STATE CAPITOL
P.O. BOX 942849
SACRAMENTO, CA 94249-0115

California Legislature

The Administration's Policy Package on California Environmental Quality Act Judicial Review

An Informational Hearing of the Assembly Committees on Natural Resources and Judiciary

Wednesday June 7, 2023
2:30 p.m.
1021 O St., Room 1100

I. Welcome and Introductory Remarks

II. The Newsom Administration's Proposal

Witnesses
Gayle Miller, Senior Counselor on Infrastructure and Clean Energy Finance
Wade Crowfoot, Secretary, California Natural Resources Agency
Toks Omishakin, Secretary, California State Transportation Agency
Chris Calfee, Special Counsel, California Natural Resources Agency
Mark Tollefson, Undersecretary, California State Transportation Agency
Tyson Eckerle, Senior Advisor for Clean Infrastructure and Mobility, GO-Biz
Helen Kerstein, Principal Fiscal & Policy Analyst, Legislative Analyst's Office

III. Potential Impacts to the Courts Resulting from Expediting Judicial Review of CEQA Cases

Witness
Hon. Marla O. Anderson, Judge, Monterey County Superior Court & Chair of Judicial Council Legislation Committee

IV. Nongovernmental Stakeholder Viewpoints

Witnesses
Barbara Barrigan-Parrilla, Executive Director, Restore the Delta
David Pettit, Senior Attorney, Natural Resources Defense Council
Brandon Dawson, Director, Sierra Club California
Jonathan Pruitt, Green Zones Program Manager, California Environmental Justice Alliance

V. Public Comment

VI. Concluding Remarks

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By the Staff of the Assembly Committees on Natural Resources and Judiciary

I. An Overview of the California Environmental Quality Act

Originally enacted in 1970, and signed into law by then-Governor Ronald Reagan, the California Environmental Quality Act (CEQA) requires government agencies to consider the environmental impacts of governmental actions before approving plans, policies, or development projects. At its core, CEQA seeks to ensure that public agencies do not approve projects without considering the negative impacts a project may inflict on the environment. Although CEQA is too often, and incorrectly, viewed as a tool to skew outcomes in a manner that favors environmentalists and deters development, in reality, "CEQA operates, not by dictating pro-environmental outcomes, but rather by mandating that 'decision makers and the public' study the likely environmental effects of contemplated government actions and thus make fully informed decisions regarding those actions."[1]

The CEQA process begins with a preliminary review of a proposal to determine if the governmental action would trigger a CEQA review. A proposal will only trigger CEQA review if it involves the exercise of discretionary powers by the government agency and results in a direct, or reasonably foreseeable indirect, physical change in the environment.[2] Once a project triggers CEQA, the government agency, typically referred to as the "lead agency," must then determine if the project falls within a statutory or regulatory exemption to CEQA. If it does, the lead agency may file a notice of exemption and no additional actions are required.[3] If a project does not qualify for an exemption, the lead agency must conduct an initial review to determine if the project may have a "significant" environmental impact, based on 21 environmental factors. If the agency finds that the project would not have a significant impact on the environment or that revisions to the project will mitigate potential impacts, the lead agency may file a negative declaration or mitigated negative declaration.[4] If a significant environmental impact may occur, the lead agency must prepare a full environmental impact report or EIR. The EIR process involves the lead agency producing a draft document outlining the environmental impacts of a

[1] *Citizens Coalition Los Angeles v. City of Los Angeles* (2018) 26 Cal.App. 5th 561, 577.
[2] 14 CCR Section 15060 (c).
[3] 14 CCR Section 15062.
[4] *Gentry v. City of Murrieta* (1995) 36 Cal.App. 4th 1359.

project, any available mitigation measures, and a consideration of less environmentally impactful alternatives. The draft document must then be released for public comment. The lead agency must revise the EIR or submit a response to the comments prior to certifying the final EIR.[5] Thus, when examined as a whole, the primary objective of the environmental review required by CEQA is to steer agency decision makers into approving projects in a manner that utilizes feasible alternatives and mitigation measures to lessen the project's impact on the environment. These considerations of the impacts of a project make up the majority of the EIR. CEQA directs agencies to complete and certify an EIR within one year of the project application. The failure to properly consider a project's impacts is what typically results in litigation.

In the event a lead agency fails to properly conduct an EIR, they may be subject to litigation challenging the validity of the document and the overarching approval of the project. Most CEQA lawsuits must be brought within 30 days of the approval of the final EIR.[6] As with most court proceedings questioning government decision making and actions, CEQA litigation is heavily reliant on official government records as well as communications between stakeholders and government officials.

II. Legislative Policy and Budget Committees Serve Two Distinct, Yet Important, Purposes.

The Legislature utilizes policy and budget committees in two distinct matters. The budget committees evaluate executive agencies and policy priorities based on the impact to the state's budget and track agencies' progress toward overall legislative priorities. The Legislature's policy committees are primarily focused on the merits of various policy proposals and their impacts on everyday Californians. Although somewhat time consuming, the policy committee process ensures that legislation is well-designed by the time it reaches the Governor's desk.

Governor Newsom unveiled a broad set of policy proposals on May 19, 2023 seeking to streamline clean energy, water, and transportation infrastructure projects. Despite the breadth of these policy changes, these proposals were designed to be adopted through the budget process, thus bypassing consideration by policy committees. This "infrastructure package" includes the following 10 policy proposals:

- ***CEQA Administrative Records Review (updated: 05/19/2023)***
- ***CEQA Judicial Streamlining (updated: 05/19/2023)***
- Green Financing Programs for Federal Inflation Reduction Act Funding (updated: 05/19/2023)
- Accelerating Environmental Mitigation (updated: 05/19/2023)
- National Environmental Policy Act (NEPA) Delegation Authority (updated: 05/19/2023)
- Direct Contracting: Public-Private Partnership Authority 1-15 Wildlife Crossings (updated: 05/19/2023)
- Job Order Contracting (updated: 05/19/2023)
- Progressive Design Build Authority for the Department of Transportation and the Department of Water Resources (updated: 05/19/2023)
- Fully Protected Species Reclassification (updated: 05/19/2023)
- Delta Reform Act Streamlining (updated: 05/19/2023)

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[5] 14 CCR Section 15088.

[6] See, Public Resources Code Section 21167.

Although this joint informational hearing is only focused on the two CEQA related proposals, the list above illustrates how many policy changes the Governor seeks to enact through the expedited budget committee review process. This package was made public along with the issuance of Executive Order N-8-23, which calls for the convening of an Infrastructure Strike Team to identify streamlining opportunities. When unveiling the proposals, Governor Newsom noted that these proposals seek to "facilitate and streamline project approval and completion to maximize California's share of federal infrastructure dollars and expedite the implementation of projects that meet the state's ambitious economic, climate, and social goals."

The Governor has expressed a desire that the Legislature include these streamlining proposals – released after the May Revision – as "trailer bills" in the 2023-24 State Budget. As a whole, this package of bills represents significant policy changes in various areas, including transportation, wildlife, water, and natural resource laws. Considering these proposals late in the Budget process, especially after budget sub-committees have concluded their work, significantly limits transparency and public input. Hastily considering these proposals also increases the potential for creating unintended consequences while limiting the Legislature's ability to evaluate whether the proposals will actually lead to the positive impacts envisioned by this Administration.

In order to better understand the implications of these proposals, the Transportation Committee, Water, Parks, and Wildlife Committee, Natural Resources Committee, and Judiciary Committee are holding informational hearings to gather information and hear initial stakeholder input on these infrastructure proposals. While these informational hearings are important first conversations, a more thorough policy process is likely needed, especially for the more expansive proposals. By seeking to circumvent the traditional committee process, these budget proposals would limit both houses of the Legislature from thoroughly vetting these proposals.

Furthermore, while accelerating the development and construction of critical infrastructure is a laudable and shared goal, each of these proposals should be evaluated to determine whether it is necessary to take legislative action in June as part of the Budget, or if it is even necessary to undertake a truncated legislative process to consider these proposals through the remainder of this legislative year. These proposals relate to streamlining environmental review for certain projects, expediting public contracting processes, and changing quorum rules for one state agency. Should aspects of these proposals be found to have merit and be passed by the Legislature, there will likely be minimal impact on project implementation timelines, whether these measures are passed in June or August, or even January of next year.

The Legislature may wish to evaluate each of these proposals to understand whether there are sufficient benefits for acting on these policies during a very truncated timeline, given the potential for unintended consequences.

