC §116378)

3) Requires, pursuant to the federal Safe Drinking Water Act (SDWA) and California SDWA, drinking water to meet specified standards for contamination (maximum contaminant levels (MCLs)) as set by the United States Environmental Protection Agency (US EPA) or the State Water Resources Control Board (SWRCB). (Health & Safety Code (HSC) § 116270, et seq.)

4) Establishes the policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes. (Water Code § 106.3)

5) Requires the SWRCB to administer provisions relating to the regulation of drinking water to protect public health, including conducting research, studies, and demonstration projects relating the provisions of a dependable, safe supply of drinking water (HSC §116350)

6) Requires the SWRCB to adopt regulations to implement the SDWA, including, but not limited to, the monitoring of contaminants, including the type of contaminant, frequency and method of sampling and testing, and the reporting of results, as well as the monitoring of unregulated contaminants for which drinking water standards have not been established by the department. (HSC §116375).

This bill:

1) Defines "firefighter protective equipment" to mean personal protective equipment (PPE) covered by the general industry safety orders in regulation.

2) Defines "manufacturer" to mean a person, firm, association, partnership, corporation, organization, or joint venture that manufactures, imports, or distributes domestically firefighter personal protective equipment.

3) Defines "perfluoroalkyl and polyfluoroalkyl substances or "PFAS" to mean a class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom.

4) Defines "Class B firefighting foam" to mean foam designed to prevent or extinguish a fire in flammable liquids, combustible liquids, petroleum greases, tars, oils, oil-based paints, solvents, lacquers, alcohols, and flammable gases.

5) Defines "large atmospheric storage tank" to mean large diameter (greater than 40 meters) open top floating roof storage tanks for flammable liquids.

6) Defines "terminal" to mean a fuel storage and distribution facility that has been assigned a terminal control number by the United States Internal Revenue Service.

7) Commencing January 1, 2022, prohibits the use, manufacturing, sale, or distribution in the state of class B firefighting foam that contains intentionally added PFAS chemicals. Specifies that these provisions do not apply to any manufacture, sale or distribution of such foam for which inclusion of PFAS chemicals is required by federal law.

8) Requires a manufacturer of class B firefighting foam to notify, in writing, persons that sell the manufacture's products in the state about these provisions by July 1, 2021. Requires such manufacturers to recall products prohibited by these provisions by January 1, 2022 and reimburse the retailer or purchaser for the product.

9) Specifies that the above restrictions do not apply until January 1, 2024, for the use of class B firefighting foam for use on large atmospheric storage tank fires at chemical plants, fuel storage and distribution facilities, or oil refineries. Requires such manufacturers to recall products prohibited by these provisions by January 1, 2024 and reimburse the retailer or purchaser for the product.

10) Specifies that such product recalls include safe transport, storage, and documentation of the amount and storage location of the PFAS containing firefighting foam unless and until the California Environmental Protection Agency formally identifies a safe disposal technology. The documentation shall be submitted to the State Fire Marshal upon request.

11) Requires the State Fire Marshal, prior to January 1, 2022, to inform public entities that provide firefighting services of the upcoming prohibitions.

12) Authorizes the State Fire Marshal to request a manufacturer certify compliance with the provisions pertaining to class B firefighting foam.

13) Imposes civil penalties of up to $5,000 (first violation) and $10,000 for each subsequent violation of the provisions related to class B firefighting foam. Specifies that individual firefighters are not personally liable for payment of these penalties.

14) Prohibits the discharge or otherwise use for training purposes of any class B firefighting foam that contains intentionally added PFAS starting January 1, 2022.

15) Imposes civil penalties of up to $5,000 (first violation) and $10,000 for each subsequent violation of the provisions related to such discharge of class B firefighting foam. Specifies that individual firefighters are not personally liable for payment of these penalties.

16) Requires any person, including a manufacturer, that sells firefighting PPE that contains PFAS to provide a written notice to the purchaser to that effect and the reason that PFAS chemicals are added to the equipment starting January 1, 2022.

17) Stipulates that the seller and purchaser of the firefighter PPE retain the written notice for three years and provide the notice, upon request, to the State Fire Marshal within 60 days.

18) Authorizes the State Fire Marshal to request a manufacturer certify compliance with these provisions.

19) Imposes civil penalties of up to $5,000 (first violation) and $10,000 for each subsequent violation of these provisions. Specifies that individual firefighters are not personally liable for payment of these penalties.

20) Provides that these provisions are severable.

Background

1) *Overview of PFAS.* Per- and Poly-fluoroalkyls (PFAS) are a group of nearly 5,000 man-made chemicals not found naturally in the environment. The PFAS group includes chemicals such as perfluorooctanoic acid (PFOA), perfluorooctanesulfonate (PFOS) and GenX. Produced since the 1950s, PFAS chemicals, used in food packaging, stain- and water-repellent fabrics, nonstick products such as Teflon, and in fire-fighting foams, have been linked to cancers and other health issues. Firefighting foam accounts for a significant amount of total global production of PFAS.

PFAS chemicals have been detected near areas where they are manufactured or where products containing PFAS are used. These chemicals can travel long distances, move through soil, seep into groundwater, or be carried through the air. They are now so widespread that almost every person on Earth has been exposed to PFAS and scientists have found these toxins in the blood of nearly all people tested.

People are exposed to PFOS and PFOA through food, food packaging, consumer products, house dust, and drinking water. Exposure through drinking water has become an increasing concern due to the tendency of PFASs to accumulate in groundwater. Such contamination is typically localized and associated with a specific facility, for example, an industrial facility where these chemicals were manufacture or used in other products, or airfields which used the chemicals for firefighting.

Between 2000 and 2002, PFOS was voluntarily phased out of production in the U.S. by its primary manufacturer. Beginning in 2006 other manufacturers began to voluntarily limit the number of ongoing uses. *However, manufacturers are developing replacement technologies in the PFAS family. The limited but growing data on these newer chemicals indicate that they are of similar structure, are equally persistent in the environment, and behave in similar fashion in the human body, particularly at the cellular level.*

2) *Impacts on Public Health a Growing Concern*. The Agency for Toxic Substances and Disease Registry (ATSDR) and the US EPA developed the toxicologic profile of 14 PFAS chemicals. Based on a number of factors, including the consistency of findings across studies, the available epidemiology studies suggest associations between perfluoroalkyl exposure and several adverse health effects, including:

- Pregnancy-induced hypertension/pre-eclampsia (PFOA, PFOS)
- Liver damage, as evidenced by increases in serum enzymes and decreases in serum bilirubin levels (PFOA, PFOS, PFHxS)
- Increases in serum lipids, particularly total cholesterol and low-density lipoprotein (LDL) cholesterol (PFOA, PFOS, PFNA, PFDeA)
- Increased risk of thyroid disease (PFOA, PFOS)
- Decreased antibody response to vaccines (PFOA, PFOS, PFHxS, PFDeA)
- Increased risk of asthma diagnosis (PFOA)
- Increased risk of decreased fertility (PFOA, PFOS)
- Small decreases in birth weight (PFOA, PFOS)

PFAS are persistent in the environment – meaning they don't break down – many also accumulate and persist in the human body. Because of their presence and persistence in many drinking water supplies, they remain a serious source of exposure decades after their release into the environment.

3) *Short-Chain vs Long-Chain PFAS.* Short-chain PFAS (less than six or seven carbons) have been touted as safer alternatives than the older long-chain PFAS based on the idea that they linger for a shorter time in human bodies. However, evidence is growing that short-chain PFAS are associated with similar adverse health effects as the long-chain, legacy PFAS that they have replaced, and are also being detected in drinking water along with long-chains.

Furthermore, short-chain PFAS are still highly persistent and are even more mobile in the environment than long-chain PFAS, meaning that they are still "forever" and travel even more easily and can be harder to clean up.

Some short-chain PFAS are not detected frequently or detected at low levels in human blood; therefore, some industry groups have claimed that short-chain PFAS are readily eliminated from the body. However, recent research does not support this conclusion. A study of cadavers that looked beyond blood showed that short-chain PFAS accumulate in interior organs, some at concentrations that are higher than long-chain PFAS. Additionally, the rate at which a chemical is eliminated from the body may in fact be an inadequate measure of health threats to humans for chemicals like PFAS, where humans likely face chronic (i.e., frequent) exposure. The widespread use of short-chain PFAS in commerce and their persistence in the environment will lead to chronic exposures in people. Finally, it is important to acknowledge that exposure to short-chain and other replacement PFAS, is happening on top of a pre-existing health burden from historically used, long-chain PFAS.

