

August 16, 2013

The Honorable Edmund G. Brown, Jr.
Governor of California
State Capitol
Sacramento, CA 95814



Dear Governor Brown:

We, the undersigned, are writing to share our concerns about the proposal put forward by the Office of Planning and Research to amend SB 731. While OPR's intent may be to improve CEQA, its proposed amendment language would actually do a tremendous amount of damage to the important environmental protections it currently provides.

CEQA plays an essential role both in preserving California's unparalleled natural resources and in protecting the rights of residents to weigh in on the land use decisions that most affect them. The updated version of SB 731 released by Senator Steinberg already represents a compromise between groups seeking significant changes to the California Environmental Quality Act and conservationists, community groups, and organized labor. Any major departures from this compromise would have significant negative consequences for both our environment and our economy.

While we have serious concerns about OPR's proposal as a whole, we bring to your attention the following examples of provisions that should be removed or modified:

- Remove changes to Government Code section 65457, which would expand an already problematic exemption from CEQA.

OPR's suggested amendments to SB 731 would expand Government Code section 65457's exemption for residential projects consistent with a specific plan, as long as the Environmental Impact Report (EIR) for the specific plan was certified after January 1, 1980. Under OPR's new proposal, this exemption would extend to commercial and mixed use development projects.

We urge you to remove this proposed change. As all CEQA practitioners know, an EIR prepared 30 years ago, before California adopted aggressive policies to confront climate change, is of very little utility. Because section 65457's exemption allows reliance on such stale environmental documents, it should not be expanded to exempt additional development projects. If anything, section 65457 should be amended to require that specific plan EIRs relied upon be no more than five years old.

- Remove Public Resources Code sections 21159.5 and 21082(b) and (c), which would allow cities to set their own "environmental standards" and would eliminate the fair argument test.

OPR's suggested amendments to SB 731 include the addition of Public Resources Code sections 21159.5 and 21082(b) and (c). These new sections are extremely troubling for a number of reasons.

Sections 21159.5 and 21082(b) and (c) would allow cities to adopt thresholds of significance based on an unlimited range of unspecified "environmental standards." Under section 21159.5, if a city

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makes a finding, based on substantial evidence, that the environmental standard as applied to a project avoids that project's significant effects, the city would not be required to prepare an EIR for the project. And under section 21082(b) and (c), if the Resources Agency adopts guidelines identifying standards suitable for use as thresholds, the city could rely on unspecified information in the Resources Agency's rulemaking file as "substantial evidence" in support of the threshold.

These amendments reach well beyond the most radical proposed changes to CEQA in recent years by removing the "fair argument" test for most projects within incorporated cities. The "fair argument" test has been the heart of CEQA for decades. Applying the "substantial evidence" test in determining whether an EIR must be prepared is a radical departure from the current standard, which mandates an EIR when there is a fair argument that the project could create significant environmental impacts. Removing this test and allowing cities to set their own environmental standards would eviscerate environmental protections that have helped California retain its competitive advantage as a desirable place to live and work.

Section 21159.5 explicitly does away with the "fair argument" standard. Under that section, cities could avoid preparing an EIR simply by making a finding, based on "substantial evidence," that a project's compliance with the city's environmental standard avoids significant impacts to the environment. Moreover, although section 21159.5 grants cities carte blanche to draft their own environmental standards, it provides few parameters as to what should be included in such standards. It thus opens the door for cities to base their land use decisions on purported environmental standards that are essentially meaningless. And given section 21159.5's broad definition of key terms, this new approach would apply to almost any non-industrial project in any incorporated city, regardless of the project's size or effect. We raise these issues because OPR may not be aware the extent to which these combined proposals would weaken the protections CEQA provides.

Although section 21082(c) is more ambiguous, its references to "substantial evidence" in the state's rulemaking file could undermine application of the "fair argument" standard in every other project in the state.

We respectfully encourage OPR to remove these sections from its draft amendments to the bill and we will similarly work with the Legislature to reject any such change to SB 731.