III. California Environmental Quality Act: Record of Proceedings

A. Existing Law Regarding Record of Proceedings

As noted above, CEQA litigation is highly dependent on the record of proceedings that lead to the approval of an EIR. The record of proceedings, generally, refers to all documents presented to or considered by the lead agency. As it relates to CEQA litigation a petitioner is required to

seek the official record from the lead agency within ten days of filing the lawsuit.[7] A petitioner may elect to prepare the record at its own expense, or rely on the agency to do it. Once the request for the record is received, the lead agency has 60 days to prepare and certify the record and transmit the documents to the court.[8] The petitioner and the lead agency may agree to an alternative method of developing the record, but the lead agency is still required to certify the document's accuracy.[9] Specifically related to CEQA matters, the record must contain, at minimum, the following:

- All project application materials.
- All staff reports and related documents prepared by the respondent public agency with respect to its compliance with the substantive and procedural requirements of CEQA and with respect to the action on the project.
- All staff reports and related documents prepared by the respondent public agency and written testimony or documents submitted by any person relevant to any findings or statement of overriding considerations adopted by the lead agency.
- Any transcript or minutes of the proceedings at which the decisionmaking body of the respondent public agency heard testimony on, or considered any environmental document on, the project, and any transcript or minutes of proceedings before any advisory body to the lead public agency that were presented to the decisionmaking body prior to action on the environmental documents or on the project.
- All notices issued by the lead public agency.
- All written comments received in response to, or in connection with, environmental documents prepared for the project, including responses to the notice of preparation.
- All written evidence or correspondence submitted to, or transferred from, the lead public agency with respect to the project.
- Any proposed decisions or findings submitted to the decisionmaking body of the respondent public agency by its staff, the project proponent, project opponents, or other persons.
- The documentation of the final public agency decision, including the final EIR, mitigated negative declaration, or negative declaration, and all documents cited or relied on in the findings or in a statement of overriding considerations.
- Any other written materials relevant to the lead public agency's compliance with CEQA or to its decision on the merits of the project, including the initial study, any drafts of any environmental document, or portions thereof, that have been released for public review, and copies of studies or other documents relied upon in any environmental document prepared for the project and either made available to the public during the public review period or included in the respondent public agency's files on the project, and all internal agency communications, including staff notes and memoranda related to the project or to compliance with CEQA.
- The full written record before any inferior administrative decisionmaking body whose decision was appealed to a superior administrative decisionmaking body prior to the filing of litigation.[10]

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[7] Public Resources Code Section 21167.6 (a).
[8] Public Resources Code Section 21167.6 (b).
[9] *Ibid.*
[10] Public Resources Code Section 21167.6 (e).

It should be noted that in CEQA cases, like other writ of mandate proceedings, evidence outside of the record is almost never admissible.[11] Generally, the only exceptions to this rule are for evidence that could not have been produced despite the exercise of reasonable diligence, [12] evidence regarding issues other than the validity of the agency's decision making (jurisdictional concerns or other procedural issues),[13] and evidence related to procedural fairness. [14] Evidence seeking information regarding an individual elected official's decisionmaking processes is never admissible, however, documents that the decision maker relied upon may be obtained utilizing the California Public Records Act (CPRA).[15]

B. Administration Proposal

The Newsom Administration contends that, "in the reported case law, record preparation took between four and 17 months."[16] Although it is unclear what "case law" provided these figures, the Administration appears to indicate that the record takes too long to prepare and thus delays litigation. Accordingly, the administrative record streamlining proposal would seek to remedy this purported issue in the following ways:

- Allow a public agency to prepare a record notwithstanding a petitioner's request to prepare the documents so long as the agency notifies all parties and assumes the initial costs, but appears to permit the lead agency to seek cost recovery from the petitioner.
- Require the record to be submitted electronically to the court, unless the court requests otherwise.
- Limit extensions of the statutory timelines for compiling the record to only cases in which a court deems good cause exists.[17]

The Administration's proposal also seeks to modify the contents of the official record itself. As noted above correspondence of the lead agency on matters related to an EIR is part of the official record. The Newsom Administration proposal would remove from disclosure as an "internal agency communication" all internal electronic communications including, "including emails that were not presented to the final decisionmaking body."[18] However, the proposal notes that nothing in the proposed trailer bill would limit the application of the CPRA or relevant provisions of the Evidence Code.

C. Policy Considerations

How does the proposal apply to lead agencies without decisionmaking bodies?

This proposal appears to capture typical CEQA lead agencies where the final CEQA determination is made by a council or board. In those cases, it is not clear if the proposal is

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[11] See, Evidence Code Section 350, *State of California v. Superior Court* (1974) 12 Cal. 3d 237,
[12] Code of Civil Procedure Section 1094.5 (e)
[13] *Running Fence Corp. v. Superior Court* (1975) 51 Cal.App. 3d 400.
[14] *Clark v. City of Hermosa Beach* (1996) 48 Cal.App. 4th 1152.
[15] *City of San Jose v. Superior Court* (2017) 53 Cal.App 3d 1325.
[16] Dept. of Finance, *Proposed Trailer Bill Legislation: CEQA Administrative Record Fact Sheet* available at: https://esd.dof.ca.gov/trailer-bill/public/trailerBill/pdf/954.
[17] *Ibid.*
[18] *Ibid.*

intended to shield all internal electronic communications except those presented to the entire decisionmaking body, if electronic communications sent to individual council or board members, but not the entire body are included, or why communication with important lesser decisionmakers, such as planning commissions and planning directors, should be excluded from the record.

In some cases, CEQA determinations are made by an agency executive, and there is no "final decisionmaking body." In those cases, this proposal could allow the agency to exclude all internal electronic communications from the record. The proposal has the potential to encourage agency staff to withhold communication to the entire decisionmaking body as a means to exclude information from the record.

The proposal allows the agency to pick and choose what documents to include in the record. Communication by e-mail and text is ubiquitous, and relatively easy to track and disclose. It's hard to suggest that e-mails and texts are not a common and important form of agency communication and decisionmaking, and therefore a relevant part of the agency record. If the problem is that including emails and texts creates a burden for preparation of the record, perhaps agency staff should be prohibited from communicating about a project via e-mail and text?

If the Governor's broader CEQA reforms are enacted, the Legislature may wish to eliminate these provisions of the trailer bill language or significantly modify the proposal to ensure that the full-scope of agency decision can be properly reviewed by the courts.

Impacts of internal electronic communications exemption.

The Newsom Administration argues that excluding external electronic communications from the official record will save time as lead agencies would not be forced to gather and review e-mails searching for relevant correspondence. While this may be true, this exception is likely to result in the omission of significant information regarding an agency's decisionmaking process from the official record, and therefore the evidence of the adequacy of the ultimate decision of the lead agency. Given the highly electronic nature of modern government business, significant portions of the information that presently compose the official record for CEQA litigation is likely to be relevant but would be omitted from the official record. Indeed, due to ambiguity in the language of the proposal, one may be able to argue that attachments of critical documents contained in electronic communications may also be exempt from disclosure in the official record. For example, if a lead agency considering a transportation project received a study on potential greenhouse gas (GHG) emission impacts from a consultant via e-mail, would the document's inclusion in the electronic communication be sufficient to keep it out of the official record? Should the language be interpreted to permit such an omission, this proposal would significantly undermine a court's ability to review the adequacy of an agency's decision and determine if it was made in conformity with the evidence on the record. Additionally, such a sweeping change to the existing law governing the official record would treat judicial review of CEQA determinations differently than judicial review of all other types of public agency decision making.

While this language could be clarified to avoid such ambiguity, as presently drafted, the chilling effect on government accountability that would result should the proposal be enacted would be

significant. However, it is unclear if such a sweeping exclusion of information is the actual intent of the Newsom Administration.

Accordingly, should the Legislature agree to adopt this proposal, it should require significant clarification of this provision to avoid substantially impairing the court's ability to review the merits of an agency's decisions under CEQA.

The California Public Records Act and the internal communications exemption.

Setting aside the potentially detrimental impact to judicial review that exempting electronic communications from an official record may have, the proposal may actually result in *more* work and delay for lead agencies. As noted above, existing law does permit petitioners to utilize the CPRA to seek internal agency documents that can be deemed public records and that may be relevant to CEQA litigation.[19] Pursuant to the CPRA, a public record is, "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."[20] It is not difficult to envision a scenario, should this proposal be enacted, in which CEQA litigants simply turn to the CPRA to gain access to documents not contained in the official record. In such an instance, the lead agency would have to search for and provide records of electronic communications, notwithstanding the proposed changes to the CEQA records statute.

