

April 22, 2015

McGeorge Legislative and Public Policy Clinic

AB 291 (Medina): CEQA notice streamlining for multi-county water projects

I. Define the Problem

The California Environmental Quality Act (CEQA) currently requires local agencies to submit notices of determination (NODs) to all the counties where an approved project is located. Each county has its own particular notice filing requirements that differ based on the number of copies required, the types of copies of the NOD, and the fee amount. Information about the filing requirements is not easily accessible, with the result that most local agencies physically send staff to submit notices. Local agencies have a 5-day window to submit the NOD to the counties. If a mistake occurs in the posting of the NOD, the local agency can be exposed to unnecessary litigation.

AB 291 (Medina, D-Riverside) would streamline the filing of NODs for multi-county water projects and improve public access to these notices. It gives local agencies the option to file the NOD with the state's Office of Planning and Research (OPR) for an electronic posting on the CEQAnet website and to file with the county clerk in the agency's home county.

II. Background

a. Law on the Subject

1. Overview of CEQA

CEQA was passed into law in 1970 to balance the impacts that development and construction projects have on the environment. Depending on the potential impacts to the environment, the proponents of a land use project may have to prepare an environmental impact report (EIR), which analyzes the potential physical and future implementing effects on the environment. Projects that have been approved through the extensive CEQA process may be challenged in court on various issues, including violations of the public notice. For local agency projects, the NOD has to be filed and posted in each individual county where the project is located. CEQA's public notice requirement mandates that the NOD remains posted at a county clerk's office for at least 30 days.

Pursuant to Public Resources Code section 21152, subdivision (a), a lead agency must file an NOD within 5 working days after approval of a project. The NOD must include the project name, description, location, and date of project approval. The NOD also must summarize the project's significant impacts and state whether mitigation measures were adopted as conditions of approval and findings prepared. The notice must state that the final EIR (FEIR) is

available for public review and disclose the location where the FEIR and record of the project approval is available for review.¹

If a local agency implements a project, it is the lead agency. The lead agency must file the NOD with the county clerk of the county or the counties in which the project will be located. The county clerk must then post the notice within 24 hours of receipt.²

Currently, if a state agency is the lead agency, the NOD shall be filed with the State Clearinghouse in the Office of Planning and Research (OPR); the State Clearinghouse then posts the NOD electronically on CEQAnet. Created in 2003, CEQAnet is an online searchable database of CEQA documents that is available to the public and easy to use. CEQAnet provides summaries of EIRs and other types of CEQA documents, like NODs. The summaries include the project title, project location, lead agency name, contact information, and project description, all information that is required under Public Resources Code section 21152 and CEQA Guidelines section 15094.

For local and state agency projects, the NOD must be posted and available for public inspection for a period of at least 30 days.³ Filing an NOD within the 5 working days begins a 30-day statute of limitations to court challenges.⁴ If the notification process is not followed, the statute of limitations is extended to 180 days from the date the decision to carry out or approve the project is made.⁵ Because a project cannot move forward until all litigation is decided, these delays add substantial cost burdens to lead agencies, including many local agencies.

2. Water Projects in California

Across California, many water agencies, particularly within the service areas of the Central Valley Project (CVP) and State Water Project (SWP), approve multi-county water projects, such as contracts for water transfers. Under Water Code section 1725, most are one-year transfers, which are CEQA-exempt (but require approval by the State Water Resources Control Board).⁶ These short-term transfers provide temporary water supply flexibility throughout the state, as agencies are able to transfer water from areas with relatively high supply and low demand to areas of relatively low supply and high demand during times of water scarcity, such as drought. Long-term water transfers under agreements that last longer than one year provide similar water supply flexibility. However, under Water Code section 1735, long-term water transfers are not CEQA-exempt, and when transfers cross county boundaries, these transfers are located in multiple counties and thus require filing NODs with multiple counties and multiple county clerks. These long-term water transfers are in contrast to most local land-use

¹ Pub. Resources Code, § 21152, subd. (a); CEQA Guidelines, § 15094.