4) *Federal Action on PFAS.* In May 2016, the US EPA issued a lifetime health advisory for PFOS and PFOA for drinking water, advising municipalities that they should notify their customers of the presence of levels over 70 parts per trillion in community water supplies. US EPA recommended that the notification of customers include information on the increased risk to health, especially for susceptible populations.

The US EPA's health advisories are non-enforceable, non-regulatory, and provide technical information to states' agencies and other public health

officials on health effects, analytical methodologies, and treatment technologies associated with drinking water contamination.

More recently, the National Defense Authorization Act, signed into law in December, phases out military uses of PFAS-containing fire-fighting foam by 2024 and prohibits the Department of Defense from using PFAS-containing foams during training exercises at military installations. Similarly, a 2018 federal law directed the Federal Aviation Authority (FAA) to change its rules to allow airports to use PFAS-free foams.

5) *State Action on PFAS.* The State recognizes the urgent challenge of PFAS chemicals and is tackling the problem on multiple fronts, including:

- Department of Toxic Substances Control's (DTSC) Safer Consumer Products Program has proposed PFAS in carpets and rugs as a priority product listing and is considering future PFAS action related to food packaging as well as PFAS containing treatment products (e.g., Scotchguard); DTSC's Site Mitigation Program is addressing some sites with PFAS on a case-by-case basis, mainly military bases where firefighting training was conducted; The bases are currently conducting preliminary assessments and investigations;
- Office of Environmental Health Hazard Assessment (OEHHA) is developing public health goals for PFOA and PFOS. In 2017, OEHHA listed the chemicals under Proposition 65 based on developmental toxicity;
- CalRecycle is evaluating the potential for PFASs used in food service packaging, as part of the regulations to implement SB 1335 (Allen, Chapter 610, Statutes of 2018); and
- California Air Resources Board is assessing the health and environmental impacts of chemical fume suppressants containing PFAS used in chrome plating operations.

Additionally, the SWRCB is conducting a comprehensive investigation into the extent of PFOA and PFOS contamination in water systems and groundwater statewide. In February 6, the SWRCB announced it will reduce the levels of PFOA and PFOS in drinking water that trigger responses by local water systems. The new levels are based on updated health recommendations from the OEHHA.

Under a new law, AB 756 (C. Garcia), if a water system receives a SWRCB order for testing and finds that the PFOA or PFOS concentration exceeds their response level, the system is required to take the water source out of service,

provide treatment, or notify their customers in writing. Water systems are also required to take several other measures to communicate the test results to the public.

The SWRCB is also seeking to establish its first enforceable regulatory standards for PFOA and PFOS. In August, the SWRCB requested that OEHHA develop public health goals (PHGs) for the two chemicals as the next step in developing regulatory standards, known as maximum contaminant levels (MCLs). Other PFAS chemicals may be considered for PHG and MCL development later, as data permits.

Data on PFAS detections from more than 600 water system sites in California have been reported to the SWRCB since August 2019 and continue to be collected on a quarterly basis. In the first phase of testing, public water systems were ordered to sample drinking water supply wells near landfills and airports, locations where these chemicals are believed to be especially prevalent. They were also ordered to test wells near where the contaminants had been previously found. Subsequent phases of testing will look at other sources, such as industrial sites and wastewater treatment systems.

Results from the SWRCB's state-wide investigation of PFAS contamination sites shows:

- Over 300 source wells representing nearly 100 public water systems that serve approximately 7.5 million Californians across the state are contaminated with PFAS;
- More than 200 wells are contaminated above recently-adopted notification levels for two individual PFAS;
- Many wells had detections of multiple PFAS (some with up to eight in a single well) including a mixture of "legacy" and newer replacement PFAS.
- Investigations at the airports and landfills show a high number of detections of PFAS chemicals compared to the sampling data from the public water systems. The same PFAS chemicals reported at the airports and landfills are being found in the public water systems.

6) *Other States' Action on PFAS.* Several states are beginning to address PFAS chemicals. The North Carolina legislature enacted legislation funding the monitoring and treatment of PFAS, specifically the chemical GenX. A New York bill requires the department of health to perform biomonitoring studies (studying the extent of chemicals in people). The Washington Department of Health plans to test several hundred water systems in the state for trace

contamination of more than a dozen chemicals found in some firefighting foams.

Additionally, Washington, New Hampshire, New York, and Colorado have banned all PFAS in firefighting foam, with limited exceptions, and require reporting of the presence of all PFAS in firefighting gear.

7) *PFAS in Firefighting Foam and Available Alternatives.* Class B firefighting foam (not to be confused with fire retardant used to stop the spread of wildfires) is used to extinguish flammable liquid fires, primarily at airports, refineries, and chemical plants. These foams help extinguish those fires by forming a film around the burning liquid, preventing airflow and evaporation. PFAS is present in many of these foams.

According to an International Pollutants Elimination Network (IPEN) expert panel report from 2018, fluorine-free (PFAS) foams are "available, certified and effective for all firefighting applications." Further, in 2019, an IPEN expert panel evaluated available alternatives and concluded that all PFAS-based firefighting foam should be phased out and that non-PFAS foams are viable and cost-saving. London's Heathrow Airport, one of the largest in the world, and other airports around the world, including all 27 major Australian airports, have already transitioned to PFAS-free firefighting foam.

8) *Firefighter Health Impacts.* Elevated levels of PFAS chemicals have been documented in the bodies of firefighters. One biomonitoring study of firefighters in California showed blood concentrations for firefighters were three times higher than in National Health and Nutrition Examination Survey (NHANES) adult males, revealing that firefighters may have sources of occupational exposure to PFAS chemicals.

In addition to exposure to PFAS in firefighting foam, concern has been raised about PFAS in PPE used by firefighters. Scientists at the University of Notre Dame are conducting an independent study of turnout gear worn by firefighters after initial samples tested positive for high levels PFAS chemicals. The initial tests results suggest that individual PFAS can come off the gear and potentially expose firefighters through inhalation of volatile PFAS and ingestion of PFAS collected on firefighter hands after contact with gear.

9) *Importance of Moisture Barriers in Fire Fighting Gear.* Firefighters face extreme hazards on the job including intense heat, exposure to biological fluids, and exposure to hazardous substances such as sulfuric acid, chlorine,

gasoline, and numerous combustion by-products. The National Fire Protection Association (NFPA) administers the process of developing product safety standards for PPE. The NFPA standard, NFPA 1971: Standard on Protective Ensembles for Structural Fire Fighting and Proximity Fire Fighting, prescribes minimum performance requirements for product manufacturing, design, performance, testing, and certification for all PPE to ensure breathability, thermal stability, and chemical and oil resistance.
The ability to regulate core temperature, critical to firefighter health, is significantly improved through the breathable moisture barrier in PPE. Moisture barrier textiles are used in the middle layer, of a three layer system used in firefighter's PPE garments and may contain one or more short chain PFAS. According to W.L. Gore & Associates, makers of moisture barrier products that are a key component in firefighting PPE, the NFPA 1971 standards can not be achieved without the use of PFAS materials and there is "no line of sight to alternate materials which provide the same combination of performance, breathability, durability, and protection offered by current materials and chemistries."

However, according the Department of Forestry and Fire Protection (CAL FIRE), the NFPA technical committee responsible for NFPA 1971 has a task group aggressively looking at the issue of PFAS and any other chemicals that might cause cancer and might be used in PPE.

10) *State Use of Class B Firefighting Foam.* CAL FIRE states that it does use class B firefighting foam in some cases, such as for flammable liquid fires that require specialized foams designed to both extinguish a fire and prevent re-ignition. These foams are primarily used by CAL FIRE Cooperative Fire Protection Agreements in municipal settings, also known as Schedule A agreements. Class B foams are mostly used in conjunction with airports/aircraft fires and for flammable liquid type fires. These class B foams are sometimes carried in five gallon containers on CAL FIRE fire engines. CAL FIRE does not centrally track how much is used across the Department's 21 units. CAL FIRE states that it is currently in the process of looking at alternatives to class B foam. Further, CAL FIRE acknowledges that all *structure* firefighting turnout gear (pants and jackets worn by firefighters when responding to structure fire/vehicle collisions) contain PFAS.