Much like CEQA, the CPRA is subject to frequent litigation. Should a CEQA litigant believe a lead agency failed to adequately comply with a CPRA request, they would be able to file suit seeking records under the CPRA. Should that lawsuit become protracted it would almost certainly delay the CEQA litigation, thus completely undermining the goal of expediting CEQA cases that the Newsom Administration seeks with this proposal. In fact this very scenario recently played out in San Diego County. As a result of an overly aggressive e-mail retention and deletion policy, the County was deleting all e-mails that did not contain official government documents within 60 days, including e-mails involving EIRs. When the County planning documents were litigated for not adequately adhering to CEQA, the County would not produce e-mails requested by the plaintiffs. As a result the County was sued utilizing a CPRA claim. That claim delayed the CEQA case by nearly four years.[21] Of note to this proposal, the court deciding that matter noted, "e-mail, especially combined with the ability to attach documents, is also used to communicate important information previously sent by mail or private delivery service."[22]

Furthermore, protracted litigation about disclosure of these records could prove very costly to public agencies. Existing law *requires* the court to award court costs and reasonable attorney's fees to the requester should the agency improperly withhold any requested record, while only requiring the requester to pay the agency's costs and attorney fees if the court finds that the requester's case is clearly frivolous.[23] Therefore, litigation over disclosure of the electronic communications sought to be protected by the Administration's proposal could have the

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[19] *City of San Jose v. Superior Court, supra.*
[20] Government Code Section 7920.530 (a).
[21] *Golden Door Properties, LLC. v. Superior Court* (2020) 52 Cal.App 5th 837.
[22] *Id.* at 875.
[23] Government Code Sections 7923.110, 7923.115.

unintended consequence of imposing much higher litigation costs on public agencies that choose to withhold those records.

Accordingly, the Legislature should strongly consider the unintended impacts on CEQA litigation timelines and costs before potentially approving this proposal.

There are procedures under current law to make preparation and certification of the record of the record more efficient and faster, and that do not compromise the content of the record.

Each of the prior expedited judicial review bills that have passed the Legislature, dating back to 2011, has included provisions for concurrent, electronic preparation of the record, as well as limitations on public comments after the close of the public comment period. In addition, Public Resources Code Section 21167.6.2 authorizes any lead agency to prepare the record concurrently with the administrative process. Under these procedures, all materials are submitted, compiled, and posted electronically during the administrative process, allowing the agency to certify the record within 30 days of its final CEQA determination. The concurrent preparation procedures treat electronic documents as the solution, not the problem.

IV. California Environmental Quality Act: Infrastructure Projects: Streamlining Judicial Review.

A. Existing Law Regarding CEQA Litigation.

Once a party challenges an agency's decision pursuant to CEQA, the courts are required to review the adequacy of the decision. Such reviews utilize a "substantial evidence" standard that requires a court to determine if the lead agency's decision was consistent with the substantial body of evidence contained in the official record.[24] Because the evidence in the record can be voluminous and highly technical, CEQA litigation can take time. In addition to the length of litigation, CEQA reform advocates argue that the eventual court decision in CEQA cases can be unpredictable. While claims about CEQA litigation frequently reach hyperbolic levels, Public Resources Code Section does 21168.9 confer significant latitude to judicial officers in crafting remedies for CEQA violations. Should a court determine a CEQA violation occurred it may do any of the following:

- Mandate that the determination, finding, or decision be voided by the public agency, in whole or in part.
- Mandate that the public agency and any real parties in interest suspend any or all specific project activity or activities, pursuant to the determination, finding, or decision, that could result in an adverse change or alteration to the physical environment, until the public agency has taken any actions that may be necessary to bring the determination, finding, or decision into compliance with CEQA.
- Mandate that the public agency take specific action as may be necessary to bring the determination, finding, or decision into compliance with CEQA.

In essence, an adverse CEQA ruling can result in a judicial determination that ranges from simply requiring updated mitigation measures to stopping a proposed project from ever going

[24] *Vineyard Area Citizens v. City of Rancho Cordova* (2007) 40 Cal. 4th 412.

forward. Accordingly, it is unsurprising that many reform advocates highlight the need for quick resolutions to CEQA litigation as a means of establishing certainty for public projects. To that end, existing law already provides CEQA cases preferences over *all* other civil litigation,[25] including those cases given calendaring preferences in the Code of Civil Procedure due to the poor health of the litigants.[26] The Code of Civil Procedure provisions build upon the existing law's efforts to deter unnecessary or frivolous CEQA litigation, including provisions enabling the court to require plaintiffs to put forward a financial security payment for potential damages when an affordable housing development is challenged.[27]

B. Administration Proposal

Scope of projects eligible for streamlining.

The Administration proposes to offer expedited judicial review (i.e., requiring the courts to resolve lawsuits within 270 days, to the extent feasible) to a broad range of infrastructure projects falling into four categories – energy, transportation, water, and semiconductor or microelectronic.

Prior expedited judicial review legislation has been limited in scope and/or duration (Approximately 30 projects have been eligible for expedited review since 2011. Of those, fewer than half proceeded to approval and only four have faced litigation.) This bill applies to an unlimited number of projects in and does so in perpetuity.

While the proposal is part of a package billed as advancing clean energy and climate goals, many eligible project types are likely to increase GHG emissions in construction, operation, or both, as well as have a range of other significant environmental impacts. There is no requirement that eligible projects result in GHG emissions benefits, or even mitigate GHG emissions.

Additionally, this proposal encompasses some projects that, regardless of any potential benefits of harms to the environment, remain highly controversial to impacted communities. One aspect of the Administration's proposal would authorize judicial streamlining for "water related projects." These projects are defined as the Sacramento-San Joaquin Delta Conveyance Project (Delta Conveyance Project), water storage projects funded by the Water Storage Investment Program under Proposition 1, recycled water projects, water desalination projects, and water canal or conveyance projects (e.g., California Aqueduct that is part of State Water Project). This proposal would limit the timeline for court consideration of these highly complicated, and controversial, "water related projects."

Eligibility requirements & certification process for projects.

In addition to the project certification requirements and expedited record certification procedures, this proposal seeks to adopt the familiar 270-day timeline for the adjudication of a CEQA dispute arising from a project certified in accordance with this proposal. Given the staff and cost pressures that such a timeline places on the judicial branch, project applicants would also be required to pay the costs of the trial court and Court of Appeal related to the court's

[25] Public Resources Code Section 21167.1 (a).
[26] Code of Civil Procedure Section 36.
[27] Code of Civil Procedure Section 529.9.

hearing and adjudicating any expedited CEQA lawsuit (except for transportation projects). Given that the courts are a government agency largely funded by General Fund expenditures and the fees charged to litigants, requiring a party to pay the government's cost to adjudicate their case is somewhat unusual and may give rise to concerns that the party funding the courts may receive special treatment.

Equally unique are the provisions of the bill limiting judicial review of an agency's decision to certify a project for the streamlined litigation provisions proposed by the trailer bill. While such an action would typically be subject to review through a writ of mandate, this bill forecloses such actions. Coupled with the blanket exemption from the Administrative Procedure Act provided for the development of criteria for certifying a project for streamlined judicial review, this proposal provides various parts of the Executive Branch with significant, and unchecked, leeway to certify projects as the Executive Branch sees fit.

C. Policy Considerations

This proposal abandons all of the "environmental leadership" requirements common to prior expedited judicial review laws.

AB 900 (Buchanan) Chap. 354, Stats. 2011, SB 7 (Atkins) Chap. 19, Stats. 2021, and each of the several project-specific bills that have passed the Legislature since 2011 have all included progressively stronger environmental leadership requirements. These bills require eligible projects to undergo an EIR, achieve GHG neutrality in construction and operation, exceed CEQA requirements for GHG and traffic mitigation, and, for building projects, earn LEED certification. This proposal includes *none* of these requirements.

Are eligible projects consistent with climate and other environmental goals?

According to Governor Newsom, the infrastructure package is aimed at "accelerating the building of clean infrastructure so California can reach its world-leading climate goals." However, this proposal does not have any direct requirements or other mechanisms to assure eligible projects have a GHG benefit or are otherwise consistent with the state's climate goals. As noted above, the broad project categories include project types that are likely to increase GHG emissions, as well as air pollution and water consumption, while reducing available habitat and impacting other resources.

Should the Legislature opt to advance these proposals, the Legislature should strongly consider amending into the trailer bill many of the GHG and other environmental requirements contained in prior CEQA streamlining measures to ensure that projects receiving priority treatment in the courts actually further California's climate goals.

The standards and process for certification of eligible projects is exceptionally vague.

In addition to the broad range of eligible projects it's not clear when and how projects will be certified as eligible. In some cases, it's not clear that the certifying entity will have any record, experience, or jurisdiction regarding the project. In particular, the Executive Director of the California Energy Commission (CEC) and the Director of the Office of Planning and Research (OPR) are charged with certifying projects completely outside their jurisdiction and normal duties. Is it not clear at what stage of project review the certification decision by the CEC or

OPR would be made, what record it is based on, or what role the public may have, beyond the minimal requirement to publish "evidence and materials submitted in for the certification...at least 15 days before the certification of the project." Further, is it not clear how the certifying entity can enforce the various conditions and requirements, such as the requirement to pay the lead agency and court costs.