² Pub. Resources Code, §§ 21092.3, 21152, subd. (a), (c); CEQA Guidelines, § 15094.

³ CEQA Guidelines, § 15094.

⁴ Pub. Resources Code, § 21167, subd. (c).

⁵ CEQA Guidelines, § 15112.

⁶ Wat. Code, § 1729

projects, which only require the local lead agency to file the NOD with one county clerk in the one county in which the project is located.

b. Evidence of the Problem

Local agencies approving multi-county water projects face a myriad of different submission requirements from each county. Each county clerk office often has its own procedures, often unpublished, for filing an NOD. Frequently, local agencies have to call to learn of the distinct requirements. While most counties allow local agencies to file the NOD via registered U.S. mail, most recommend that the agency physically sends staff to submit the NOD. Each NOD has to be separately prepared on a county-by-county basis. The McGeorge students called all 58 counties, and the broad spectrum of requirements presents a substantial burden for local agencies to comply with CEQA's public notice requirement.

While many counties require just the \$50 NOD administrative fee,⁵ Sacramento County requires a \$26 filing fee⁶; in Stanislaus County, that fee is \$57, and in Imperial County, it is \$62.⁷ Some require wet-ink originals, while others require black-and-white copies and others color copies. In Merced County, for one of the Addenda EIRs mentioned below, YCWA had to submit a complete EIR with the NOD, while generally, most counties require just the NOD for projects. Furthermore, counties do not post NODs electronically; rather, they are physically posted in the clerk's office.⁸ The local agencies physical travel to each county to hand-deliver the NOD and to ensure that the NOD is complying with CEQA's public notice requirement.

While there is no case dealing exactly with NOD compliance for local projects that are located in multiple counties, the same notification issues have arisen from similar projects. In *Latinos Unidos de Napa*, the NOD was posted late and, upon an improper filing, removed early by the county clerk on the 29th day of the posting.⁹ The local agency was sued. The court held that if the county clerk fails to properly post the notice, the statute of limitations period for a CEQA lawsuit against the project can be extended from 30 days to 180 days.¹⁰ This extension effectively prohibits a local agency from carrying out its project.

Many lead agencies hand-deliver NODs to ensure on-site compliance with the county's filing requirements. Delivering notices to county clerks in multiple counties can require up to a day's worth of travel in order to ensure that NODs are posted on the same date so that there is clarity about when the CEQA statute of limitations begins. For local agencies, a consistent filing date provides certainty as to its liability under CEQA.

⁵ Fish & G. Code, § 711.4

⁶ Telephone interview with Sacramento County Clerk Recorder (Dec. 8, 2014).

⁷ Telephone interview with Stanislaus County Clerk (Dec. 8, 2014); telephone interview with Imperial County Recorder (Dec. 8, 2014).

⁸ ACWA CEQA proposal meeting, Nov. 5, 2014.

⁹ *Latinos Unidos de Napa v. City of Napa* (2011) 196 Cal.App.4th 1154, 1166.

¹⁰ See *Ibid.*; see *Lewis v. Seventeenth Dist. Agricultural Assoc.* (1985) 165 Cal.App.3d 823, 835.

In the example of Yuba County Water Agency (YCWA), YCWA has been the most active water transferor in California since the late 1980s. Previously, most of YCWA's transfers were short-term, one-year transfers that were exempted from CEQA. In 2007, YCWA certified the EIR for the Yuba River Accord, which is an aggregation of 3 agreements concerning water transfers from Northern California to SWP and CVP water contractors in the San Joaquin Valley and Southern California. These agreements have a 20-year duration and do not fall under the CEQA exemption provision of the Water Code. In preparing and completing its EIR, YCWA had to physically send staff to file the NOD for the Accord EIR to 53 of California's 58 counties because the transfer was authorized to all areas within the SWP's and CVP's places of use, where YCWA's project was located.