Comments

1) *Purpose of Bill.* According to the author, "Per- and poly-fluoroalkyl substances (PFAS) are a class of manufactured chemicals that are prevalent in the

environment, can build up in our bodies, and are linked to numerous health problems including, cancer, hormone disruption, kidney and liver damage, thyroid disease, birth defects, and harm to developing infants and children. PFAS have been used since the 1950s to make commercial and industrial products that resist heat, stains, grease, and water, including carpets, clothing, non-stick pans, paints, cleaning products, and food packaging. These manmade chemicals are extremely stable. That stability prevents break down, causing accumulation in the environment. PFAS contaminates drinking water around the country, including drinking water sources for the public water systems that serve at least 7.5 million people in California. One of the primary sources of this contamination is the use of PFAS-containing firefighting foam, used to fight liquid fires, known as "Class B" fires.

"Firefighters already face greater risks of cancer and other health problems than the general population due to exposure related to their vital work. Firefighting protective gear also contains PFAS, so there is exposure from both the gear and the firefighting foam. Elevated levels of PFAS chemicals have been documented in the bodies of firefighters, putting them at greater risk of harm from the health effects associated with PFAS, including cancer. SB 1044 addresses two sources of PFAS chemicals that threaten the health of firefighters and pollute our drinking water. Specifically, the bill bans the use of firefighting foam containing PFAS chemicals except in situations where it is federally required. When federal requirements are rescinded, these applications will also switch to non-PFAS foams. In addition, it would require notification of the presence of PFAS in the protective equipment of firefighters, which will allow firefighting organizations and firefighters to make informed choices to limit unnecessary exposure."

2) *Move to Safer Alternatives*. SB 1044 addresses two sources of PFAS chemicals that pollute our drinking water and pose a health risk to firefighters. Specifically, the bill bans the use of firefighting foam containing PFAS chemicals except in situations where it is federally required. Additionally, it requires notification of the presence of PFAS in the protective equipment of firefighters.

Federal military specifications drove the use of PFAS firefighting foam because the standard required the use of PFAS chemicals. However, as noted above, that is changing. The recently enacted NDAA phases out military uses of PFAS-containing fire-fighting foam by 2024 and other the federal law directs the FAA to change its rules to allow airports to use PFAS-free foams. Because the FAA has been moving slowly to implement the law, this bill exempts federally

required uses until federal regulations catch up with the law. Further, requiring manufacturers of PFAS-containing firefighting gear to notify anyone purchasing the gear that it contains PFAS will allow firefighting organizations and firefighters to make informed choices to limit unnecessary exposure.

The preponderance of scientific evidence on the health and environmental impacts of PFAS chemicals is well established and many other countries and states are ahead of us in moving away from the use of PFAS-containing firefighting foam – a significant source of PFAS contamination in our drinking water.

PFAS chemicals present an urgent challenge to the State -- they number in the thousands, are widespread across a broad range of product categories and manufacturing processes, and present existing and future contamination issues. Additionally, the cost to research, monitor, investigate, treat, and clean up these chemicals is high. Unless federally required, there is no reason to allow continued PFAS exposures and pollution in California, when effective, safer alternatives are available. This bill takes a reasonable approach to one important aspect of the PFAS problem in California by eliminating a significant source of contamination to our drinking water and protecting our state's firefighters from the health risks exposure to these chemicals can cause.

3) *Efficacy of Non-PFAS Foam on Large Oil Tank Fires*. Opponents have raised concerns about the bill's timeline for a complete prohibition on PFAS-containing foams. They argue that the "science and technical development of alternative foams" may not be available by January 1, 2022. Specifically, they state, "*In some instances, particularly high hazard facilities like oil refineries, large scale tank farms, and chemical plants, access to AFFF is still necessary in order to mitigate the risks of high-hazard fire emergencies associated with having large amounts of various flammable liquids on-site.*"

However, according to information provided by the author, an independent expert panel concluded that all PFAS-based firefighting foam should be phased out, without exception, and that fluorine-free (i.e., non-PFAS), foams are viable and economical. "*A leading operator of 40 offshore oil/gas installations in Norway's North Sea, Equinor, has switched to non-PFAS foams*," according to proponents. Further, Washington State just passed a law phasing out refinery uses of PFAS foam except for extremely limited exemptions for large open storage tanks, an exception that this bill also makes, albeit for a shorter period of time.

Specifically, the author has recently amended the bill to extend the available use of PFAS-containing firefighting foam for use on large atmospheric storage tanks fires at chemical plants, fuel storage and distribution facilities, and oil refineries until January 1, 2024. This new date aligns with the recently enacted NDAA (discussed above) that phases out military uses of PFAS-containing firefighting foam by 2024.

4) Comments from Senate Judiciary Committee. This bill touches upon various issues within the jurisdiction of the Senate Judiciary Committee, including due process and civil actions. The Senate Judiciary Committee has tended to favor the adoption of bills that ensure due process is given to those who are assessed liability by the state and where it is clear what conduct is being prohibited.

Related/Prior Legislation

AB 1056 (Portantino) requires the State Water Resources Control Board (SWRCB) to establish an analytical laboratory method, by January 1, 2022, that can be used as a tool to assess the extent of per- and polyfluoroalkyl substances (PFAS) contamination in drinking water, surface water, groundwater, and wastewater. Held at the request of the author in the Senate Environmental Quality Committee.

AB 756 (C. Garcia, Chapter 162, Statutes of 2019) authorizes the State Water Resources Control Board (SWRCB) to order one or more public water systems to monitor for perfluoroalkyl and polyfluroalkyl substances (PFASs) and establishes a separate customer notification process as a result of any confirmed detection.

SOURCE:

Breast Cancer Prevention Partners, California Professional Firefighters, Clean Water Action, Environmental Working Group, Natural Resources Defense Council

SUPPORT:

5 Gyres Institute, the
7th Generation Advisors
Association of California Water Agencies (ACWA)
Breast Cancer Action
Breast Cancer Prevention Partners
California Coastkeeper Alliance

California Fire Chiefs Association
California Healthy Nail Salon Collaborative
California Indian Environmental Alliance
California League of Conservation Voters
California Municipal Utilities Association
California Product Stewardship Council
California Professional Firefighters
California Public Interest Research Group Education Fund
California Special Districts Association
California State Firefighters' Association
California Water Service
Calpirg
Center for Environmental Health
Center for Oceanic Awareness, Research, and Education, the
Center for Public Environmental Oversight
Citizens for Choice
Clean Water Action
Community Water Center
Defenders of Wildlife
Environmental Working Group
Friends Committee on Legislation of California
Green Science Policy Institute
Leadership Council for Justice and Accountability
Metropolitan Water District of Southern California
National Resources Defense Council
National Stewardship Action Council
Natural Resources Defense Council (NRDC)
Oregon Environmental Council
Physicians for Social Responsibility - San Francisco Bay Area Chapter
Plastic Pollution Coalition
Safer States
San Francisco Baykeeper
Sanitation Districts of Los Angeles County
Santa Clara Valley Water District
Save Our Shores
Seventh Generation Advisors
Sierra Club California
The Center for Environmental Health
The Center for Oceanic Awareness, Research, and Education
Wholly H2o
Women's Voices for The Earth

OPPOSITION:

American Chemistry Council
California Chamber of Commerce
California Manufacturers & Technology Association
Chemical Industry Council of California
Fire Fighting Foam Coalition
Industrial Environmental Association
Western Independent Refiners Association
Western States Petroleum Association

ARGUMENTS IN SUPPORT:

According to the California Professional Firefighters, "Firefighters who use Class B firefighting foams that contain PFAS face an unacceptable level of additional health risks in a profession that already brings with it an elevated risk of cancer along with other job-related conditions. There is no reason to continue permitting the usage of fluorinated firefighting foams when there are non-fluorinated options available that function with the same level of efficiency. The IPEN white paper also determined that the film formed by AFFF does not actually provide a noticeable advantage in combatting three-dimensional liquid fires, and that additionally the development of fluorine-free foams has made the usage of AFFF unnecessary. Several departments and facilities in both the United States and internationally have already transitioned to fluorine-free foam, including "high-risk" facilities such as oil refineries, chemical plants and airports.

