

March 11, 2010

Hon. Edmund G. Brown Jr.
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Krystal Paris
Initiative Coordinator

Dear Attorney General Brown:

Pursuant to Elections Code Section 9005, we have reviewed a proposed statutory initiative relating to changes to the California Environmental Quality Act (CEQA) (A.G. File No. 10-0008).

Background

The CEQA. The CEQA was enacted in 1970 in order to ensure that state and local agencies consider the environmental impact of their discretionary decisions when approving a public or private project. Under CEQA, a public agency must take into account the environmental impact of its decisions, and generally are required to provide mitigation for any significant unavoidable harm. The description of significant harm and the mitigation proposed is contained in a document called an environmental impact report (EIR). The public agency decision maker that is required to comply with CEQA is referred to as the “lead agency.”

The EIRs Are Prepared by the Lead Agency Through a Public Process. An EIR is prepared through a public consultation process and may involve the review of multiple state environmental agencies. Once the preparation of an EIR is complete, the lead agency certifies the EIR—meaning that it becomes the official record of the project description and environmental review as well as the required mitigation measures. Once the lead agency certifies an EIR, it can be challenged in the courts based on such issues as whether the document provided adequate measures to mitigate negative effects of the project on the environment, or whether the EIR considered appropriate alternatives to the project that would reduce its environmental harm.

Challenges to EIRs. Under current law, individuals, organizations, or other public agencies can challenge a certified EIR only by initiating litigation in the court system. That is, other than the courts, no state government agency has the day-to-day adminis-

trative responsibility and authority to enforce compliance with CEQA. In general, to be granted the legal standing to challenge an EIR, the individual, organization, or agency making the challenge must have participated in the public process regarding the development of that EIR. The one exception to this general requirement applies to the state Attorney General, who is authorized to act in the public interest in challenging EIRs without having participated in the public process leading to the certification of the EIR. Generally, the Attorney General files only a few such cases each year.

Attorney General's Role in CEQA Matters. The Attorney General also represents state agencies, as defense counsel, in cases where that state agency, acting as a lead agency in the CEQA process, certified an EIR that is being challenged in litigation. The Attorney General also provides legal advice to state and local agencies during the development of EIRs. Funding for the Attorney General's work on CEQA-related cases comes from the state's General Fund and other state special funds.

Number of Cases Related to EIR Challenges. The estimated number of CEQA-related cases filed each year in the state's court system is around 250, of which an estimated 150 relate to EIRs. This includes both those cases filed by participants in the EIR process and those filed by the Attorney General.

Proposal

Attorney General Given Sole Authority to Instigate a Legal Challenge of a Certified EIR. This measure would give the Attorney General the exclusive right to challenge the validity of a certified EIR through the courts. No other person, state or local agency, or other organization would be able to legally challenge the EIR. The measure would apply prospectively—that is, the restriction on challenges would only apply to EIRs certified after the effective date of the measure.

Fiscal Effects

The CEQA Litigation Workload for the Attorney General. As discussed above, the Attorney General currently has two roles under CEQA—(1) representing state agencies challenged under CEQA and (2) challenging EIRs when he/she determines it is in the public interest to do so.

This measure could increase the CEQA litigation workload of the Department of Justice (DOJ), which is administered by the Attorney General, as the Attorney General would now be the sole entity that could pursue these cases on behalf of the public if the certification of an EIR was at issue. However, the amount of this additional workload is uncertain, because the determination of which cases to pursue, and thus the number of cases pursued, would be left solely to the discretion of the Attorney General.

This additional workload for DOJ would probably be partially offset to the unknown extent that this measure prompts the Attorney General to withdraw from providing legal defense of state agencies involved in CEQA litigation. This is because the

Attorney General could not both pursue CEQA litigation against state agencies and act as defense counsel for those state agencies in such litigation.

The net fiscal impact of the measure on DOJ's workload is uncertain, but is unlikely to result in additional state costs of more than the low millions of dollars annually.

State Court Workload and Revenues. The measure could decrease the number of CEQA-related lawsuits in state courts, to the extent that fewer cases are filed due to the measure's limitation on who can instigate CEQA litigation. This decrease in lawsuits could reduce the overall workload in state courts. This would not necessarily result in a corresponding reduction in state court costs, however, to the extent that the courts redirected court resources to address backlogs of other civil or criminal cases. A decrease in the filing of CEQA cases would also reduce the revenues from court filing fees. The net fiscal effect of the loss of these revenues and the reduction in court operating costs is unknown, but is unlikely to be significant.

State and Local Agency CEQA Litigation Defense Costs. To the extent that this measure reduces the number of challenges to EIRs, state and local agencies involved in certifying EIRs would see a decrease in their litigation-related costs. These savings to state agencies would be offset to the unknown extent that state agencies were required to retain more expensive outside counsel because the Attorney General could no longer act as their defense counsel. The net effect of these impacts on state and local agency litigation costs is unknown, but could result in either significant savings or costs.

Potential Indirect Impacts on State and Local Revenues and Costs. This measure could have a net positive fiscal effect on state and local revenues, to the extent that it reduces delays associated with development projects by reducing the number of challenges to EIRs. Such potential reductions in development delays could lead to increases in firms' profitability and the level of economic activity, leading to corresponding increases in state and local revenues. The scale of this potential positive effect on the economy and state and local revenues is unknown. The fiscal effect, if any, of the measure on costs for state and local government agencies to mitigate environmental effects, for either their own projects or other projects approved by CEQA lead agencies, is unknown.

Summary of Fiscal Effects

In summary, the initiative would have the following major fiscal effects:

- Potential additional net costs for DOJ from increased CEQA litigation workload, likely not more than the low millions of dollars annually.
- Potentially significant savings or costs for state and local government litigation defense in CEQA cases.

- Unknown, but likely positive, net impact on state and local government revenues from increased economic activity. Unknown fiscal effect, if any, on state and local government costs to mitigate environmental effects of projects.

Sincerely,

Mac Taylor
Legislative Analyst

Ana J. Matosantos
Director of Finance