In 2014, YCWA prepared 2 addenda to the Yuba River Accord; it added operations of the Freeport Point of Rediversion (see Supplement 2) and the San Luis Dam Point of Rediversion. Upon certifying the addenda, YCWA had to physically send staff with NODs to the clerks of the counties in which the water originated, through which the water was moved, and to where the water was ultimately transferred. For the San Luis Dam Point of Rediversion Addendum EIR, YCWA sent the NOD to 8 counties, Yuba, Fresno, Kings, Merced, San Benito, San Joaquin, Santa Clara, and Stanislaus. In the Freeport Point of Rediversion Addendum EIR, YCWA sent the NOD to 9 counties, Yuba, Alameda, Amador, Butte, Calaveras, Contra Costa, Sacramento, San Joaquin, and Sutter.

Although YCWA did properly file the NODs for both Addenda EIRs and was not challenged in court, the process of filing the NODs with each county clerk in person to ensure a consistent trigger date for the 30-day statute of limitations under CEQA required a YCWA official to spend a full day out of the office to travel to each county clerk office. More so than the NOD administrative filing fees, this filing process caused a substantial cost burden on YCWA for the official to travel and resulted in lost productivity in YCWA's office.

c. Prior Attempts to Address the Problem

In 2013, Assemblyman Roger Dickinson (D-Sacramento) introduced AB 380. It would have required a local agency to post the required CEQA notices with OPR on the CEQAnet database, but it would have also continued the requirement to post the NOD with each county in which the project was located. It would have changed the timeline for determining the beginning of the public notice requirements to the date the notice was readily available to the public through CEQAnet. This bill required the release of CEQAnet 2.0 to be fully functional in order to be able to handle the new online filings.

Ultimately, AB 380 was held on the Assembly floor and then gutted and amended. OPR could not guarantee that the State Clearinghouse would be ready to implement the requirements of the bill through CEQAnet. The Assembly Appropriations Committee estimated that the bill would have required \$100,000 to implement changes through CEQAnet 2.0. This estimate was

believed to be conservative because CEQAnet was still in the process of being updated. The contract for the prototype upgrade was \$200,000; however, costs will likely total \$500,000.

Originally scheduled to be completed in 2013, the update will allow for full electronic submission of CEQA documents, linking CEQA documents to interactive maps and state parcel data, electronic collection of CEQA fees on behalf of the California Department of Fish and Wildlife, and provide for various search capabilities.

If the new CEQAnet features do not include the ability of local agencies to upload notices themselves, the cost of implementation of the bill would likely require additional staff at OPR, which may be problematic in appropriations committees. However, after meeting with OPR for AB 291 the filings specified would not be contingent on the release of CEQAnet 2.0.

d. Views of the Parties of Interest

On AB 380, the Association of California Water Agencies (ACWA) took an “opposed unless amended” position. ACWA stated that the bill “would add further cost, delay, and the risk of actionable procedural violations to administrative CEQA process.”

Largely affirming ACWA’s position, the El Dorado Irrigation District was concerned that waiting until the later of two notice processes, one at OPR and the other with county clerks, would make it “difficult for agencies to plan timelines” and require additional monitoring of county clerks and OPR to determine when timelines begin and end. “This adds uncertainty, delay, and the possibility of error to what is already an intricate process with arguable robust public participation.”¹¹

The Rural County Representatives of California (RCRC) expressed concern that the statute of limitations would not commence until the NODs would actually be posted for public review by the county clerk or would be available in the OPR online database, whichever is later. RCRC stated that what was most troublesome was “the lack of certainty caused by ‘whichever is later’ provision related to posting... [T]his requirement would complicate planning efforts relating to the start and end of CEQA timelines.”¹²

III. Alternative Solution

The alternative to AB 380 and allowing current trends to continue is YCWA’s proposal for Public Resources Code section 21152.2 (“water projects”). The proposal will streamline water projects, prevent confusion over the proper statute of limitations for CEQA lawsuits, and improve statewide access to CEQA notices by permitting a local agency approving a multi-county water project to file the NOD required by Public Resources Code section 21152 in the

¹¹ *Ibid.*

¹² *Ibid.*

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county where the local agency is located and with OPR for posting on the statewide CEQAnet website. It will not require a state-mandated cost on counties concerning NOD posting requirements. It is limited to a narrow range of water projects, such as transfers of conserved water, changes in points of discharge, place of use, or purpose of use for treated wastewater, temporary urgency changes, and temporary and long-term transfers of water.

