
SENATE COMMITTEE ON ENVIRONMENTAL QUALITY

Senator Allen, Chair

2021 - 2022 Regular

Bill No: SB 1404
Author: Stern
Version: 4/6/2022
Urgency: No
Consultant: Genevieve M. Wong

Hearing Date: 4/20/2022
Fiscal: Yes

SUBJECT: California Environmental Quality Act: oak woodlands

DIGEST: Requires public agencies, instead of counties, to determine whether a project may result in a conversion of oak woodlands that will have a significant effect on the environment and requires that the removal of three or more oak trees within an oak woodland constitutes a significant effect on the environment.

ANALYSIS:

Existing law, 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.)
 - a) Requires an EIR to be prepared if there is substantial evidence that the project may have a significant effect on the environment. Defines “significant effect on the environment: to mean a substantial, or potentially substantial, adverse change in the environment. (PRC §§21068, 21080(d))
- 2) Requires lead agencies to prepare a MND for a project that may have a significant effect on the environment if revisions in the project would avoid or mitigate that effect and there is no substantial evidence that the project, as revised, would have a significant effect on the environment. (PRC §21080(c))
- 3) Requires a county to determine whether a project within its jurisdiction may result in a conversion of oak woodlands that will have a significant effect on the environment. If the county determines that there may be a significant effect on the environment, the county is required at least one of specified oak woodland mitigation alternatives. Does not apply these requirements to certain types of projects such as affordable housing projects for lower income

households and projects undertaken pursuant to an approved Natural Community Conservation Plan. (PRC §§21083.4(b), (d))

- 4) Authorizes a county to use a grant awarded pursuant to the Oak Woodlands Conservation Act to prepare an oak conservation element for a general plan, an oak protection ordinance, or an oak woodlands management plan. (PRC §21083.4(c))
- 5) Provides that a lead agency that adopts, and a project that incorporates, at least one of the specified mitigation measures is deemed in compliance with CEQA only to the effects on oaks and oak woodlands.

This bill:

- 1) Applies these oak woodland provisions to a public agency, instead of a county, Specifically:
 - a) Requires a public agency, instead of a county, to determine whether a project may result in a conversion of oak woodlands that would have a significant effect on the environment.
 - b) Requires the public agency, instead of the county, to require the specified mitigation alternatives to mitigate the significant effect of oak woodlands conversion.
 - c) Authorizes a public agency, instead of the county, to use a grant awarded pursuant to the Oak Woodlands Conservation Act to prepare an oak conservation element, oak protection ordinance, or oak woodlands management plan.
- 2) Makes the removal of three or more oak trees within an oak woodland a significant effect on the environment.
- 3) Deletes the requirement that a lead agency that adopts, and a project that incorporates, at least one of the oak tree mitigation measures be deemed in compliance with CEQA as it applies to oaks and oak woodlands.
- 4) Prohibits these oak woodland provisions from being construed to prohibit a person from bringing a cause of action to set aside a decision by a public agency.
- 5) Defines “oak woodland” to mean an oak stand with a greater than 10 percent canopy cover, that may have historically supported greater than 10 percent canopy cover, or with savanna-like canopy cover.

- 6) Defines “stand” as a group or grouping of three or more trees.
- 7) Defines “savanna-like canopy cover” as canopy cover that is less than 10 percent but is evenly distributed.

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 ND. 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) *Mitigation under CEQA.* The purpose of a mitigation measure is to minimize environmental impacts and mitigation may take various forms. Courts usually defer to the agency’s determination that mitigation measures are adequate and an agency’s power to impose mitigation measures are subject to constitutional limitations, including that the measures must have a reasonable relationship to impacts created by the project.
- 3) *Oak woodlands.* According to information provided by the author, oak woodlands and forests are necessary to sustain California’s unique biodiversity, and are important for many ecosystem services that communities rely on for safety and economic stability, including water quality protection, carbon sequestration, erosion control, and soil retention. In addition, forests are an important carbon sink that can help moderate the impacts of climate change.