"This measure would, beginning January 1, 2022, prohibit a manufacturer of firefighting foam to manufacture, sell, or distribute class B fire-fighting foam that contains PFAS. SB 1044 would require the State Fire Marshal to provide guidance to assist public entities that provide firefighting services, inform them of the upcoming ban, and offer resources to help departments convert their equipment. This multi-tier approach gives both time and resources for departments to source foam alternatives and switch out or decontaminate their equipment, where necessary. Additionally, this bill will require a manufacturer of firefighter PPE that contains PFAS to notify the purchaser at the point of sale that the equipment contains the harmful chemical.

"Phasing out this dangerous chemical in favor of a safer, cheaper, and equally

effective alternative will benefit the health of not only the firefighters who use it but the entirety of California."

ARGUMENTS IN OPPOSITION:

According to the American Chemistry Council and Western States Petroleum Association, "While "fluorine-free foams" are available and can provide an alternative to fluorinated foams in some applications such as spill fires and smaller tank fires, they do not uniformly meet necessary performance requirements for a significant fire event that may occur at an oil refinery or a large tank farm, given the different flammable liquids being managed. The chemistries within AFFF provide fuel repellency and heat stability, allow for rapid extinguishment, burnback resistance, and protection against vapor release, which help to prevent re-ignition and protect firefighters working in the area as part of the rescue and recovery operations.

"Chemical manufacturers and downstream users of AFFF recognize the need to ensure release of these chemistries into the environment is minimized to the greatest extent possible. There are alternative fluids and methods currently available that make it possible in many cases to eliminate the use of AFFF foams for training, which represent the majority of foam use and discharges. In fact, industry has supported legislation in several states to ban the use of firefighting foam containing added PFAS chemistries for training and allow its use in equipment testing and calibration only if the foam is contained.

"SB 1044 also addresses the personal protective equipment firefighters wear that is designed to protect them from the extreme hazards they face on the job, including exposure to substances such as sulfuric acid, chlorine, gasoline, and numerous combustion by-products. Turnout gear, including jackets and pants, are designed to resist water, oil and various chemicals. They must also be breathable (allow body moisture to pass through the garment) to modulate core body temperature and reduce heat stress. In a fire event, these performance attributes can mean the difference between life and death, not just for the firefighter but also for potential fire victims. Despite years of on-going research into potential alternatives, use of PFAS-based materials remains the only viable option to preserve these vital performance properties."

-- END --

SENATE COMMITTEE ON ENVIRONMENTAL QUALITY
Senator Allen, Chair
2019 - 2020 Regular

Bill No:	SB 1099		
Author:	Dodd		
Version:	2/19/2020	**Hearing Date:**	5/29/2020
Urgency:	No	**Fiscal:**	Yes
Consultant:	Eric Walters		

SUBJECT: Emergency backup generators: critical facilities: exemption

DIGEST: Requires air districts to adopt or revise their rules to allow critical facilities, as defined, to be allowed to use backup generators (BUGs)—without it counting towards permitted annual runtime totals—during deenergization events and for testing/maintenance. Also prevents air districts from collecting permitting fees for any BUG.

ANALYSIS:

Existing federal law:

1) Sets, through the Federal Clean Air Act (FCAA) and its implementing regulations, National Ambient Air Quality Standards (NAAQS) for six criteria pollutants and requires states to prepare, submit, and adopt a State Implementation Plan (SIP) to limit air pollution and attain federal standards. (42 U.S.C. §7401 et seq.)

Existing state law:

2) Establishes the Air Resources Board (ARB) as the air pollution control agency in California and requires ARB, among other things, to coordinate, encourage, and review the efforts of all levels of government as they affect air quality. (Health and Safety Code (HSC) §39500 et seq.)

3) Creates the 35 air pollution control and air quality management districts (air districts) to be responsible for regional air quality planning, monitoring, and stationary source and facility permitting. (HSC §40000 et seq.)

4) Defines "emergency use" as providing electrical power during specified events, including the loss of normal electrical power for reasons beyond the control of the operator. (Title 17 of the California Code of Regulations (CCR) §93115.4)

5) Requires, under SB 901 (Dodd, Chapter 626, Statutes of 2018), electric utilities to develop annual wildfire mitigation plans (WMPs) to prevent, combat, and respond to wildfires within their service territories. (Public Utilities Code (PUC) §8386)

6) Allows any person to apply to an air district's hearing board for a variance from the district's rules, regulations, and orders (HSC §42350 et seq.), and makes specifications for the issuance of that variance, including:

   a) That no variance shall be granted unless it is found that compliance would otherwise result in either an arbitrary or unreasonable taking of property, or the practical closing and elimination of a lawful business.

   b) Requiring a hearing board to (when the petitioner is a public agency) consider whether immediate compliance would otherwise impose an unreasonable burden on an "essential public service"—specifically, a prison, detention facility, police or firefighting facility, school, health care facility, landfill gas control or processing facility, sewage treatment works, or water delivery operation, if owned and operated by a public agency.

7) Allows an air district board or air pollution control officer (APCO) to, after notice and hearing, order an entity to abate its emissions from a given technology, and such an order may contain stipulations regarding that abatement. (HSC § 42451)

8) Allows air districts to establish a permit system, consistent with FCAA requirements, which requires any person who builds, erects, alters, replaces, operates, or uses any equipment that issues air contaminants. (HSC §42300)

This bill:

1) Defines pertinent terms for this chapter of the Health and Safety Code.

2) Makes findings and declarations regarding:

   a) The impacts on humans and the environment of increasing wildfires.
   b) How PSPS events create challenges for water agencies moving and delivering water.
   c) The necessity for action to reduce impacts from different events on different facilities, and that that action provide better access to alternative power sources for the purposes of water delivery and wildfire response.

3) Requires air districts to adopt (or revise existing) rules to not count towards any time limitation for a critical facility:
   a) Using a BUG during a PSPS; or
   b) Performing routine testing and maintenance (following certain instructions, as specified) on a BUG.

4) Prevents an air district from imposing a fee for issuing or renewing a permit for any BUG used by a critical facility.

Background

1) *Public safety power shutoffs*. California's wildfires have become more frequent, threatened more residents, and happened throughout more of the year in recent decades. More than 25 million acres of California wildlands are classified as under very high or extreme fire threat. Roughly a quarter of the state's residents live in this area. Climate change has exacerbated the hot, dry conditions that support catastrophic fires, and while California attempts to mitigate its contributions to global climate change, the state is also taking immediate actions to protect its residents from wildfires.

   To better protect safety and public health from uncontrolled wildfires, utility providers have adopted the use of Public Safety Power Shutoff (PSPS) events. Electricity transmission and distribution systems have sparked a number of wildfires, and this risk can be reduced by de-energizing the power lines during extreme weather events. During October of 2019, California utility providers conducted a dozen PSPS events. These affected millions of residents across 30 counties. While being an important public safety tool, power loss also has many negative impacts, especially to vulnerable populations (including residential customers that rely on reliable electric service to power life-saving medical devices), medical and emergency service providers (including hospitals, fire departments and police stations), and important public service providers (such as water agencies, gas stations and grocery stores).

2) *Backup generators*. In order to mitigate the damage of power loss, many of these critical service providers may rely on backup generators (BUGs) to replace lost grid power. Additionally, many businesses may use BUGs to avoid catastrophic system disruptions and to minimize economic disruption that could result from prolonged power outages. However, this use of BUGs may result in air quality and public health impacts.

   According to estimates from ARB, nearly 125,000 BUGs were used in California during PSPS events in October 2019. Assuming an average of 50

hours of operation each, those generators released a cumulative total of 166.4 tons of nitrogen oxides (NOx), 19.4 tons of particulate matter (PM), and 8.9 tons of diesel PM. The diesel PM release was roughly equivalent to 29,000 additional heavy-duty diesel trucks being used for the month.

3) *Health impacts of diesel emissions.* In 1998, California identified diesel PM as a toxic air contaminant based on its potential to cause cancer, premature death, and other health problems. Numerous studies have documented a range of adverse health impacts from long-term exposure to diesel pollution, including increased risk for respiratory and cardiovascular illnesses, such as asthma, heart attacks and lung cancer, stunted lung growth in children, adverse birth outcomes, more frequent emergency room visits, and higher mortality rates.