Further, ACWA's proposal aims to reduce the hassle factor of lead agencies sending staff or officials to physically hand-deliver NODs to multiple county clerks. That aims to reduce lost productivity in the office and cost burdens related to transportation and personnel costs. Further, in addressing the possible issue of loss of public access, most people have access to the Internet, and those that do not can access the Internet and CEQAnet at a local county library.

IV. Parties Involved

The parties co-sponsoring this proposed legislative action are the Association of California Water Agencies (ACWA) and Adam Borchard, Caroline Soto, and Stephen Guichard from the McGeorge Legislative and Public Policy Clinic. The lead contact person at ACWA for this proposal is Whitnie Wiley, the legislative advocate specializing in CEQA issues.

Support for this proposal is led by Ryan Bezzera, partner at Bartkiewicz, Kronick & Shanahan, and Pilar Oñate-Quintana, YCWA's lobbyist at The Onate Group. Mr. Bezzera is the legal representative and acting agent of the Yuba County Water Agency. Other tentative support to have file letters and speak to the appropriate committees in the California Senate or Assembly will come from Metropolitan Water District, Sonoma Water District, San Luis Delta-Mendota Water Authority, San Francisco Public Utilities Commission, and Los Angeles Department of Water and Power.

The only opposition currently filed is from Inyo County and the Sierra Club. However, at the Natural Resources Committee hearing on April 13, 2015, the Sierra Club stated they would be rethinking their opposition given the amendments to AB 291. The amendments would allow for a local agency to only file with the county of the lead agency and with OPR, but the local agency would then send the NOD through certified U.S. mail to the other counties where the project is located.¹³

The second source of opposition could be various county clerks and recorders or the organizations that represent those groups such as the California State Association of Counties (CSAC), County Recordors' Association of California (CRAC), and California Association of Clerks and Election Officials (CACEO). The main issue that will trigger their opposition is a possible reduction in the collection of filing and posting fees. If this were a widespread reform for all NODs, the reduction in filing fees at multiple county recorders may be significant in

¹³ Assem. Local Gov't Comm. Rep., Assem. B. 380, 2013-2014 Leg., Reg. Sess. (Cal. 2006).¹⁷
Telephone interview with Sacramento County Clerk Recorder (Dec. 8, 2014).

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aggregate. No additional opposition has been filed since AB 291 made it out of the Assembly's Natural Resources Committee.

AB 291 provides for a streamlining of NOD filings for a narrow area of CEQA projects that involves water projects. The fee collected at the Sacramento County Clerk Recorder for a solitary NOD is only \$26.¹⁷ This is the only fee that would be affected by the streamlining policy being advocated within this proposal. The other NOD fees that include Fish and Wildlife fees, negative declaration NOD filing (\$2,207.25)¹⁴, or Environmental Impact Report with NOD (\$3,055.75)¹⁵ will not be affected by AB 291.

Lastly, OPR could oppose the proposal if this bill were to be amended to change the operation of their recently updated website CEQAnet. As it currently operates, the website only contains summaries of all documents filed with OPR's State Clearinghouse.¹⁶ If an individual wants a copy of that document, he can contact the State Clearinghouse and receive a copy in electronic format.¹⁷ If an amendment requiring CEQAnet to offer e-mail notification for tracking updates or to contain full documents for download as opposed to summaries, there may be a significant cost to OPR that could trigger opposition. However, after meeting with OPR in preparation for this bill, it does not appear that the additional online filings will be too costly for the current staff to handle.

V. Assembly Bill 291

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1.

Section 21152 of the Public Resources Code is amended to read:
21152.