Conversion, with regard to oak woodlands, means changing land uses to uses such as livestock grazing, vineyards, and the growing and harvesting of other commodities, and residential and commercial development. Conversion

generally results in the removal of most or all of the trees in the oak woodlands.

In 2001, the Legislature passed the California Oak Woodland Conservation Act (AB 242, Thompson, Chapter 588, Statutes of 2001) which created a grant program (Oak Woodland Conservation Program). The program, administered by the Wildlife Conservation Program, provides funding encouraging the long-term private stewardship of California oak woodlands.

According to the Wildlife Conservation Board's 2010 report on the program, there were about 10 million acres of oak woodlands remaining in California. Though no comprehensive data exist to track the statewide rate of oak woodlands conversion, oak woodlands acreage has declined over the past 30 years. Conversion is only one factor leading to the decline in oak woodland acreage, however, since oak tree stands in California are also susceptible to oak regeneration problems and, in recent years, the spread of the fungus that causes Sudden Oak Death. Oak woodlands in California have been divided into eight geographical regions with the following acreage: North Coast (2.1 million); Klamath/South Cascade (940,000); Modoc (5,000); Central Coast (1.9 million); Southern California (590,000); Central Valley (960,000); Sierra Nevada Foothills (2.1 million); and Sierra Nevada (590,000). The primary threat to the continued existence of these oak woodlands is conversion to residential development, and other agricultural uses, primarily vineyards. According to WCB, the program has not been funded since about 2010.

- 4) *The future of California's oaks.* According to information provided by the author, more than one million acres of California's oak woodlands are developed, and approximately 750,000 acres, or about 20 percent of California's oak woodlands, are forecasted and at risk of urban development before 2040. The oak woodlands of the Central Valley and Sierra Foothills face the most immediate threats. Eighty percent of California's oak woodlands that are at risk of development are located in the Sacramento and San Joaquin regions. Additionally, recent studies have shown that frequent droughts associated with climate warming have escalated the decline of oak woodlands tree cover.
- 5) *CEQA and oak woodlands.* CEQA requires counties to determine whether a project will result in the conversion of oak woodlands and if that conversion would have a significant effect on the environment (SB 1334, Kuehl, Chapter 732, Statutes of 2004). If it is determined that the conversion of oak woodlands will have a significant effect on the environment, the county is required to adopt at least one specified oak woodlands mitigation alternatives

from a list. These mitigations include: (1) conserving oak woodlands, through the use of conservation easements; (2) planting an appropriate number of trees, including maintaining plantings and replacing dead or diseased trees; (3) contributing funds to the Oak Woodlands Conservation Act; and (4) other mitigation measures developed by the county.

Comments

- 1) *Purpose of Bill.* According to the author, “California’s oaks are seriously threatened as a burgeoning state population makes ever more use of oak habitat. Ecological functions, including reducing wildfire risk, wildlife habitat, recreational opportunities, and scenic values are seriously impaired as population densities and other landscape use pressures increase. All public agencies should be required to mitigate the harmful ecological effects of the conversion of oak woodlands. By clearly defining what constitutes significant effects by means of Oak tree removal and extending existing law to allow public agency oversight on mitigation efforts, California can better protect these iconic and native species.”
- 2) *Applying to public agencies.* Requiring public agencies, instead of counties, to determine whether a project results in a conversion of oak woodlands may lead to confusion on which entity should be making the determination. Should it be the lead agency? A responsible agency? A local area commission? CEQA defines “public agency” as “any state agency, board, commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision. Generally referring to “public agency” opens the door to a variety of agencies making the decision. If a state agency makes the determination, could someone argue that a different state agency should have been the appropriate lead agency on the project?

According to the bill’s factsheet, the intent of SB 1404 is to protect oak woodlands to the greatest extent possible, and across all types of projects; not just projects carried out by counties. As such, it may be more appropriate to require the lead agency make this determination.

The committee may wish to amend the bill to require that the lead agency make the determination of whether a project results in a conversion of oak woodlands, and to make conforming changes.