Accordingly, should the Legislature opt to adopt the Governor's proposals, at minimum, additional clarity should be added to the trailer bill language to strengthen the project certification process and ensure robust public participation in the creation of the rules governing project certification.

Appropriateness of limiting judicial review of agency certification?

As discussed above this proposal explicitly prohibits Executive Branch certification of projects for judicial streamlining from judicial review. For efficiency's sake this prohibition may be appropriate in most cases, however, the existing language may be overly broad and will prevent any judicial review even in cases of official malfeasance or governmental overreach. For example, should officials approve a project that does not meet established criteria, which is proposed to be developed without meaningful public input, project opponents would have no recourse to challenge the decision in court.

Accordingly, should the Legislature opt to approve this proposal it should strongly consider modifying the prohibition on judicial review of project certification to include exceptions for, at minimum, official malfeasance and abuse of discretion.

Historic lack of use of the 270-day streamlining.

Acceding to the myth that CEQA slows development, several litigation streamlining measures have been enacted over the past decade. The Legislature's first foray into expediting the review of CEQA cases was the passage of AB 900 in 2011. That measure provided that "environmental leadership" projects, projects meeting specified environmental and labor requirements, would be granted immediate appellate-level review within 175 days of a case being filed. Those provisions were ultimately struck down as unconstitutional.[28] Moving away from the strict timeline and original appellate jurisdiction provisions, the Legislature began adopting project-specific CEQA streamlining bills that adopted a 270-day hearing timeline at the superior courts if such a timeline was "feasible." (See, SB 743 (Steinberg) Chap. 386, Stats. 2013.) In addition to the project-specific CEQA exemptions, the Legislature has repeatedly reenacted provisions of AB 900 adopting the "if feasible" 270-day timeline approach, including the recent 2021 extension of the AB 900 framework.[29]

When examining both "environmental leadership" bills and those for specific projects, since 2011, at least a dozen CEQA litigation streamlining bills have been adopted by the Legislature, with dozens more having been introduced for favored projects. These bills simply boost the idea that CEQA, and related litigation, stifles development. However, research suggests that actual litigation is exceedingly rare. Between 2002 and 2015 no single year saw more than 250 CEQA-

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[28] *Planning and Conservation League v. State of California* (2012) RG12626904 (Alameda Sup. Ct.).
[29] SB 7 (Atkins) Chap. 19, Stats. 2021.

related cases filed statewide.[30] Additionally, a 2012 study by the Attorney General's office suggested that the actual rate of litigation over matters related to CEQA may be as low as 0.3 percent of all projects approved in California.[31] Given the low rate at which projects subject to CEQA are actually litigated, it appears that the real deterrence to large-scale development in California is more likely local zoning laws, land use policies, construction costs, and the general lack of open space in this state's largest cities.

Similar to CEQA litigation overall, data suggests projects that have been given CEQA-streamlining by the Legislature are rarely are litigated in court. Based on data provided by the Judicial Council, of the approximately 30 projects that have qualified for expedited CEQA review since 2011, only four projects have faced CEQA litigation. Of those four cases, two were high-profile stadium projects that, in some cases, utilized taxpayer money to build a private facility, one was a luxury condominium tower, and one is the reconstruction of the Capitol Annex. Notably, in addition to the relatively low-rate of litigation, of those 30 projects that qualified for expedited review another four were either terminated or withdrawn, and thus never built, due to financial or other business considerations and not environmentally-related legal exposure.[32] Of particular note, CEQA streamlining proved insufficient to convince the Oakland Athletics baseball club to build a new stadium in California as the Athletics are presently trying to convince the Nevada Legislature to finance a new stadium in that state.[33] Accordingly, despite the Legislature's use of CEQA-streamlining, an equal number of qualified projects benefited from these laws as those that failed under the weight of their own financial difficulties.

Although the existing law's 270-day CEQA litigation provisions are rarely utilized, as noted above this proposal dramatically scales back the GHG emission reduction and environmental leadership requirements typically contained in CEQA streamlining measures. Unfortunately the litigation data discussed above does not illuminate whether or not the minimal use of the CEQA streamlining provisions is the result of the stringent environmental standards (which are arguably an important prerequisite to obtaining streamlining) or the result of the streamlining provisions being relatively useless in the broader context of conducting environmental reviews and litigating CEQA cases.

Accordingly, the Legislature should strongly consider if the 270-day timeline for CEQA litigation is actually a helpful tool or if other alternatives should be considered to provide greater, and more useful, legal certainty for projects subject to environmental review. Unfortunately, seeking to adopt this proposal through the budget process significantly limits the Legislature's ability to consider such alternatives.

Are existing CEQA priority statutes inadequate?

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[30] BAE Urban Economics, *CEQA in the 21st Century* (Aug. 2016), p. 19, available at https://rosefdn.org/wp-content/uploads/2016/08/CEQA-in-the-21st-Century.pdf.

[31] Office of the Attorney General, *Quantifying the Rate of Litigation Under the California Environmental Quality Act: A Case Study* (2012).

[32] California Senate Office of Research, *Review of Environmental Leadership Projects,* (Apr. 2019) at p. 5.

[33] AB 734 (Bonta) Chap. 959, Stats. 2018, Jeff Passan, *The Las Vegas A's? The latest on potential move from Oakland,* ESPN, Apr. 21, 2023, available at: https://www.espn.com/mlb/story/_/id/36246762/las-vegas-latest-potential-mlb-team-move-oakland.

As discussed above, CEQA litigation already enjoys significant litigation preferences and protections for project proponents and lead agencies. For example, affordable housing projects challenged under CEQA can seek the imposition of financial assurances from plaintiffs to ensure the project is not harmed by frivolous litigation.[34] Additionally, the existing civil litigation calendaring preferences means that CEQA litigation takes priority over all other civil cases, including those involving elderly or terminally ill plaintiffs, eviction and other housing related matters, labor and back wage disputes, and cases in which person's civil rights and liberties are at stake. It should be further noted that unlike many of the above described cases that directly impact the lives of ordinary Californians, CEQA litigation frequently involves private developers or large government agencies.

In justifying the proposed trailer bill language, the Newsom Administration notes, "California expects to make historic investments in infrastructure as a result of funding made available by the federal Infrastructure Investment and Jobs Act, Inflation Reduction Act, and CHIPS and Science Act, as well as separate investments reflected in this Administration's proposed budget... Given the substantial public benefits expected from these infrastructure investments, it is imperative that the environmental review and planning processes proceed as efficiently as possible."[35] Beyond references to recent federal legislation, which notably does not appear to have any significant requirements regarding timelines for project approvals, the Newsom Administration provides no evidence or discussion as to why the above described CEQA litigation preferences and protections are inadequate.

Given the minimal utilization of prior 270-day judicial streamlining, the Legislature should press the Administration as to why these provisions are needed for projects that may be funded using federal dollars, if such a timeline would actually be utilized by these projects, and if an alternative solution may accomplish the legal finality the Administration seeks in a more efficient and effective manner.

The impact to court personnel and calendars from expediting review of CEQA cases.

As noted above, this proposal would require all qualified CEQA litigation to be provided a fast-tracked 270-day litigation timeline. In order to ensure that the courts can meet this timeline, the Judicial Council of California notes that this proposal would require significant court resources. CEQA cases can be highly complex, and in order to facilitate proper review of the cases staff assets may be pulled from other judicial departments. Given that this proposal provides no additional resources to the courts, there is little chance that these positions could be backfilled. Additionally, given this proposal's elimination of the requirements regarding environmental leadership or clear GHG emissions reductions contained in prior judicial streaming bills, this measure may dramatically expand the number of cases that actually seek judicial streamlining. While the courts successfully managed the few cases that have actually been fast-tracked since 2010, should this proposal result in an influx of streamlined cases, the courts may become overwhelmed.

In the event CEQA cases overwhelm civil departments, significant impacts may occur. First, most courts maintain only a handful of departments with specialized CEQA experience. Should

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[34] Code of Civil Procedure Section 529.9.

[35] Dept. of Finance, *Proposed Trailer Bill Legislation: CEQA Judicial Streamlining Fact Sheet*, available at: https://esd.dof.ca.gov/trailer-bill/public/trailerBill/pdf/956.

those departments become inundated with streamlined CEQA cases, other CEQA cases may be diverted to civil departments lacking the requisite knowledge of the intricacies of CEQA to properly evaluate a case. This may then result, despite the best effort of judicial officers and court staff, in inconsistent or otherwise substandard decisions as a result of the lack of specialized knowledge in CEQA. Even more problematic would be the diversion of court resources away from other civil matters. Prioritizing and expediting CEQA cases will deny justice to everyday Californians as their cases are put on hold while CEQA cases proceed. Furthermore, should CEQA cases overburden limited court resources, the quality of decisions in other civil matters may suffer due to the over extension of court resources. While this measure appears to contemplate project proponents paying for court costs, the inconsistency of such funding would likely preclude the courts from being able to adequately anticipate ongoing revenues and augment staffing levels.