4) *Air district permitting rules.* Each of the state's 35 air districts adopts their own sets of regulations and rules tailored to the sources and air quality challenges of its region and overseen by ARB. Ultimately, these actions are designed to achieve NAAQS set by the FCAA. Collectively, these strategies (i.e. emission standards, fuel regulations, emission limits, etc.) are included in the State Implementation Plan (SIP). ARB is the lead agency in California for achieving the emission reductions goals and timelines described in the SIP. The 35 air districts, as well as other agencies, prepare SIP elements to be reviewed and approved by ARB before being integrated into the SIP.

   With few exceptions, anyone constructing or operating a facility that emits air pollutants must obtain an appropriate permit from the local air district. Each air district establishes its own fee schedule, and may maintain different requirements. An air district uses these permits to assess the air pollution impacts of stationary sources within its jurisdiction, and it may require additional standards or control technologies be used to align permitted entities' emissions with the SIP.

5) *Using and maintaining BUGs in California.* Because of the air quality and public health impacts of diesel emissions, ARB and air districts have adopted rules and regulations that affect the amount of time BUGs can be used. The amount of time permitted for routine maintenance is dictated by ARB's Airborne Toxic Control Measure for Stationary Diesel Engines. This regulation—and the implementing rules from air districts—dictates that older, more-polluting engines be tested for less time to control cumulative emissions.

   There is currently no statewide regulation limiting the hours a BUG can be run. Notably, the South Coast Air Quality Management District (SCAQMD) has adopted such rules. SCAQMD's Rule 1110.2 dictates that a permitted BUG

may only be run for 200 hours (~8.3 days) per year, including usage for maintenance and testing (an estimated 10-30 hours, depending on generator technology).

6) *Air district rules during emergencies.* Air districts provide for administrative exemption from established rules and regulations through the variance process, or in some cases have specific rules that do not apply during an emergency. For example, Yolo-Solano Air Quality Management District's Rule 110 exempts emergency standby engines used during an emergency from the District's other regulations on engines used over 200 hours per year, and the Bay Area Air Quality Management District's Rule 9-8-330 states that a person may operate an emergency standby generator an unlimited number of hours for emergency use.

   If a permitted facility anticipates they will need to exceed their authorized emissions due to reasons outside their control, they may submit a request for a variance to the board of the air district, who will hear and vote on the request at a public meeting. Should an interruption arise without time for the normal variance and hearing process, there is also an established emergency variance process. When an emergency variance is requested, it can be granted by the chair of the air district board (or a designee) without the board convening.

Comments

1) *Purpose of Bill.* According to the author, "Exacerbated by climate change, the wildfire season is now year-round and getting worse in terms of total acreage and impacts to people, communities and the environment. Recognizing the risk of powerlines or other utility equipment igniting a wildfire, California's investor-owned electric utilities have incorporated Public Safety Power Shutoffs (PSPS) into their wildfire mitigation plans to reduce the likelihood of such a scenario. But PSPS events have significant impacts on critical facilities including water and wastewater agencies, such as the inability to pump water, inadequate fire flows, sewage backups and air conditioning shutoffs in facilities with temperature-sensitive equipment. If agencies cannot access reliable electricity, communities could face a public health crisis if they lack safe drinking water for consumption, cooking and sanitation. This goes directly against the state's policy of a Human Right to Water.

   "To mitigate these effects and ensure reliable electricity during a PSPS or other catastrophic loss of power like a wildfire, critical facilities must depend on their standby onsite emergency generators. However, state and air district restrictions for some existing generators adopted prior to the widespread use of

PSPS do not provide enough time for proper testing in advance of a PSPS event or enough runtime during a PSPS event.

"SB 1099 would require local air districts to adopt a rule, or revise an existing rule, to allow critical facilities with a permitted emergency backup generator to operate their generators during a PSPS or other loss of power and test and maintain them in alignment with national standards, without facing penalties for keeping the water flowing and other critical facilities operating. This bill would provide a tailored solution that will balance the need to preserve air quality throughout the state with the need to ensure people and public health are protected."

2) *Is there a real problem?* As of this hearing, the committee has seen no evidence of BUG regulations causing any facility to shut down or receive a fine during a PSPS event. Moreover, it is the understanding of staff that the only air district whose rules could limit BUG use during a PSPS is SCAQMD. Despite this, advocates for SB 1099 and similar BUG-exempting bills claim that the looming possibility of such consequences merits legislative action. It is impossible to predict the extent to which California's utility providers will rely on grid deenergization to mitigate wildfire risk going forward.

3) *Stipulated Orders of Abatement.* An SOA is a legally-binding agreement between an air district and a facility operating a stationary pollution source. An air district hearing board has statutory authority to issue such an order, with terms and conditions, to a facility. In the event that a facility expects they may exceed their runtime limits and be in violation of their permit, they could enter into an SOA to find a mutually-agreeable solution to that potential exceedance with the air district. Instead of being fined for exceeding their permit conditions, the facility could be required to address their emissions by, for example, agreeing to retire highly polluting generators under a defined timeline.

Given the extent to which an SOA allows a regulated facility to have certainty they will not be fined for using a permitted generator during a PSPS, while still allowing the air district to uphold their FCAA obligations to regulate stationary pollution sources, the committee may wish to consider amending SB 1099 ensure the applicability of an SOA instead of a direct exemption of BUG hours from district rules.

As part of the stipulations in the SOA, the committee may wish to consider terms and conditions including but not limited to:

a) ***Allowing a facility to use an emergency BUG in exceedance of runtime and/or testing and maintenance limits (so long as that use is due to a PSPS, and the testing and maintenance are done according to established standards).***

b) ***A schedule for a technically and economically feasible retirement of more-polluting generators.***

c) ***Requiring the facility to report to the air district its BUG use that would exceed its permitted conditions.***

d) ***Board approval of agreed-upon terms and conditions.***

4) *Which facilities are critical*? The definition of critical facility used in SB 1099 is, "a facility necessary or convenient in providing essential public services, including, but not limited to, facilities such as police stations, fire stations, emergency operations centers, water and wastewater facilities, incident command posts, and communication systems used to support essential public services." The addition of "or convenient" means that the list of facilities exempted from air district rules could be much larger than intended.

The broad definition of "critical facilities" in SB 1099 goes beyond the author's stated goals; the committee may wish to consider constraining the definition of "critical facilities", and specifically including health facilities.

Related/Prior Legislation

SB 802 (Glazer, 2020) would exempt health facilities from BUG use counting towards air district emission timing rules during a PSPS. SB 802 is currently in the Senate Environmental Quality committee.

SB 1185 (Moorlach, 2020) would require applicants for emergency variances to demonstrate they are using the cleanest, feasible, available technology, and it would require reporting on PSPS events from utilities to air districts and ARB. SB 1185 will be heard by the Senate Environmental Quality committee on 5/29/2020.

AB 2182 (Rubio, 2020) would exempt any alternative power source used by any essential service provider during a PSPS from all local, regional, or state regulations. AB 2182 is currently in the Assembly Utilities and Energy committee.

SOURCE:

California Municipal Utilities Association

Las Virgenes Municipal Water District

Support

Association of California Water Agencies (ACWA)
California Cable & Telecommunications Association
California Groundwater Coalition
California Water Service
Calleguas Municipal Water District
Eastern Municipal Water District
Elsinore Valley Municipal Water District
Irvine Ranch Water District
Laguna Beach County Water District
Mesa Water District
Metropolitan Water District of Southern California
Municipal Water District of Orange County
Northern California Water Association
Public Water Agencies Group
Rowland Water District
Rural County Representatives of California
San Diego County Water Authority
Sanitation Districts of Los Angeles County
Santa Clarita Valley Water Agency
Trabuco Canyon Water District
Western Municipal Water District

OPPOSITION

Bay Area Air Quality Management District
California Air Pollution Control Officers Association
Sierra Club
South Coast Air Quality Management District

ARGUMENTS IN SUPPORT:

According to one of the sponsors, the California Municipal Utilities Association,

"The widespread use of Public Safety Power Shutoffs (PSPS) to mitigate the risk

of these wildfires could have significant impacts on critical facilities including water and wastewater agencies, such as the inability to pump water, inadequate fire flows, sewage backups and air conditioning shutoffs in facilities with temperature-sensitive equipment. If these agencies cannot access reliable electricity, communities could also face a public health crisis if they lack safe drinking water for consumption, cooking and sanitation.