- Remove Public Resources Code section 21167.8.5, which would undermine CEQA settlements and unnecessarily burden the courts.

OPR's suggested amendments to SB 731 include the addition of Public Resources Code section 21167.8.5, which requires court approval of settlements of CEQA lawsuits. While the change proposed in this section may be intended to encourage speedy resolution of CEQA-related disputes, it instead creates additional hurdles that would make it more difficult for settlements to be reached and increase burdens to the already over-taxed court system.

By requiring that any settlement agreement that includes "consideration from the respondent or real party" be approved by the court, this section imposes a new hurdle that would actually impede the ability of parties to reach speedy settlements. While those calling for this change

decry “illegitimate” CEQA-related settlements, there is a dearth of statistical evidence to support such claims. Thus, this section would present a “solution” where, in fact, there is no evidence of a problem. Unless meaningful evidence of a real problem emerges – something beyond the anecdotal reports peddled by those who wish to see CEQA weakened – the Legislature should decline to impose this new burden on the courts and litigants.

Even if there were justification for court oversight of CEQA settlements, the proposed amendment goes too far. Proposed subsection (b)(2) requires petitioners to establish that their lawsuits were not commenced for an improper purpose, “such as to harass or cause unnecessary delay....” This provision implies that a settling petitioner bears the burden to show that its case was not frivolous. As long as the petitioner made the showing required by subsection (b)(1) (that the settlement advances CEQA’s policies), a showing of non-frivolousness should not be necessary and adds an excessive burden on petitioners.

Similarly, subsection (b)(3) requires petitioners to establish that their attorney’s fees are reasonable under Code of Civil Procedure section 1021.5. This provision places an unnecessary burden on petitioners that could ultimately lead to fewer CEQA settlements: even after a case is settled, petitioners would still essentially have to prepare an attorney’s fees motion for the court. Such a requirement would undermine settlements, for agreed-upon fees can be much lower if a time-consuming attorney’s fees motion can be avoided.

For the reasons outlined above, we respectfully urge OPR to withdraw its suggested addition of section 21167.8.5.

- Modify proposed changes to SB 731’s amendments to Public Resources Code section 21081.5, so as to ensure appropriate public notice of CEQA findings.

OPR’s suggested amendments to SB 731 would also eliminate most of the bill’s provisions, included in Public Resources Code section 21081.5, that call for enhanced public notice of draft CEQA findings. We urge you to withdraw these changes.

First, OPR would shorten the public review period for draft CEQA findings from 15 to 10 days. Given that CEQA findings can be voluminous, this change would deprive the public and other agencies of a meaningful opportunity to comment on a key CEQA document.

Second, OPR’s changes would eliminate the requirement that members of the public—even those who commented on the draft EIR or specifically requested notice—be given any actual notice of the availability of the findings. Merely posting findings on a website, without notifying interested members of the public that they have been posted, is entirely insufficient. We urge OPR to modify this stance and require, at a minimum, that electronic notice be required for all parties who request such notice or who have commented on the draft EIR for a project.

Our groups represent hundreds of thousands of residents living in communities, both urban and rural, throughout California who are deeply invested in the long-term prosperity and environmental protection of our great state. CEQA has never stood in the way of our state’s economic development; rather, it has helped make California attractive to high-skilled workers essential to

business interests. We respectfully urge you to help protect CEQA's core principles – and to ensure that our children and grandchildren enjoy the same clean air, clean water, productive agricultural economy, and bountiful recreational opportunities that we have enjoyed.

Last year, you made headlines by travelling to China to educate that nation's leaders in environmental matters. We are proud that our state has always led the nation in environmental protection, and were thrilled to see our governor take this message to the international community. With that strong legacy and the state's economy on the mend, now is not the time to turn back the clock on California's landmark environmental achievements.

Sincerely,

A handwritten signature in black ink, appearing to read "Jana Haehl". The signature is fluid and cursive, with a long horizontal stroke at the end.

Jana Haehl
1st Vice President
Marin Conservation League