Accordingly, while the topic of this proposal may not be appropriate for the budget, should the Legislature decide to move forward with the proposal it should strongly consider allocating significant new resources to the courts for training and staffing for CEQA matters. To the extent that the Newsom Administration believes that such resources would be inappropriate as a result of the present budget constraints, *the Administration may wish to consider delaying the proposal until the state's financial outlook improves or altering this proposal to lessen the financial burden on the judicial branch.*

Administrative Record Reform
Draft Trailer Bill Language
May 19, 2023

Section 21167.6 of the Public Resources Code is amended to read:

21167.6. Notwithstanding any other law, in all actions or proceedings brought pursuant to Section 21167, except as provided in Section 21167.6.2 or those involving the Public Utilities Commission, all of the following shall apply:

(A) ~~At the time that the action or proceeding is filed, the plaintiff or petitioner shall file a request that the respondent public agency prepare the record of proceedings relating to the subject of the action or proceeding. The request, together with the complaint or petition,~~ The complaint or petition shall be served personally upon the public agency not later than 10 business days from the date that the action or proceeding was filed.

(b) (1) The public agency shall prepare and certify the record of proceedings not later than 60 days from the date that the ~~request specified in subdivision (a)~~ complaint or petition was served upon the public agency. Upon certification, the public agency shall lodge a copy of the record of proceedings with the court and shall serve on the parties notice that the record of proceedings has been certified and lodged with the court. The parties shall pay any reasonable costs or fees imposed for the preparation of the record of proceedings in conformance with any law or rule of court.

(2) The plaintiff or petitioner may elect to prepare the record of ~~proceedings or the~~ proceedings. If the plaintiff or petitioner elects to prepare the record of proceedings, the plaintiff or petitioner shall do all of the following:

(A) Inform the public agency that the plaintiff or petitioner intends to prepare the administrative record within 10 business days from the date that the action or proceeding was filed.

(B) (i) Provide the record of proceedings to the public agency for certification no later than 60 days after receiving from the lead agency the documents that constitute the record of proceedings.

(ii) If the petitioner or plaintiff fails to comply with clause (i), the public agency may assume the duty of preparing the record of proceedings, unless the parties stipulate to an extension of time, or the court finds good cause for any delay and grants an extension of time for the petitioner or plaintiff to prepare the record.

(3) The parties may agree to an alternative method of preparation of the record of proceedings, subject to certification of its accuracy by the public agency, within the 60-day time limit specified in this subdivision.

(4) Notwithstanding paragraph (2), the public agency may prepare the record of proceedings at its own expense. If the public agency elects to prepare the record of proceedings pursuant to this paragraph, the public agency shall notify all parties and

the court within 10 days of service of the complaint or petition and shall bear the cost of preparing the record, regardless of the ultimate resolution of the action or proceeding. The public agency may pass the cost of preparing the record of proceedings on to the project applicant.

(c) Unless the record of proceedings has been prepared concurrently with the administrative process, the court shall schedule a case management conference within 30 days of the filing of the complaint or petition to discuss the scope, timing, and costs of the record of proceedings. The parties may stipulate to a partial record of proceedings that does not contain all the documents listed in paragraph (1) of subdivision (e) if approved by the court. The time limit established by subdivision (b) may be extended only upon the stipulation of all parties who have been properly served in the action or proceeding or upon order of the court. Extensions shall be ~~liberally~~ granted by the ~~court~~ court, upon a showing of good cause, such as when the size of the record of proceedings renders infeasible compliance with that time limit. There is no limit on the number of extensions that may be granted by the court, but no single extension shall exceed 60 days unless the court determines that a longer extension is in the public interest.

(d) If the public agency fails to prepare and certify the record of proceedings within the time limit established in paragraph (1) of subdivision (b), or any continuances of that time limit, the plaintiff or petitioner may move for sanctions, and the court may, upon that motion, grant appropriate sanctions.

(e) (1) The record of proceedings shall include, but is not limited to, all of the following items:

~~(1)~~ (A) All project application materials.

~~(2)~~ (B) All staff reports and related documents prepared by the respondent public agency with respect to its compliance with the substantive and procedural requirements of this division and with respect to the action on the project.

~~(3)~~ (C) All staff reports and related documents prepared by the respondent public agency and written testimony or documents submitted by any person relevant to any findings or statement of overriding considerations adopted by the respondent agency pursuant to this division.

~~(4)~~ (D) Any transcript or minutes of the proceedings at which the decisionmaking body of the respondent public agency heard testimony on, or considered any environmental document on, the project, and any transcript or minutes of proceedings before any advisory body to the respondent public agency that were presented to the decisionmaking body ~~prior to~~ before action on the environmental documents or on the project.

~~(5)~~ (E) All notices issued by the respondent public agency to comply with this division or with any other law governing the processing and approval of the project.

~~(6)~~ (F) All written comments received in response to, or in connection with, environmental documents prepared for the project, including responses to the notice of preparation.

~~(7)~~ (G) All written evidence or correspondence submitted to, or transferred from, the respondent public agency with respect to compliance with this division or with respect to the project.

~~(8)~~ (H) Any proposed decisions or findings submitted to the decisionmaking body of the respondent public agency by its staff, or the project proponent, project opponents, or other persons.

~~(9)~~ (I) The documentation of the final public agency decision, including the final environmental impact report, mitigated negative declaration, or negative declaration, and all documents, in addition to those referenced in ~~paragraph (3),~~ subparagraph (C), cited or relied on in the findings or in a statement of overriding considerations adopted pursuant to this division.

~~(10)~~ (J) Any other written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits of the project, including the initial study, any drafts of any environmental document, or portions ~~thereof,~~ of the initial study or drafts, that have been released for public review, and copies of studies or other documents relied upon in any environmental document prepared for the project and either made available to the public during the public review period or included in the respondent public agency's files on the project, and all internal agency communications, including ~~staff notes and~~ memoranda related to the project or to compliance with this division. The term "internal agency communications" does not include internal agency electronic communications, including emails, that were not presented to the final decisionmaking body. The public agency may, but is not required to, include any documents in the record of proceedings that are not specifically set forth in this paragraph.

~~(11)~~ (K) The full written record before any inferior administrative decisionmaking body whose decision was appealed to a superior administrative decisionmaking body prior to before the filing of litigation.

(2) This subdivision does not override or abrogate any privileges contained in the Evidence Code or any exemptions contained in the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1 of the Government Code).

(f) In preparing the record of proceedings, the party preparing the record shall strive to do so at reasonable cost in light of the scope of the record. The record of proceedings shall be lodged with the court and submitted to the parties in electronic format, unless a hardcopy is requested by the court. If the record of proceedings is filed in electronic format, any court filings that refer to the documents in the record of proceedings shall include an electronic hyperlink to the cited document.

(g) The clerk of the superior court shall prepare and certify the clerk's transcript on appeal not later than 60 days from the date that the notice designating the papers or records to be included in the clerk's transcript was filed with the superior court, if the party or parties pay any costs or fees for the preparation of the clerk's transcript imposed in conformance with any law or rules of court. Nothing in this subdivision precludes an election to proceed by appendix, as provided in Rule 8.124 of the California Rules of Court.

(h) Extensions of the period for the filing of any brief on appeal may be allowed only by stipulation of the parties or by order of the court for good cause shown. Extensions for the filing of a brief on appeal shall be limited to one 30-day extension for the preparation of an opening brief and one 30-day extension for the preparation of a responding brief, except that the court may grant a longer extension or additional extensions if it determines that there is a substantial likelihood of settlement that would avoid the necessity of completing the appeal.

(i) At the completion of the filing of briefs on appeal, the appellant shall notify the court of the completion of the filing of briefs, whereupon the clerk of the reviewing court shall set the appeal for hearing on the first available calendar date.

Proposed Trailer Bill Legislation

CEQA Administrative Record

FACT SHEET

SUMMARY:

This proposal clarifies and streamlines procedures related to the preparation of the public record for the judicial review of level challenges brought under CEQA in order to reduce the litigation time.

BACKGROUND:

California's landmark environmental law, the California Environmental Quality Act (CEQA), provides important public oversight to government-approved projects by requiring the identification and mitigation of a project's environmental impacts. CEQA is enforced by lawsuits brought by the public. While compliance with CEQA may offer environmental benefits to the public, the costs of delays associated with CEQA litigation offer no such benefits and often result in the delay or the demise of beneficial projects such as housing. CEQA lawsuits typically take 1-2 years to resolve at the trial court level. Often the preparation of CEQA administrative records can take a significant period of that time, extending the time and cost of litigation. In the reported case law, record preparation took between four and 17 months.

