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**SENATE COMMITTEE ON ENVIRONMENTAL QUALITY**

**Senator Allen, Chair**

**2021 - 2022 Regular**

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**Bill No:** SB 1118  
**Author:** Borgeas  
**Version:** 4/5/2022  
**Urgency:** No  
**Consultant:** Genevieve M. Wong

**Hearing Date:** 4/20/2022  
**Fiscal:** No

**SUBJECT:** California Environmental Quality Act: judicial relief

**DIGEST:** Requires a court to find that a public agency's determination, finding, or decision was made with a prejudicial lack of compliance with CEQA before ordering certain mandates for relief and to issue written findings that the order is necessary to avoid or mitigate a specific, adverse impact upon the environment, public health, or public safety.

**ANALYSIS:**

Existing law:

- 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 (PRC) §§21000 et seq.)
- 2) Sets 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 §21167).
- 3) Prohibits, when there is a challenge to a determination or decision of a public agency alleging CEQA noncompliance and the proceeding of that determination required a hearing, evidence to be taken, and discretion in the determination of facts be vested in the public agency, the court from exercising independent judgment on the evidence and requires the court to only determine whether the decision is supported by substantial evidence in light of the whole record. Requires, in other challenges to a determination or decision of a public agency alleging CEQA noncompliance, the inquiry to extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. (PRC

§§21168, 21168.5)

- 4) Requires, if a court finds that any determination, finding, or decision of a public agency has been made without compliance with CEQA, the court to enter an order that includes one or more of the following: (PRC §21168.9(a))
  - a) A mandate that the determination, finding, or decision be voided by the public agency, in whole or in part.
  - b) A mandate that the public agency and any real parties in interest suspend any or all specific project activity that could result in an adverse change in alteration to the physical environment until the public agency has taken actions necessary to bring the determination, finding, or decision into compliance, if the court finds that a specific project activity will prejudice the consideration or implementation of mitigation measures or alternatives to the public.
  - c) A mandate that the public agency take specific action has may be necessary to bring the determination, finding, or decision into compliance.
- 5) Requires any order pursuant to (4) only include those mandates that are necessary to achieve compliance with CEQA and to only those specific activities in noncompliance with CEQA.

This bill:

- 1) Requires the court to find that the determination, finding, or decision of a public agency has been made with a prejudicial lack of compliance with CEQA, rather than finding that there has been a lack of compliance, before entering an order.
  - a) Defines “prejudicial lack of compliance” as the deficiency in the determination, finding, or decision of the public agency was made without substantial relevant information about the project’s likely adverse impacts. Specifies that insubstantial or merely technical violations are not grounds for relief.
- 2) Requires, before the court issues an order with one of the three specified mandates, the court to first issue written findings, based on preponderance of evidence, that the order is necessary to avoid or mitigate a specific, adverse impact upon the environment, public health, or safety.
- 3) Defines “specific, adverse impact” as a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the

application was deemed complete.

## 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. 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 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) *Enforcement of CEQA.* CEQA is enforced through judicial review. CEQA actions taken by public agencies can be challenged in the Superior Court once the agency approves or determines to carry out the project. If a court finds that a determination, finding, or decision of a public agency was made without compliance with CEQA, the court will issue at least one of the following forms of relief:
  - A mandate that the determination, finding, or decision be voided by the public agency, in whole or in part.
  - Injunctive relief.
  - A mandate that the public agency take specific action as may be necessary to bring the determination, finding, or decision into compliance.
- 3) *CEQA Standards of Review.* While PRC §21168 and §21168.5 lays out two, superficially different standards of review, courts have interpreted them to impose the same two tests in any action reviewing a CEQA determination: (1) whether there is substantial evidence to support the agency decision, and (2) whether the agency failed to proceed in the manner the manner required by

law.

- a) *Substantial Evidence Test.* The substantial evidence test applies to the court's review of the agency's factual determinations. "Substantial evidence" means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (CEQA Guidelines 15384(a)). This standard of review gives a lot of deference to the agency and its discretion to resolve questions of fact. Under this test, a reviewing court does not reweigh the evidence and is limited to determining whether the record contains relevant information that a reasonable mind might accept as sufficient to support the conclusion reached.
  - b) *Failure to Proceed in Manner Required by Law.* An agency abuses its discretion by failing to proceed in the manner required by law if its action or decision does not substantially comply with the requirements of CEQA. This test applies when the petitioner claims that the agency failed to comply with CEQA's procedural requirements.
  - c) *Prejudicial Error.* If, based on the above two tests, the court finds that there was CEQA noncompliance, a court will evaluate whether the noncompliance constituted a prejudicial abuse of discretion (PRC §21005). PRC §21005 has generally been interpreted to mean that a determination of prejudice depends on whether legal error hindered accomplishment of CEQA's objectives, not whether the error might have affected the outcome. The courts do not determine whether the agency's ultimate decision would have been different if the law had been followed. Instead, the court focuses on whether the violation of CEQA prevented informed decision making or public participation.
- 4) *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* 57 Cal.4th 439 (2013), (hereafter *Neighbors*). In *Neighbors*, Neighbors for Smart Rail (NSR) challenged the certification of an EIR for a light rail construction project on the grounds that the EIR (1) failed to consider existing environmental conditions, only looking at future impacts to traffic and air quality and (2) didn't incorporate mandatory and enforcement mitigation measures for spillover parking effects.