"To mitigate these effects and ensure reliable electricity during a PSPS or other catastrophic loss of power like a wildfire, critical facilities must depend on their onsite emergency generators. However, state and local air district restrictions for some existing generators adopted prior to the widespread use of PSPS do not provide enough time for proper testing in advance of an event or enough runtime during an event.

"SB 1099 would require local air districts to adopt a rule, or revise an existing rule, to allow critical facilities with a permitted emergency backup generator to operate their generators during a PSPS or other loss of power and test and maintain them consistent with national standards, without facing penalties for keeping the water flowing and other critical facilities operating. This bill would provide a tailored solution that will balance the need to preserve air quality throughout the state with the need to ensure people and public health are protected."

ARGUMENTS IN OPPOSITION: According to the California Air Pollution Control Officers Association,

"This bill appears to be a solution looking for a problem. To date, the bill's supporters have not identified a single instance of an air district preventing an essential service provider from operating BUGs or penalizing their use in response to an actual emergency. Local air districts understand the importance of BUGs operating during a PSPS event or other emergency to provide necessary power, especially for essential services. However, it is also important to ensure that this power is provided in a way that minimizes the potential harmful effects of significant diesel emissions on the community that can be caused by the operation of BUGs. The potential statewide effects of this bill could be significant, especially for older BUGs that emit greater amounts of NOx and toxic emissions while operating, with these emissions occurring near sensitive receptors, such as children and the elderly. For example, the South Coast AQMD has more than 10,000 permitted diesel-fueled emergency BUGs in its four-county jurisdiction with varying sizes, ages, and emission levels, with about 40 percent of these generators more than twenty years old.

"SB 1099 would reduce local air districts' authority to regulate air pollution related to operation of BUGs and would also impose a financial burden on local air

districts' already strained budgetary resources by eliminating the ability to collect fees needed to help fund local air district permitting functions related to mitigating emissions from BUGs. This would hurt air districts' air pollution reduction efforts by shrinking overall resources, which will ultimately result in negative impacts to public health.

"Overall, this bill runs counter to local air districts' missions to protect public health, reduce the impacts of air pollution throughout California, and attain federal air quality standards. Further, the issues raised in the bill have been and will continue to be successfully addressed at the local level without interruption of needed power during emergency situations."

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SENATE COMMITTEE ON ENVIRONMENTAL QUALITY
Senator Allen, Chair
2019 - 2020 Regular

Bill No:	SB 1156		
Author:	Archuleta		
Version:	5/26/2020	**Hearing Date:**	5/29/20
Urgency:	No	**Fiscal:**	Yes
Consultant:	Maria Montchal		

SUBJECT: Lithium-ion batteries: illegal disposal: penalties

DIGEST: Requires agencies and representatives from the solid waste industry to develop a protocol and training identifying best practices for preventing and suppressing fires caused by lithium-ion batteries or products containing lithium-ion batteries. Requires CalRecycle, in consultation with DTSC, to develop a public education program on fire risk from improper disposal of lithium-ion batteries or products containing lithium-ion batteries. Prohibits a person from knowingly disposing of a lithium-ion battery in the garbage or recycling streams, unless the container or receptacle is designated for the collection of batteries for recycling.

Due to the COVID-19 Pandemic and the unprecedented nature of the 2020 Legislative Session, all Senate Policy Committees are working under a compressed timeline. This timeline does not allow this bill to be referred and heard by more than one committee as a typical timeline would allow.

ANALYSIS:

Existing law:

1) Defines universal waste to include batteries (22 CCR 66273.1(a)(1) et seq.)

2) Prohibits a universal waste handler from disposing of universal waste, except that a universal waste handler may take batteries, among other things, to a destination facility for disposal (22 CCR 66273.31).

3) Prohibits the disposal of a battery anywhere besides a destination facility (HSC § 25190 et seq.).

4) Prohibits many retailers from selling rechargeable batteries in California unless they have a system in place for collecting used rechargeable batteries from consumers (PRC § 42451).

5) Requires a retailer selling a cell phone to have a system in place for collection of used cell phones for reuse, recycling, or proper disposal (PRC § 42490-42499).

6) Assesses a recycling fee on retail sales of covered electronic devices (such as televisions) and tasks CalRecycle with administering a payment system for collectors and recyclers to cover the average net costs of recovering and recycling covered electronic waste (PRC § 42460 et seq.).

7) Requires the Secretary for Environmental Protection to convene the Lithium-Ion Car Battery Recycling Advisory Group to review, and advise the Legislature on, policies pertaining to the recovery and recycling of lithium-ion batteries sold with motor vehicles in the state. It also requires the advisory group to submit, on or before on or before April 1, 2022, policy recommendations to the Legislature aimed at ensuring that as close to 100% as possible of lithium-ion batteries in the state are reused or recycled (PRC § 42450.5).

This bill:

1) Requires the Department of Forestry and Fire Protection, in consultation with relevant state agencies and stakeholders, including DTSC, CalRecycle, the Department of the California Highway Patrol, and representatives from the solid waste industry to develop a protocol and training that identifies best practices for detection, safe handling, and suppression of fires originating from discarded lithium-ion batteries or products containing lithium-ion batteries in waste or recycling vehicles, transfer or processing stations, or disposal facilities.

2) Requires a solid waste enterprise to, before July 1, 2022, consult with the fire marshal of every county in which they conduct solid waste collection and adopt a protocol identifying procedures to follow for detection, safe handling, and suppression of fires originating from discarded lithium-ion batteries or products containing lithium-ion batteries in solid waste or recycling collection vehicles, transfer or processing stations, or disposal facilities.

3) Requires CalRecycle to, in consultation with DTSC, develop and promote a program to better inform, educate, and increase public awareness regarding fire risk from improper disposal of and proper handling of lithium-ion batteries and products containing lithium-ion batteries. This bill also requires CalRecycle to convene a working group of representatives from the solid waste industry and

local government to advise CalRecycle on content development and promotion of this program.

4) Prohibits a person from knowingly disposing of a lithium-ion battery by placing it in a receptacle intended for solid waste or recyclable materials, unless the container or receptacle is designated for the collection of batteries for recycling.

Background

1) *Lithium-ion batteries.* Lithium-ion batteries are widely used in electronics like laptops, smart phones, digital cameras, televisions, game consoles, and cordless power tools. All batteries, including lithium-ion batteries, are considered hazardous waste in California when they are discarded, because they contain hazardous substances. According to CalRecycle, there are approximately 44 million lithium-ion batteries in California. It is estimated that between 800-2,000 tons enter the waste stream annually, while voluntary recovery is estimated at only 250 tons.

2) *Fire danger.* Lithium-ion batteries pose a fire hazard. They typically have a small piece of material between electrodes. If this material is damaged, the electrodes can touch and heat up. The electrodes themselves are filled with a flammable substance that can combust when it is heated. Lithium-ion batteries can start a fire if they are dropped or crushed, which can easily happen if they are disposed of improperly. According to Resource Recycling Systems, 65 percent of fires in California waste facilities were started by lithium-ion batteries.

3) *Recycling lithium-ion batteries.* In 2005, to help promote proper disposal of rechargeable batteries by the public, the Governor signed the California Rechargeable Battery Recycling Act (PRC § 42451), which requires retailers to have a mechanism to accept all rechargeable batteries from consumers for recycling. Large chain supermarkets and persons (including corporations or franchises) who have less than one million dollars annually in gross sales are not considered "retailers" under this law's definition; and therefore, these businesses are not subject to the law's requirements. Also, sales of rechargeable batteries that are contained in, or packaged with, a battery-operated device are not subject to this law. However, a retailer selling replacement batteries for such devices must comply.

   To encourage the recycling of cell phones, which can contain lithium-ion batteries, the Governor signed The California Cell Phone Recycling Act of 2004 (PRC § 42490-42499), which requires retailers to accept all cell phones

from consumers for recycling. According to DTSC, the estimated recycling rate for cell phones in 2018 was only 10%.