The administrative record (also referred to as the record or record of proceedings) constitutes the evidence at trial in CEQA cases. Under existing law, parties have 60 days to compile the record, but time extensions are allowed and commonplace. There are several reasons for why record preparation takes so long. First, under current law, petitioners challenging a project may elect to prepare the record themselves, even though public agencies are in physical possession of record documents and are in the best position to efficiently gather, organize, and prepare the record. Further, parties often argue over the scope and contents of the record in court. In particular, parties dispute what documents should be included under Public Resources Code section 21167.6, subdivision (e)(10), which requires the record to include "all internal agency communications" that are "related to the project or to compliance with [CEQA]." This all often results in voluminous records that are filed long after the original 60-day timeframe, with only a fraction of the documents being germane to the issues being litigated.

The proposed CEQA administrative record trailer bill language would clarify and streamline the administrative record requirements set forth in Public Resources Code section 21167.6 to address these issues and to allow CEQA administrative records to be developed more expediently, with fewer litigation delays.

PROPOSED LANGUAGE:

Specify procedures to expedite record preparation

- Allows a public agency to prepare the record notwithstanding the petitioner's election to prepare it. If the public agency elects to prepare the record, it must do so at its own expense, regardless of the outcome of the litigation, and may pass the cost of preparation on to the project applicant. The agency must also notify all parties and the court within 10 days of the service of the complaint of its decision.
- If the petitioner elects to prepare the record but fails to do so within the 60-day deadline, then the public agency may assume the duty of record preparation. The petitioner must also notify the public agency within 10 days of filing the action that it is electing to prepare the record.
- Regardless of which party is preparing the record, mandates that extensions to record preparation deadlines may be granted by the court only upon a showing of good cause.
- Requires that the record will be prepared in an electronic format unless a hard copy is requested by the court and for all court filings to hyperlink the record in court filings citing to the record.

More narrowly defines the scope of "internal agency communications"

- Explains that the term "internal agency communications" does not include internal electronic communications, including emails, that were not presented to the final decision-making body, and which are rarely important to the outcome of a CEQA case.
- This clarification will reduce the time required to gather and review emails, greatly reducing records cost and size.

An act to add Chapter 7 (commencing with Section 21189.80) to Division 13 of the Public Resources Code, relating to environmental quality.

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

SECTION 1. Chapter 7 (commencing with Section 21189.80) is added to Division 13 of the Public Resources Code, to read:

CHAPTER 7. INFRASTRUCTURE PROJECTS

21189.80. The Legislature finds and declares all of the following:

(a) This division requires that the environmental impacts of development projects be identified and mitigated.

(b) This division also guarantees the public an opportunity to review and comment on the environmental impacts of a project and to participate meaningfully in the development of mitigation measures for potentially significant environmental impacts.

(c) Historic federal and state investments in infrastructure will lead to the development of numerous transportation-related, water-related, technology, and energy facilities across the state that would further California's commitments to reducing emissions of greenhouse gases and protecting its people from the worst extremes of climate change while also leveraging federal resources to increase access to quality jobs in our communities.

(d) These projects will further generate full-time jobs during construction and additional jobs once the projects are constructed and operating.

(e) The transportation-related projects would help state, regional, and local agencies more quickly meet the goals of advancing safety, rehabilitating the aging transportation infrastructure, and addressing the impacts of climate change.

(f) The transportation-related projects will accelerate critical state, regional, and local "fix it first" projects supported by a historic federal and state partnership through Chapter 5 of the Statutes of 2017, and the federal Infrastructure Investment and Jobs Act (Public Law 117-58).

(g) The purpose of this chapter is to provide unique streamlining benefits under this division for critical state, regional, and local investments in climate resiliency, safety, and infrastructure maintenance while maintaining the environmental and public engagement benefits of this division for projects that provide the public benefits, including environmental and climate-related benefits, described above and to both achieve those benefits and put people to work as soon as possible.

21189.81. For purposes of this chapter, the following definitions apply:

(a) "Applicant" means a public or private entity or its affiliates, or a person or entity that undertakes a public works project, that proposes a project and its successors, heirs, and assignees.

(b) "Certifying entity" means any of the following:

(1) For an energy infrastructure project, the Executive Director of the State Energy Resources Conservation and Development Commission.

(2) For a semiconductor or microelectronic project, the Director of the Office of Planning and Research.

(3) For a transportation-related project, the Secretary of Transportation.

(4) For a water-related project, the Secretary of the Natural Resources Agency.

(c) (1) "Energy infrastructure project" means any of the following:

(A) A solar photovoltaic or terrestrial wind electrical generating powerplant.

(B) An energy storage system as defined in Section 2835 of the Public Utilities Code.

(C) A project for which the applicant has certified that a capital investment of at least two hundred fifty million dollars ($250,000,000) made over a period of five years and the project is for either of the following:

(i) The manufacture, production, or assembly of an energy storage system or component manufacturing, wind system or component manufacturing, and solar photovoltaic energy system or component manufacturing.

(ii) The manufacture, production, or assembly of specialized products, components, or systems that are integral to renewable energy or energy storage technologies.

(D) An electric transmission project for purposes of transmitting electricity to, or within, the state.

(2) Except for solar photovoltaic and terrestrial wind electrical generating powerplants with a generating capacity of less than 20 megawatts and energy storage projects capable of storing less than 80 megawatt hours of electrical energy, an energy infrastructure project shall meet the requirements of Sections 25545.3.3 and 25545.3.5.

(d) "Infrastructure project" means a project that is certified pursuant to Section 21189.82 as any of the following:

(1) An energy infrastructure project.

(2) A semiconductor or microelectronic project.

(3) A transportation-related project.

(4) A water-related project.

(e) "Semiconductor or microelectronic project" means a project that meets the requirements related to investment in new or expanded facilities and is awarded funds under the federal Creating Helpful Incentives to Produce Semiconductors Act of 2022 (Public Law 117-167), commonly known as the CHIPS Act of 2022, and the requirements of Section 21183.5.

(f) (1) "Transportation-related project" means a transportation infrastructure project that advances one or more of, and does not conflict with, the following goals related to the Climate Action Plan for Transportation Infrastructure adopted by the Transportation Agency:

(A) Build toward an integrated, statewide rail and transit network.

(B) Invest in networks of safe and accessible bicycle and pedestrian infrastructure.

(C) Include investments in light-, medium-, and heavy-duty zero-emission vehicle infrastructure.

(D) Develop a zero-emission freight transportation system.

(E) Reduce public health and economic harms and maximize community benefits.

(F) Make safety improvements to reduce fatalities and severe injuries of all users towards zero.

(G) Assess and integrate assessments of physical climate risk.

(H) Promote projects that do not significantly increase passenger vehicle travel.

(I) Promote compact infill development while protecting residents and businesses from displacement.

(J) Protect natural and working lands.

(2) Transportation-related projects are public works for the purposes of Section 1720 of the Labor Code and shall comply with the applicable provisions of Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code.

(g) (1) "Water-related project" means any of the following:

(A) The Delta Conveyance Project.

(B) Water storage projects funded by the California Water Commission pursuant to Chapter 8 (commencing with Section 79750) of Division 26.7 of the Water Code.

(C) Projects for the production, distribution, or use of recycled water, as defined in Section 13050 of the Water Code.

(D) Contaminant and salt removal projects, including, but not limited to, groundwater and seawater desalination and associated treatment, storage, conveyance, and distribution facilities.

(E) Canal or other conveyance maintenance and repair.

(2) Water-related projects are public works for the purposes of Section 1720 of the Labor Code and shall comply with the applicable provisions of Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code.

21189.82. (a) (1) (A) The Executive Director of the State Energy Resources Conservation and Development Commission may certify a project as an energy infrastructure project for purposes of this chapter if the project meets the requirements of subdivision (c) of Section 21189.81.

(B) In addition to subparagraph (A), if the applicant is not the lead agency, the executive director shall ensure all of the following:

(i) The applicant agrees to pay the costs of the trial court and the court of appeal in hearing and deciding any case challenging a lead agency's action on a certified project under this division, including payment of the costs for the appointment of a special master if deemed appropriate by the court, in a form and manner as provided in the rule of court adopted by the Judicial Council under Section 21189.84.

(ii) The applicant agrees to pay the costs of preparing the record of proceedings for the project concurrent with the review and consideration of the project under this division, in a form and manner specified by the lead agency for the project.

(iii) For a project for which environmental review has commenced, the applicant demonstrates that the record of proceedings is being prepared in accordance with Section 21189.85.

(2) (A) The Director of the Office of Planning and Research may certify a project as a semiconductor or microelectronic project for purposes of this chapter if the project meets the requirements of subdivision (e) of Section 21189.81.

(B) In addition to subparagraph (A), if the applicant is not the lead agency, the director shall ensure all of the following:

(i) The applicant agrees to pay the costs of the trial court and the court of appeal in hearing and deciding any case challenging a lead agency's action on a certified project under this division, including payment of the costs for the appointment of a special master if deemed appropriate by the court, in a form and manner as provided in the rule of court adopted by the Judicial Council under Section 21189.84.