Applying the substantial evidence test to the agency's decision to rely solely on projected future conditions in evaluating significant impacts, the California Supreme Court found there was not substantial evidence showing that an

analysis based on existing conditions would be misleading or without informational value and therefore no justification for the agency to leave that information out. However, an omission in an EIR's significant impacts analysis is only deemed prejudicial if the omission deprives the public and decision makers of substantial relevant information about the project's likely adverse impacts. "A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*Id.*, at 516). On that matter, the Court concluded that leaving the information out was nonprejudicial because the exclusion did not deprive the agency or the public of substantial relevant information on those impacts and did not preclude informed decisionmaking.

Thus, while there was an abuse of discretion by the agency to certify an EIR without analyzing certain impacts, that omission did not result in a prejudicial abuse of discretion because it did not prohibit informed decision making or informed public participation.

## Comments

- 1) *Purpose of Bill.* According to the author, "[t]he California Environmental Quality Act (CEQA) was enacted over 50 years ago to ensure that state and local agencies consider the environmental impact of their decisions when approving a public or private project. And while this law has undoubtedly done an excellent job in protecting and conserving the natural resources of the State, it is also clear that this law has been used to facilitate needless and costly litigation whose purpose is often times unrelated to protecting the environment.

"In *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal. 4th 439, the California Supreme Court held that "[i]nsubstantial or merely technical omissions are not grounds for relief" under CEQA. That decision further noted that an omission is prejudicial "if it deprived the public and decision makers of substantial relevant information about the project's likely adverse impacts." If enacted, SB 1118 would amend CEQA to require a finding that an agency caused "prejudicial" violation of the act before a court can issue an order directing a lead agency or real parties in interest to take additional steps. This change would help limit the number of frivolous suits that are filed every year under CEQA because it would ensure that only those cases with real merit will ever succeed in obtaining relief."

- 2) *Prejudicial lack of compliance.* Currently, courts, when reviewing a public agency's determination, finding, or decision under CEQA, determine whether

there has been a “prejudicial abuse of discretion” of the public agency. “A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.” (*Id.*, pp. 517)

SB 1118 introduces a new, very similar standard of review – a “prejudicial lack of compliance,” which the bill defines as “that the deficiency in the determination, finding, or decision of the public agency was made without substantial relevant information about the project’s likely adverse impacts. Insubstantial or merely technical violations are not grounds for relief.” SB 1118 only permits a court to issue specified mandates if the court finds that a public agency’s determination, finding, or decision was made with a *prejudicial lack of compliance* with CEQA.

On its surface, it would appear that this new standard, a prejudicial lack of compliance, is consistent with a common practice of the courts. However, the language could also be interpreted to require the courts to look beyond the administrative record to evaluate the agency’s determination, finding, or decision. A court’s review is limited to the evidence that is available in the administrative record. As discussed above, a CEQA violation occurs when the lead agency has made a conclusion based on a legally insufficient analysis of the relevant information that is a part of the administrative record. In other words, the deficiency in the public agency’s determination, finding, or decision was made despite the substantial relevant information about the project’s likely adverse impacts being in the administrative record. If relevant substantial information was not a part of the administrative record, and a court cannot rely on information that is outside of the administrative record, how will a court be able to find a prejudicial lack of compliance?

According to the author, the intent of this change was to codify the court’s ruling in *Neighbors*. While the author’s intent is to codify a common practice of the courts, adding this standard of review, as written, may cause additional confusion with little benefit.

***The committee may wish to amend the bill to insert intent language indicating that the intent of this new standard of review is to codify the Supreme Court’s holding in “Neighbors for Smart Rail.” The committee may also wish to require the author to continue to work with the committee to craft language that would not imply that a court looks at information outside of the administrative record when determining a “prejudicial lack of***