(a) Except as provided in Section 21152.2, if a local agency approves or determines to carry out a project that is subject to this division, the local agency shall file notice of the approval or the determination within five working days after the approval or determination becomes final, with the county clerk of each county in which the project will be located. The notice shall identify the person or persons in subdivision (b) or (c) of Section 21065, as reflected in the agency's record of proceedings, and indicate the determination of the local agency whether the project will, or will not, have a significant effect on the environment and shall indicate whether an environmental impact report has been prepared

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ CEQAnet Home, <http://www.ceqanet.ca.gov> (last visited Nov. 19, 2014); See Also Assem. Local Gov't Comm. Rep., Assem. B. 380, 2013-2014 Leg., Reg. Sess. (Cal. 2006).

¹⁷ *Id.*

pursuant to this division. The notice shall also include certification that the final environmental impact report, if one was prepared, together with comments and responses, is available to the general public.

(b) If a local agency determines that a project is not subject to this division pursuant to subdivision (b) of Section 21080 ~~or pursuant to Section 21172~~, and the local agency approves or determines to carry out the project, the local agency or the person specified in subdivision (b) or (c) of Section 21065 may file a notice of the determination with the county clerk of each county in which the project will be located. A notice filed pursuant to this subdivision shall identify the person or persons in subdivision (b) or (c) of Section 21065, as reflected in the agency's record of proceedings. A notice filed pursuant to this subdivision by a person specified in subdivision (b) or (c) of Section 21065 shall have a certificate of determination attached to it issued by the local agency responsible for making the determination that the project is not subject to this division pursuant to subdivision (b) of Section 21080 ~~or Section 21172~~. The certificate of determination may be in the form of a certified copy of an existing document or record of the local agency.

(c) A notice filed pursuant to this section shall be available for public inspection, and shall be posted within 24 hours of receipt in the office of the county clerk. A notice shall remain posted for a period of 30 days. Thereafter, the clerk shall return the notice to the local agency with a notation of the period it was posted. The local agency shall retain the notice for not less than 12 months.

SEC. 2.

Section 21152.2 is added to the Public Resources Code, to read:
21152.2.

(a) For purposes of this section, "water project" means an activity undertaken pursuant to Sections 1011, 1011.5, and 1211 of, Chapter 2 (commencing with Section 1250), Chapter 6.6 (commencing with Section 1435), Chapter 10 (commencing with Section ~~1700~~ 1700), and Chapter 10.5 (commencing with Section 1725) of Part 2 of Division 2 of, the Water Code.

~~(b) A local agency that is required to file a notice pursuant to Section 21152 for a water project may, in lieu of the filing requirements of that section, file the notice in the form required by that section with the county clerk of the county in which the local agency's principal office is located.~~

~~(c) If the lead agency files a notice pursuant to this section, the local agency shall also file the notice with the Office of Planning and Research.~~

(b) Within five working days after a local agency has approved or made a determination to carry out a water project, a local agency, in lieu of the notice filing requirements of subdivision (a) of Section 21152 for that water project, may take all of the following actions:

(1) File the notice in the form required by subdivision (a) of Section 21152 with the county clerk of the county in which the local agency's principal office is located.

(2) File the notice with the Office of Planning and Research.

(3) Mail copies of the notice through the United States mail, first-class postage prepaid with return receipt requested, to the county clerk of all the counties in which the water project will be located.

~~(d)~~

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(c) (1) The county clerk receiving a notice pursuant to *paragraph (1) of* subdivision (b) shall comply with subdivision (c) of Section ~~25112~~. *21152*.

(2) ~~(A)~~ All notices filed pursuant to *paragraph (2) of* subdivision ~~(e)~~ *(b)* shall be available for public inspection, and a list of those notices shall be posted on a weekly basis in the Office of Planning and Research. Each list shall remain posted for a period of 30 days.

~~(B) Failure to file the notice pursuant to subdivision (e) does not affect the validity of a project.~~

(3) As promptly as possible, a county clerk that receives a copy of a notice pursuant to paragraph (3) of subdivision (b) shall post that copy and shall not require an original of that notice or any additional information from the local agency.

(d) The filing date of the notice specified in subdivisions (b) to (e), inclusive, of Section 21167, Section 21167.10, and Section 21177 shall be the date on which the notice is filed with the Office of Planning and Research pursuant to paragraph (2) of subdivision (b).

(e) Nothing in this section affects the application of Section 21092.2.