California enacted the Electronic Waste Recycling Act of 2003 (PRC § 42460 et seq.) to establish a funding system for the collection and recycling of certain electronic wastes. The intent of the act is to reduce illegal dumping and increase proper disposition of covered electronic waste, provide financial relief to parties responsible for managing covered electronic waste, and foster cost-free recycling opportunities for consumers throughout the state.

Comments

1) *Purpose of Bill.* According to the author, "The proliferation of lithium-ion batteries and the improper disposal of these batteries has led to numerous fires at waste facilities and operations. California needs to do more to increase awareness with the public about the need to properly recycle these batteries. At the same time, California needs to implement protocols for both consumers and industry to follow in regards to the disposal of these batteries. My bill, SB 1156 would not just make the intentional disposal of lithium-ion batteries a crime, but it would also establish an educational outreach program for consumers, and task multiple California state agencies to come up with a protocol for the proper disposal of these lithium-ion batteries."

2) *Future work.* Existing law already prohibits disposal of lithium-ion batteries in the waste or recycling streams. This bill focuses on two important strategies for reducing fires from improper disposal of lithium-ion batteries: (1) consumer education and (2) tasking experts to develop fire prevention and management protocols.

   Another problem is that it can be inconvenient to properly dispose of lithium-ion batteries. Exceptions to the California Rechargeable Battery Recycling Act mean that large chain retailers who gross less than one million dollars annually are not required to accept rechargeable batteries for recycling. Additionally, sales of rechargeable batteries that are contained in, or packaged with, a battery-operated device are also not subject to this law.

   As a result, consumers would have to go out of their way to properly dispose of lithium-ion batteries. Using Call2Recycle's online tool that locates rechargeable battery recycling stations, the closest recycling center to the State Capitol is at the City of West Sacramento Police Department, which can be difficult to get to for those without a car. It's even less convenient for Californians living in more rural locations. Many would need to travel over ten

miles to recycle their rechargeable batteries or cell phones. The alternative is to buy a mail-in recycling kit, which ranges from $45-65 for even the smallest kits.

One potential solution is to task manufacturers with taking back lithium-ion batteries they sell. For example, AB 1509 would require manufacturers to provide convenient collection, transportation, and disposal of lithium-ion batteries. Putting the onus on manufacturers would ensure that consumers would be able to safely dispose of lithium-ion batteries, regardless of a consumer's location and income. The committee should consider the steps that will need to be taken in the future to increase the convenience of proper disposal of lithium-ion batteries.

Related/Prior Legislation

AB 1509 (Mullin, 2019) would establish the Lithium-Ion Battery Recycling Program (Program) within CalRecycle that requires manufacturers of lithium-ion batteries to provide convenient collection, transportation, and disposal of lithium-ion batteries. This bill is currently before the Senate Environmental Quality Committee, but the hearing has been postponed.

AB 2407 (Ting, 2018) would have required the Secretary for Environmental Protection to convene an advisory group to review, and advise the Legislature on, policies pertaining to the recovery and recycling of lithium-ion batteries sold with motor vehicles in the state. The advisory group would have also been required to submit policy recommendations to the Legislature aimed at ensuring that 90% of end-of-life lithium-ion batteries discarded in the state are recycled in a safe and cost-effective manner in the state. This bill failed passage in the Senate Environmental Quality Committee.

SOURCE:

Author

SUPPORT:

Advance Disposal Co.
Athens Services
Big Bear Disposal, INC.
Burrtec Waste Industries, INC.
California Product Stewardship Council

California Waste Haulers Council
Californians Against Waste
Call2recycle
City of Thousand Oaks
CR&R, INC.
Desert Valley Disposal, INC.
Edco
Mid Valley Disposal
Mid-state Solid Waste & Recycling
National Electrical Manufacturers Association (NEMA)
North County Recycling
Palm Springs Disposal Services
Paso Robles Waste & Recycle
Pena's Disposal Service
PRBA - the Rechargeable Battery Association
Recology
Republic Services INC.
Sanitation Districts of Los Angeles County
South Bayside Waste Management Authority Dba Rethinkwaste
Varner Bros., INC.
Waste Connections, INC.
Waste Management & Affiliated Entities

OPPOSITION:

None received_

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SENATE COMMITTEE ON ENVIRONMENTAL QUALITY
Senator Allen, Chair
2019 - 2020 Regular

Bill No:	SB 1185		
Author:	Moorlach		
Version:	5/26/2020	**Hearing Date:**	5/29/2020
Urgency:	No	**Fiscal:**	Yes
Consultant:	Eric Walters		

SUBJECT: Natural gas powered generators: operation during deenergization events

DIGEST: Requires a facility permittee, when applying for an emergency variance from backup generator runtime rules, to demonstrate that they are using the cleanest, feasible, available backup power source, including but not limited to natural gas-powered generators. Additionally requires reporting from utility providers to local and state air regulators.

Due to the COVID-19 Pandemic and the unprecedented nature of the 2020 Legislative Session, all Senate Policy Committees are working under a compressed timeline. This timeline does not allow this bill to be referred and heard by more than one committee as a typical timeline would allow.

ANALYSIS:

Existing federal law:

1) Sets, through the Federal Clean Air Act (FCAA) and its implementing regulations, National Ambient Air Quality Standards (NAAQS) for six criteria pollutants and requires states to prepare, submit, and adopt a State Implementation Plan (SIP) to limit air pollution and attain federal standards. (42 U.S.C. §7401 et seq.)

Existing state law:

2) Establishes the Air Resources Board (ARB) as the air pollution control agency in California and requires ARB, among other things, to coordinate, encourage, and review the efforts of all levels of government as they affect air quality. (Health and Safety Code (HSC) §39500 et seq.)

3) Creates the 35 air pollution control and air quality management districts (air districts) to be responsible for regional air quality planning, monitoring, and stationary source and facility permitting. (HSC §40000 et seq.)

4) Defines "emergency use" as providing electrical power during specified events, including the loss of normal electrical power for reasons beyond the control of the operator. (Title 17 of the California Code of Regulations (CCR) §93115.4)

5) Requires, under SB 901 (Dodd, Chapter 626, Statutes of 2018), electric utilities to develop annual wildfire mitigation plans (WMPs) to prevent, combat, and respond to wildfires within their service territories. (Public Utilities Code (PUC) §8386)

6) Allows any person to apply to an air district's hearing board for a variance from the district's rules, regulations, and orders (HSC §42350 et seq.), and makes specifications for the issuance of that variance, including:

   a) That no variance shall be granted unless it is found that compliance would otherwise result in either an arbitrary or unreasonable taking of property, or the practical closing and elimination of a lawful business.

   b) Requiring a hearing board to (when the petitioner is a public agency) consider whether immediate compliance would otherwise impose an unreasonable burden on an "essential public service"—specifically, a prison, detention facility, police or firefighting facility, school, health care facility, landfill gas control or processing facility, sewage treatment works, or water delivery operation, if owned and operated by a public agency.

7) Requires, upon granting a variance, an air district to prescribe requirements other than (and not more onerous than) those imposed by statute or by any rule, regulation, or order of the district board. (HSC §42353)

8) Requires an air district's hearing board, except in the case of an emergency, to hold a hearing the determine under what conditions and to what extent a variance shall be granted. (HSC §42359)

9) Allows for the issuance of emergency variances by the chairman or any other member of a district hearing board (without notice and hearing), provided that the emergency variance be issued for a good cause and not remain in effect for longer than 30 days. (HSC §42359.5)

10) Allows air districts to establish a permit system, consistent with FCAA requirements, which requires any person who builds, erects, alters, replaces, operates, or uses any equipment that issues air contaminants. (HSC §42300 et seq.)

This bill:

1) Requires a facility permittee, when applying for an emergency variance from BUG runtime rules, to demonstrate that they are using the cleanest, feasible, available backup power source, including but not limited to natural gas-powered generators.

2) Requires electric utilities (whether a corporation, cooperative, or publically owned entity) to report annually to affected air districts and ARB on the area and duration of any PSPS events they utilized.

3) Makes a finding and declaration of the need to curtail the standard public process of issuing a variance in the case of an emergency, due to the need for rapid response from the air pollution control officer.

Background

1) *Public safety power shutoffs*. California's wildfires have become more frequent, threatened more residents, and happened throughout more of the year in recent decades. More than 25 million acres of California wildlands are classified as under very high or extreme fire threat. Roughly a quarter of the state's residents live in this area. Climate change has exacerbated the hot, dry conditions that support catastrophic fires, and while California attempts to mitigate its contributions to global climate change, the state is also taking immediate actions to protect its residents from wildfires.