(ii) The applicant agrees to pay the costs of preparing the record of proceedings for the project concurrent with the review and consideration of the project under this division, in a form and manner specified by the lead agency for the project.

(iii) For a project for which environmental review has commenced, the applicant demonstrates that the record of proceedings is being prepared in accordance with Section 21189.85.

(3) The Secretary of Transportation may certify up to 20 transportation-related projects for purposes of this chapter, including up to 10 state projects proposed by the Department of Transportation and up to 10 local or regional projects, that meet the requirements of subdivision (f) of Section 21189.81.

(4) (A) The Secretary of the Natural Resources Agency may certify a project as a water-related project for proposes of this chapter if the project meets the requirements of subdivision (g) of Section 21189.81.

(B) In addition to subparagraph (A), if the applicant is not the lead agency, the secretary shall ensure all of the following:

(i) The applicant agrees to pay the costs of the trial court and the court of appeal in hearing and deciding any case challenging a lead agency's action on a certified project under this division, including payment of the costs for the appointment of a special master if deemed appropriate by the court, in a form and manner as provided in the rule of court adopted by the Judicial Council under Section 21189.84.

(ii) The applicant agrees to pay the costs of preparing the record of proceedings for the project concurrent with the review and consideration of the project under this division, in a form and manner specified by the lead agency for the project.

(iii) For a project for which environmental review has commenced, the applicant demonstrates that the record of proceedings is being prepared in accordance with Section 21189.85.

(b) The certifying entity may issue guidelines regarding the application and certification of projects under this chapter. Any guidelines issued under this subdivision are not subject to the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

(c) The certifying entity shall make evidence and materials submitted in for the certification of a project available to the public on the certifying entity's departmental internet website at least 15 days before the certification of the project.

(d) The certifying entity's decision to certify a project shall not be subject to judicial review.

21189.83. (a) This chapter applies to a project that is certified by the appropriate certifying entity as an infrastructure project.

(b) An applicant may apply to the appropriate certifying entity for certification and shall provide evidence and materials deemed necessary by the certifying entity in making a decision on the application for certification.

21189.84. (a) An action or proceeding brought to attack, review, set aside, void, or annul the certification of an environmental impact report for an infrastructure project subject to this chapter or the granting of any project approvals, including any potential appeals to the court of appeal or the Supreme Court, shall be resolved, to the extent feasible, within 270 days of the filing of the certified record of proceedings with the court.

(b) On or before December 31, 2023, the Judicial Council shall adopt a rule of court to implement this section.

21189.85. Notwithstanding any other law, the preparation and certification of the record of proceedings for an infrastructure project shall be performed in the following manner:

(a) The lead agency for the project shall prepare the record of proceedings under this division concurrently with the administrative process.

(b) All documents and other materials placed in the record of proceedings shall be posted on, and be downloadable from, an internet website maintained by the lead agency commencing with the date of the release of the draft environmental impact report.

(c) The lead agency shall make available to the public in a readily accessible electronic format the draft environmental impact report and all other documents submitted to, or relied on by, the lead agency in preparing the draft environmental impact report.

(d) Any document prepared by the lead agency or submitted by the applicant after the date of the release of the draft environmental impact report that is a part of the record of proceedings shall be made available to the public in a readily accessible electronic format within five days after the document is released or received by the lead agency.

(e) The lead agency shall encourage written comments on the project to be submitted in a readily accessible electronic format, and shall make any comment available to the public in a readily accessible electronic format within five days of its receipt.

(f) Within seven days after the receipt of any comment that is not in an electronic format, the lead agency shall convert that comment into a readily accessible electronic format and make it available to the public in that format.

(g) Notwithstanding subdivisions (b) to (f), inclusive, documents submitted to or relied on by the lead agency that were not prepared specifically for the project and are copyright protected are not required to be made readily accessible in an electronic format. For those copyright-protected documents, the lead agency shall make an index of these documents available in an electronic format no later than the date of the release of the draft environmental impact report, or within five days if the document is received or relied on by the lead agency after the release of the draft environmental impact report. The index shall specify the libraries or lead agency offices in which hardcopies of the copyrighted materials are available for public review.

(h) The lead agency shall certify the final record of proceedings within five days of its approval of the project.

(i) Any dispute arising from the record of proceedings shall be resolved by the superior court. Unless the superior court directs otherwise, a party disputing the content of the record of proceedings shall file a motion to augment the record of proceedings at the time it files its initial brief.

(j) The contents of the record of proceedings shall be as set forth in subdivision (e) of Section 21167.6.

(k) This section shall not be interpreted to require disclosure of documents or portions of documents that are subject to any privileges in the Evidence Code, exempt from disclosure under the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1 of the Government Code), subject to subdivision (c) of Section 21082.3, or otherwise confidential pursuant to any applicable law.

21189.86. (a) Within 10 days of the certification of a project pursuant to Section 21189.82, the lead agency shall, at the applicant's expense, if applicable, issue a public notice in no less than 12-point type stating the following:

"THE APPLICANT HAS ELECTED TO PROCEED UNDER CHAPTER 7 (COMMENCING WITH SECTION 21189.80) OF DIVISION 13 OF THE PUBLIC RESOURCES CODE, WHICH PROVIDES, AMONG OTHER THINGS, THAT ANY JUDICIAL ACTION CHALLENGING THE CERTIFICATION OF THE ENVIRONMENTAL IMPACT REPORT (EIR) OR THE APPROVAL OF THE PROJECT DESCRIBED IN THE EIR IS SUBJECT TO THE PROCEDURES SET FORTH IN SECTIONS 21189.84 AND 21189.85 OF THE PUBLIC RESOURCES CODE. A COPY OF CHAPTER 7 (COMMENCING WITH SECTION 21189.80) OF DIVISION 13 OF THE PUBLIC RESOURCES CODE IS INCLUDED BELOW."

(b) The public notice shall be distributed by the lead agency as required for public notices issued under paragraph (3) of subdivision (b) of Section 21092.

21189.87. Except as otherwise provided expressly in this chapter, this chapter does not affect the duty of any party to comply with this division.

21189.88. The provisions of this chapter are severable. If any provision of this chapter or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act, within the meaning of Section 17556 of the Government Code.

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LEGISLATIVE COUNSEL'S DIGEST

Bill No.
as introduced, _____.
General Subject: California Environmental Quality Act: infrastructure projects: streamlining judicial review.

The California Environmental Quality Act (CEQA) requires a lead agency, as defined, to prepare, or cause to be prepared, and certify the completion of an environmental impact report (EIR) on a project that it proposes to carry out or approve that may have a significant effect on the environment or to adopt a negative declaration if it finds that the project will not have that effect. CEQA also requires a lead agency to prepare a mitigated negative declaration 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. CEQA establishes procedures by which an action or proceeding may be brought to challenge the certification of an EIR for a project on the grounds of noncompliance with CEQA. CEQA establishes procedures by which the record of proceedings is to be prepared and certified for the environmental review of a project.

This bill would establish procedures for the preparation of the record of proceedings for projects that are certified by an appropriate certifying entity as an infrastructure project, as defined. The bill would require an action or proceeding challenging the certification of an EIR for those projects or the granting of any project approvals, including any potential appeals to the court of appeal or the Supreme Court, to be resolved, to the extent feasible, within 270 days of the filing of the record of proceedings with the court. The bill would authorize a project applicant to apply to the appropriate certifying entity for the certification of a project as an infrastructure project. The bill would require the lead agency, within 10 days of the certification of a project, to provide a public notice of the certification, as provided. Because the bill would impose additional duties on a lead agency in conducting the environmental review of a certified project, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

Proposed Trailer Bill Legislation

CEQA Judicial Streamlining

FACT SHEET

Summary:
The proposed trailer bill language would provide for expedited judicial review of challenges to certain water, transportation, clean energy, and semiconductor or microelectronic projects under the California Environmental Quality Act.

Background:
The California Environmental Quality Act (or CEQA) requires public agencies to study the potential adverse environmental impacts of proposed projects, and, if those project impacts may be significant, to adopt project alternatives or mitigation measures that would reduce those impacts to the extent feasible. CEQA further requires that any environmental studies be made available for public review and comment. Public agency obligations under CEQA are enforceable by courts, often in lawsuits brought by the public. While CEQA lawsuits are given scheduling preference, it is not uncommon for lawsuits and appeals to take several years to resolve.

In recent years, the Legislature has created an expedited judicial process for certain projects that it finds are in the public's interest to be resolved quickly. Most recently, the Legislature adopted Senate Bill 7 (Atkins, 2021), also known as the Jobs and Economic Improvement Through Environmental Leadership Act of 2021, which extended a prior, similar streamlining provision for certain large projects with specified environmental attributes.