- 3) *Limiting agency discretion.* SB 1404 treats all projects the same, requiring mitigation if three or more oak trees are removed. Statutorily mandating

mitigation alternatives with the removal of three oak trees limits a public agency's discretion to make that determination. This bill does not prohibit the removal of more than three oak trees; nor does the bill prohibit a project that involves the removal of three or more oak trees. A project may include the removal of three or more oak trees if the project also includes at least one of the specific mitigation measures.

Although a project may still proceed if it adopts one of the mitigating measures, including ones developed by the public agency, stakeholders express concern that subjecting such projects to mitigation measures adds unnecessary burdens and mitigation requirements. While some stakeholders feel that there is no evidence that counties have not appropriately acted to protect oak trees, others feel that there has been abuse of discretion at the local level and the mitigation measures incorporated have not adequately mitigated the loss of oak trees.

Further, removing three trees in one project may have different impacts than compared to other projects. For example, a project that is removing three out of 10 oak trees may have a different impact than a project removing three out of 100 oak trees. What if the trees are "hazard trees?" (Trees that are considered old, dead, or dangerous.) What if the project is for levee maintenance when such trees are prohibited on levees? Stakeholders have questioned whether it makes sense to treat all projects equally in terms of the significant impact to oak trees.

Supporters of the bill argue, that because of the high value that oak trees provide, including water quality protection, erosion control, and carbon sequestration, a low, constant number is necessary to preserve oak trees to the maximum extent possible, including in urban areas, and to prevent the piecemeal removal of them throughout the state.

According to the author and supporters of the bill, a consistent number is necessary because "[t]here is no current standard of protection for Oak trees statewide, and we believe that the three tree standard is responsive to California's dire need to protect oak woodlands. Using a percentage of trees to be removed from an oak woodland would cause this law to disparately impact urban projects involving the removal of oaks where often times there are very few oak trees to begin with. As this law is expanded to include cities, we need to have an impact threshold that provides meaningful protections for the remaining oak woodlands in urban environments. Many of these oak woodlands span multiple parcels and are subject to piecemeal development impacts. Also, oak trees provide greater environmental services than other tree

species - by orders of magnitude. This is another reason why we want a lower and consistent threshold.”

The committee may wish to ask the author to continue to work with the committee to explore alternative thresholds that would adequately protect oak trees while providing flexibility between varying projects.

- 4) *Are the mitigation measures adequate?* Currently, if a lead agency adopts, and the project incorporates at least one of the specified mitigation measures to mitigate the significant effects to oaks and oak woodlands, the lead agency and project is deemed to be in compliance with CEQA as it applies to the effects on oaks and oak woodlands. SB 1404 repeals this standard and instead provides that these oak woodland provisions do not prohibit a person from being an action to set aside a decision by a public agency, including that a lead agency failed to adequately analyze and mitigate the impacts on oak woodlands of a project.

According to some stakeholders, this change in statute could potentially bring ambiguity to the circumstances under which a person may challenge a CEQA determination under these provisions. Could this change allow a person to challenge a project if the “wrong” public agency makes the determination that there is a significant effect on the environment with regard to oak woodlands?

According to the author and sponsors of the bill, the intent of this change was not to create a cause of action for *any* action taken by a public agency, including the example given above, but to strengthen the protection of oak trees and oak woodlands. The intent of the language is to allow a person to bring a cause of action alleging CEQA noncompliance with respect to oak trees and oak woodlands, even if mitigation measures have been incorporated pursuant to these provisions, if those mitigation measures are inadequate. The current mitigation measures specified in statute, it is argued, are broad, allowing for the potential for abuse or the adoption of mitigation measures that are inappropriate. For example, “other mitigation measures developed by a public agency” could include measures that do not appropriately address the removal of oak trees.

In an example provided by one of the stakeholders, a project included the removal of six of eight oak trees. The local jurisdiction has an ordinance which requires tree replacement at a 4:1 ratio, which the city used as a mitigation measure. Despite arguments that tree replacement alone did not replace oak woodland habitat nor account for the temporal loss of individual tree canopy. The project was challenged and the court ultimately found that

tree replacement as not enough.