   To better protect safety and public health from uncontrolled wildfires, utility providers have adopted the use of Public Safety Power Shutoff (PSPS) events. Electricity transmission and distribution systems have sparked a number of wildfires, and this risk can be reduced by de-energizing the power lines during extreme weather events. During October of 2019, California utility providers conducted a dozen PSPS events. These affected millions of residents across 30 counties. While being an important public safety tool, power loss also has many negative impacts, especially to vulnerable populations (including residential customers that rely on reliable electric service to power life-saving medical devices), medical and emergency service providers (including hospitals, fire departments and police stations), and important public service providers (such as water agencies, gas stations and grocery stores).

2) *Backup generators*. In order to mitigate the damage of power loss, many of these critical service providers may rely on backup generators (BUGs) to

replace lost grid power. Additionally, many businesses may use BUGs to avoid catastrophic system disruptions and to minimize economic disruption that could result from prolonged power outages. However, this use of BUGs may result in air quality and public health impacts.

According to estimates from ARB, nearly 125,000 BUGs were used in California during PSPS events in October 2019. Assuming an average of 50 hours of operation each, those generators released a cumulative total of 166.4 tons of nitrogen oxides (NOx), 19.4 tons of particulate matter (PM), and 8.9 tons of diesel PM. The diesel PM release was roughly equivalent to 29,000 additional heavy-duty diesel trucks being used for the month.

3) *Natural gas versus diesel generators.* This bill specifically mentions natural gas powered generators. According to an analysis by the National Renewable Energy Labs (NREL), "The differences between diesel and natural gas generators in terms of economics and reliability are relatively modest." NREL also estimates that "the higher reliability of natural gas fuel supply compared to that of diesel fuel for long outages results in natural gas generators being more reliable than diesel generators, though these conclusions are based on estimates from small data sets and significant assumptions."

   The emissions from a natural gas powered internal combustion engine do still emit some air pollutants and GHGs. However, they lack the acute health impacts of diesel particular matter, which is a known carcinogen (among other negative health impacts). Neither type of generator burns purely renewable fuel. However, at this time, the upfront costs for renewable-and-storage backup power are beyond the reach of many facilities that may rely on backup power during a PSPS.

   Renewable-and-storage notwithstanding, natural gas powered BUGs are preferable to diesel powered BUGs from an environmental perspective. ARB's guidance document on PSPS back-up power includes natural gas fueled engines as technologies that would improve emissions from BUG use statewide as compared to diesel- and gasoline-powered engines.

4) *Air district permitting rules.* Each of the state's 35 air districts adopts their own sets of regulations and rules tailored to the sources and air quality challenges of its region and are overseen by ARB. Ultimately, these actions are designed to achieve NAAQS set by the FCAA. Collectively, these strategies (i.e. emission standards, fuel regulations, emission limits, etc.) are included in the State Implementation Plan (SIP). ARB is the lead agency in California for achieving the emission reductions goals and timelines described in the SIP. The 35 air

districts, as well as other agencies, prepare SIP elements to be reviewed and approved by ARB before being integrated into the SIP.

With few exceptions, anyone constructing or operating a facility that emits air pollutants must obtain an appropriate permit from the local air district. Each air district establishes its own fee schedule, and may maintain different requirements. An air district uses these permits to assess the air pollution impacts of stationary sources within its jurisdiction, and it may require additional standards or control technologies be used to align permitted entities' emissions with the SIP.

5) *Air district rules during emergencies*. Air districts provide for administrative exemption from established rules and regulations through the variance process. If a permitted facility anticipates they will need to exceed their authorized emissions due to reasons outside their control, they may submit a request for a variance to the board of the air district, who will hear and vote on the request at a public meeting. Should an interruption arise without time for the normal variance and hearing process, there is also an established emergency variance process. When an emergency variance is requested, it can be granted by the chair of the air district board (or a designee) without the board convening.

Comments

1) *Purpose of Bill.* According to the author, "In recent years, California has faced wildfires of catastrophic proportion. As a response to increased liability for wildfires and as a precautionary measure, California utility providers have begun the practice of shutting off electrical service in certain areas during peak wildfire risk times to mitigate the potential for a utility line to spark a wildfire.

"Many facilities rely on back-up generators during PSPS events to remain powered and functional. Natural gas service remains in place and functional during these events and is cleaner and more feasible than traditional diesel generation. In many cases, PSPS events have qualified as cause for an emergency variance to a back-up generator permit. However, without clear statute regarding the issuance of emergency variance permits during PSPS events, many critical facilities have expressed fear of hefty fines and compliance issues when utilizing back-up generators.

"Senate Bill 1185 clarifies existing statute to ensure that operators of back-up generators can apply for an emergency variance to their permit during a public safety power shut-off (PSPS) event while also encouraging the use of natural-gas-backup generation where applicable.

"When back-up generation occurs, it is far more favorable to utilize natural gas infrastructure, as opposed to bringing in and storing large amounts of diesel fuel—presenting a serious safety concern and elevating the risk for disaster. In addition, natural gas generation releases significantly less pollutants than diesel generation. However, natural gas generation is not always available, and as such, this bill provides flexibility for emergency variances for other sources of generation."

2) *Emergency variance approach.* Recent amendments made by the author change the mechanism by which SB 1185 operates. Instead of exempting certain hours from district rules and ARB regulations, the bill will simply add one condition to the emergency variance application process. This will uphold air districts' regulatory authority, and encourage ongoing conversations at the local level about the role natural gas can play in moving away from highly polluting diesel generators.

The committee may wish to consider supporting this measure to ensure emergency variances are granted with due consideration of the technology being used for backup power.

Related/Prior Legislation:

SB 802 (Glazer, 2020) would exempt health facilities from BUG use counting towards air district emission timing rules during a PSPS. SB 802 is currently in the Senate Environmental Quality committee.

SB 1099 (Dodd, 2020) would require air districts to adopt or revise their rules to allow critical facilities to be allowed to use BUGs during PSPSs and for testing/maintenance without it counting towards permitted annual runtime goals. SB 1099 will be heard by the Senate Environmental Quality committee 5/29/2020.

AB 2182 (Rubio, 2020) would exempt any alternative power source used by any essential service provider during a PSPS from all local, regional, or state regulations. AB 2182 is currently in the Assembly Utilities and Energy committee.

SOURCE:

Author

SUPPORT:

Association of California Water Agencies (ACWA)
California Cable & Telecommunications Association
San Diego County Water Authority
Sempra Energy Utilities
Utility Workers Union of America

OPPOSITION:

Bay Area Air Quality Management District
California Air Pollution Control Officers Association
Sierra Club
South Coast Air Quality Management District

ARGUMENTS IN SUPPORT: According to the San Diego County Water Authority, "Without proper regulatory, statutory, and administrative structure, the increased frequency of PSPS events could have significant impacts on critical facilities including water and wastewater treatment agencies. Some of these consequences include the inability to pump water, inadequate fire flows, sewage backups, and air conditioning shutoffs in facilities with temperature-sensitive equipment. If water agencies cannot access reliable electricity, communities could face a public health crisis if they lack safe drinking water for consumption, cooking, and sanitation.

"To mitigate these effects and ensure reliable electricity during a PSPS event or other catastrophic loss of power like a wildfire, many critical facilities, including water agencies, must depend on their onsite emergency generators. However, state and local air quality management district restrictions for some existing generators adopted prior to the widespread use of PSPS do not provide enough time for proper testing in advance of an event or enough run time during an event."

ARGUMENTS IN OPPOSITION: According to Sierra Club, "SB 1185 works counter to our efforts to ensure California communities are protected from the health impacts caused by air pollution. Reliance on methane gas generators will ultimately worsen California air quality, public health and quality of life. Methane gas generation produces nitrogen oxides, or NOx. Not only does NOx cause respiratory problems but it also reacts with other substances in the air to produce particulate matter and ozone which, in turn, causes an extensive list of adverse health impacts.

"…Given the impacts methane generation has on air quality and public health, California must transition away from this polluting technology. Clean technology for backup generation is available. There are better choices, and through previous legislation, the legislature has embraced and advanced new cleaner technologies."

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