*compliance.”*

- 3) *Additional step for the courts.* Before a court may issue one of the specified orders for relief, including injunctive relief, SB 1118 requires the court to also issue written findings that the order is necessary to avoid or mitigate a specific, adverse impact upon the environment, public health, or safety. Thus, a court will be required to expend additional resources to issue written findings before it can issue relief for CEQA noncompliance. According to the author, this additional step is necessary to ensure that a court does not issue an order without proper reasoning.
- 4) *Defining “specific, adverse impacts.”* The bill defines “specific, adverse impact” to mean a significant, quantifiable, direct, or unavoidable impact, based on objective, identified, written public health or safety standards, policies, or conditions, as they existed on the date the application was deemed complete.
  - a) *Borrowed from the Housing Accountability Act.* According to the author, the language for “specific, adverse impact” was borrowed from the Housing Accountability Act (SB 167, Chapter 368, Statutes of 2017).
    - i) *What about the environment?* While the issuance of the order is limited to circumstances that the court determines are necessary to avoid or mitigate specific, adverse impacts on the environment, public health, or safety, the “specific, adverse impacts” themselves are limited to public health and safety standards, policies, or conditions. According to the author, the intent is to have the environment be considered a specific, adverse impact as well.
    - ii) *What application?* It is unclear what application the definition is referring to and the language will likely need to be modified to better fit within the context of CEQA.
    - iii) *Is it necessarily transferable?* The Housing and Accountability Act prohibits a local agency from disapproving certain types of housing development projects unless the local agency made one of five written findings. If a local agency made one of the five findings, including that the project would have specific, adverse impact on public health or safety, it was permitted to deny the housing development project. A local agency was not required to make this finding, but had it as one of the options. SB 1118’s application is more restrictive on the courts, requiring a court to make this finding

before it can issue relief.

- b) *Disproportionate impact on smaller groups?* Specifically requiring the courts to find “significant, quantifiable, direct, or unavoidable impact, based on objective, identified, written public health or safety standards, policies, or conditions” means that the parties will be required to supply that information. While larger, well-resourced parties may be able to supply such material, there is concern that this requirement could be a greater hardship on smaller, under-resourced groups due to the specificity required.
- c) *Can a new standard lead to inconsistent CEQA court opinions?* As with any new standard, it will take time for the courts to implement and interpret. What is considered significant? What is considered unavoidable? Could this new standard lead to confusion and inconsistent court opinions?

***Given all of the above concerns, the committee may wish to amend the bill to remove the definition of “specific, adverse impact.”***

- 5) *Limiting courts ability to issue relief.* By requiring a court to first issue written findings that the order is necessary to avoid or mitigate a specific, adverse impact, SB 1118 restricts the ability of the courts to issue relief. This is particularly concerning in the context of injunctive relief when a court issues an order to temporarily suspend specific activities that could result in permanent change to the physical environment until the public agency has taken action to come into compliance with CEQA. Requiring a court to take this step before issuing an order requires the court to make findings that are typically done when the court is issuing its final decision. Further, if a court finds that there is no specific, adverse impact at this stage, before issuing the final decision, it will be prevented from being able to find a specific, adverse impact later, during that final decision stage.

***The committee may wish to require the author to continue to work with the committee to craft language that would address these issues regarding injunctive relief.***

- 6) *Committee Amendments.* ***Staff recommends the committee adopt the bolded amendments contained in comments 2 and 4, above, and to agree to work with the committee on other concerns described in comments 2 and 5, above.***

## **Related/Prior Legislation**



None available

**DOUBLE REFERRAL:**

If this measure is approved by the Senate Environmental Quality Committee, the do pass motion must include the action to re-refer the bill to the Senate Judiciary Committee.

**SOURCE:** Author

**SUPPORT:**

None received

**OPPOSITION:**

California Environmental Justice Alliance (CEJA) Action  
Leadership Counsel for Justice and Accountability

**ARGUMENTS IN OPPOSITION:** According to California Environmental Justice Alliance and Leadership Counsel for Justice & Accountability,

“We are especially concerned with the new set of definitions within the bill, such as “prejudicial lack of compliance” and “specific, adverse impact,” as well as the clarification that “insubstantial or merely technical violations are not grounds for relief.” These provisions are troubling because they would add new definitions that overlap with or duplicate current aspects of CEQA law, and would create vague and subjective standards for determining which CEQA violations are deemed “prejudicial” and which impacts would be deemed “significant.” Such confusion and lack of clarity, from our experience, would disadvantage EJ petitioners who are seeking justice and remedies to address environmental harms and health-related threats and would lead to more litigation to clarify these new terms. On the other hand, such loopholes would allow industry, corporate developers, or public agencies to avoid accountability if a judge could be convinced that there was an “insubstantial or technical violation” instead of a substantive violation. Parts of the definition for specific adverse impacts would be almost impossible for environmental justice communities to meet—for example, projects where significant impacts would remain even if site specific mitigation were adopted. That is often the case in overburdened communities where any additional contamination would contribute to already significant impacts. This bill

would deny overburdened communities a remedy.

“Furthermore, we are concerned that, if passed, SB 1118 would place the onus on the judiciary to justify their ruling in using such specific detail. This bill creates a more complicated task for a judge. Judges already must determine if a CEQA violation is preudicial. The definition included is very confined and would require that the courts step in for agencies which have not conducted the appropriate analysis or included the necessary mitigation measures. This definition also invites judges to replace their judgment for that of the lead agency, a role that judges specifically avoid in CEQA cases. It would have a chilling effect on judges finding prejudice: either causing them to avoid finding prejudice or encouraging judges to include findings to their rulings that replace the lead agencies own analysis.”

**-- END --**