Courts have generally deferred to an agency's assessment of the effectiveness of mitigation measures that are proposed in an EIR. However, a reviewing court will not defer to the agency's determination when the efficacy is not apparent and there is no evidence in the record showing they will be effective in remedying the identified environmental problem. If the purpose of mitigation measures is to avoid or substantially lessen impacts, does a potentially disproportionate mitigation measure developed by the agency fulfill that purpose? Should a potentially disproportionate mitigation measure for the removal of oak trees be deemed in compliance with CEQA, as would be permitted under existing law?

- 5) *Other ways to preserve oak woodlands.* The program that was intended to build partnership in the conservation of oak trees has not been funded in over 10 years. The Legislature may want to consider ways, including CEQA mitigation measures, to ensure the continued protection of oak woodlands.
- 6) *Committee amendments. Staff recommends the committee adopt the bolded amendments contained in comment 2, above and to require the author to agree to work with the committee on concerns described in comment 3. Due to timing constraints, should the committee approve this bill, the amendment in comment 2 will be adopted by the Senate Natural Resources and Water Committee.*

Related/Prior Legislation

No relevant legislation.

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 Natural Resources and Water Committee.

SOURCE: Lauren Canyon Land Trust & Laurel Canyon Association (co-sponsors)

SUPPORT:

Angelenos for Trees
Center for Biological Diversity

Endangered Habitats League
Friends of Harbors, Beaches and Parks
Hills for Everyone
Los Feliz Improvement Association
Los Padres Forestwatch
Santa Clarita Organization for Planning and The Environment
Save Lafayette Trees
Sea and Sage Audubon Society
Sierra Club, Northern California Forest Committee– Oaks Group
Treepeople
United Neighborhoods for Los Angeles (UN4LA)

OPPOSITION:

Building Owners and Managers Association of California
California Association of Realtors
California Building Industry Association (CBIA)
California Business Properties Association
California Business Roundtable
California Chamber of Commerce
California Yimby
Commercial Real Estate Development Association, Naiop of California
Orange County Business Council
Rural County Representatives of California (RCRC)

ARGUMENTS IN SUPPORT: According to the Center for Biological Diversity, “Unfortunately, California has already lost over a million acres of oak woodlands since 1950 Oak trees have been destroyed for development and are also threatened by disease, climate change, and invasive species. Reduced forest cover has been shown to result in increased runoff, erosion, sedimentation, and water temperatures; changes in channel morphology; decreased soil retention and fertility; and decreased terrestrial and aquatic biodiversity

“Despite the critical importance of oak woodlands to California communities and ecosystems, state law does not currently provide adequate protection for them. State law does not include a definition of what amount or level of oak woodlands destruction qualifies as a “significant effect” under CEQA, allowing many small and large development projects to move forward without adequate analysis and mitigation impacts of oak woodlands. This has resulted in a slow “death by a thousand cuts” of oak woodlands as smaller development projects destroy individual oak trees and portions of oak woodlands piece by piece. While the individual harm of each project may seem small, cumulatively such development

projects are slowly eliminating significant portions of California's remaining oak woodlands, particularly in the urban wildland interface."

ARGUMENTS IN OPPOSITION: According to Rural County Representatives of California, "SB 1404 significantly increases CEQA litigation risks for projects. Under existing law, if a county determines a project will convert oak woodland and have a significant effect on the environment, it must require one or more mitigation measures to reduce those impacts. Once those measures are incorporated, the project is deemed compliant with CEQA with respect to oaks and oak woodlands. SB 1404 removes this safeguard and opens the door to CEQA litigation challenging local determinations about the project's impact and adequacy of mitigation measures.

"SB 1404 will increase costs for and delay many important projects. Aside from being exploited to delay housing and economic development projects, SB 1404 will also impact many different types of public purpose projects. This bill could restrict the ability of local governments to quickly remove trees killed by sudden oak death and that pose a risk to life and property because of compromised structural integrity. SB 1404 will also likely impact local forest fuel reduction projects, underground recharge and water reliability projects, and levee maintenance projects."

-- END --