This CEQA judicial streamlining proposal for water, transportation, clean energy, and certain semiconductor or microelectronics projects has been modeled on SB 7 and is designed to provide similarly swift resolution to CEQA challenges to critical infrastructure projects.

Justification:
California expects to make historic investments in infrastructure as a result of funding made available by the federal Infrastructure Investment and Jobs Act, Inflation Reduction Act, and CHIPS and Science Act, as well as separate investments reflected in this Administration's proposed budget. These investments will lead to the development of numerous transportation, clean-energy, and water-related facilities across the state that would further California's commitments to reducing greenhouse gas emissions and protecting its people from the worst extremes of climate change. These projects will be publicly financed in whole or in part and will result in substantial public benefits, including generation of full-time jobs during construction and additional jobs once the projects are constructed and operating. Given the substantial public benefits expected from these infrastructure investments, it is imperative that the environmental review and planning processes proceed as efficiently as possible, without sacrificing the public's ability to participate fully in those processes and while preserving all appropriate environmental protections.

To that end, this proposal would not alter CEQA's requirements for public engagement (including tribal consultation where appropriate), environmental study, consideration of alternatives or imposition of mitigation measures. Instead, this proposal would promote finality and efficiency at the back end of the process, by requiring that any judicial challenges and appeals be completed, to the extent feasible, within 270 days. The specific provisions of this proposal, including project eligibility, are described below.

Proposed Language:
The CEQA judicial streamlining proposal includes these elements:

- Only certain types of infrastructure projects would be eligible for judicial streamlining, specifically water, clean transportation, clean energy, and semiconductor or microelectronic research and development facilities.

- Clean energy projects that advance California's ability to build a clean future. Specifically, this proposal identifies the following as eligible projects:
    - Solar or wind electrical generating powerplants
    - Energy storage systems
    - Projects for the manufacturing, production, or assembly of energy storage, wind, or solar energy systems
    - Electric transmission projects

- Projects that support California's Water Supply Strategy would be eligible. Specifically, this proposal identifies the following as eligible projects:
    - The Delta Conveyance Project
    - Water Storage Projects funded by the California Water Commission pursuant to the Water Storage Investment Program created by Proposition 1 (Water Code Sections 79750 et seq.)
    - Water recycling projects
    - Desalination projects
    - Canal or other conveyance maintenance and repair

- Up to 20 projects—10 state projects and 10 local projects—that support the California State Transportation Agency's Climate Action Plan for Transportation Infrastructure Framework may also be eligible, provided they are certified by the State Transportation Agency as an eligible project. This would accelerate critical state and local infrastructure projects that advance safety, rehabilitate the state's aging transportation infrastructure, or address the impacts of climate change.

- Semiconductor or microelectronic research and development facilities satisfying the federal requirements related to investments in new or expanded facilities awarded funds under the CHIPS and Science Act.

- Agencies using this streamlined judicial process must prepare the administrative record concurrently with the administrative approval process.

- Any litigation, including appeals, would need to be resolved, to the extent feasible, within 270 days.

ACWA
Association of California Water Agencies

Bringing Water Together

June 5, 2023

Re: Newsom Administration Infrastructure Package: Build California's Clean Future, Faster

Position: SUPPORT

To the Honorable Members of the California State Legislature,

On behalf of the Association of California Water Agencies (ACWA) we are writing to express our strong support for the Newsom Administration's proposed infrastructure package to accelerate critical water infrastructure projects that meet state social, climate, and economic goals. These proposals maintain the integrity of appropriate environmental review, government transparency, and community engagement.

ACWA represents over 460 public water agencies throughout California that collectively deliver over 90% of the water used for residential, agricultural, commercial, and industrial uses. ACWA members include cities, counties, special districts, and other local governments that provide safe drinking water to millions of Californians.

California faces a range of water management challenges, including droughts, floods, and other natural disasters. While our weather patterns have always been variable, climate change has, and will continue to exacerbate the weather whiplash that is intensifying drought and precipitation events. Addressing these challenges requires a coordinated effort between state and local agencies to construct and maintain water infrastructure projects needed in a 21st century climate. Unfortunately, the current permitting process for water infrastructure projects in California is complex and lengthy and can be a significant barrier to progress in expanding and improving our water supply and flood risk reduction systems. This can result in delays, higher project costs, and uncertainty for communities, agricultural interests, and businesses that rely on a reliable and sustainable water supply. In addition, this can result in worse environmental outcomes, delaying projects that provide important benefits to aquatic and natural resources.

California has a once-in-a-generation opportunity to leverage federal funding to invest in California's clean infrastructure, grow the state's economy, and create thousands of good paying jobs. Yet major infrastructure projects are too often bogged down in overly onerous regulatory processes and a siloed approach to permitting approvals, which increases overall costs and delays critical projects. In order to streamline permitting and build infrastructure responsibly and expeditiously, the Administration is proposing thoughtful, common sense reform measures to streamline regulatory and review processes so projects can be planned, permitted, and built faster while protecting the environment. Importantly, these proposals provide unique streamlining benefits under the California Environmental Quality Act (CEQA) to advance climate-

friendly projects without reducing the environmental and government transparency benefits of the environmental review process.

For these reasons, ACWA is in strong support of the Administration's water infrastructure package to build California's clean future, faster. If you have any questions regarding ACWA's position please contact ACWA State Relations Director, Adam Quiñonez at AdamQ@acwa.com.

Sincerely,

Adam Quiñonez
State Relations Director
Association of California Water Agencies.
707-761-9247

CC:

Asm Transportation Chair, Asm. Laura Friedman
Asm Water, Parks, Wildlife Chair, Asm. Rebecca Bauer-Kahan
Asm Natural Resources Chair, Asm. Luz Rivas
Asm Judiciary Chair, Asm. Brian Maienschein
Sen. Natural Resources and Water Chair, Dave Min
Sen. Judiciary Chair, Tom Umberg
Sen. Transportation, Lena Gonzalez

Mojave Water Agency

June 5, 2023

Re: Newsom Administration Infrastructure Package: Build California's Clean Future, Faster

Position: SUPPORT

To the Honorable Members of the California State Legislature,

On behalf of the Mojave Water Agency I am writing to express strong support for the Newsom Administration's proposed infrastructure package to accelerate critical clean infrastructure projects that meet state social, climate, and economic goals. These proposals maintain the integrity of appropriate environmental review, government transparency, and community engagement.

Extreme events caused by climate change, including heatwaves, wildfires, flooding, and drought, pose unprecedented challenges to the State's infrastructure. Tackling this climate crisis and advancing the State's equity goals necessitate urgent action and deployment of clean projects to meet our world-leading climate goals, build a clean and resilient electric grid, strengthen California's water resiliency, and modernize the State's clean transportation infrastructure.

The Mojave Water Agency serves a 4,900 square-mile service area in the Mojave Desert. Our population now exceeds 500,000 and is largely comprised of disadvantaged and severely disadvantaged communities. As a member of the State Water Contractors, we import water to augment our local groundwater supply to serve those most in need. The Agency invests in groundwater infrastructure in key areas of our region; however, projects have been delayed due to the cumbersome regulatory processes. The passage of this infrastructure package will enable our Agency to move forward to construct recharge basins in the communities that need assistance.

California has a once-in-a-generation opportunity to leverage federal funding to invest in California's clean infrastructure, grow the state's economy, and create thousands of good-paying jobs. Yet major infrastructure projects are too often bogged down in overly onerous regulatory processes and a siloed approach to permitting approvals, which increases overall costs and delays critical projects. In order to streamline permitting and build infrastructure responsibly and expeditiously, the Administration is proposing thoughtful, common sense reform measures to streamline regulatory and review processes so projects can be planned, permitted, and built faster while protecting the environment. Importantly, these proposals provide unique streamlining benefits under the California Environmental Quality Act (CEQA) to advance climate-friendly projects without reducing the environmental and government transparency benefits of the environmental review process.

For these reasons, the Mojave Water Agency is in strong support of the Administration's infrastructure package to build California's clean future, faster.

Sincerely,
Adnan Anabtawi, General Manager

CC:

Asm Transportation Chair, Asm. Laura Friedman
Asm Water, Parks, Wildlife Chair, Asm. Rebecca Bauer-Kahan
Asm Natural Resources Chair, Asm. Luz Rivas
Asm Judiciary Chair, Asm. Brian Maienschein
Sen. Natural Resources and Water Chair, Dave Min
Sen. Judiciary Chair, Tom Umberg
Sen. Transportation, Lena Gonzalez

Almond Alliance

The Honorable Anthony Rendon
Speaker of the Assembly
California State Assembly
1021 O Street, Suite 8330
Sacramento, CA 95814

The Honorable Toni Atkins
President Pro Tempore
California State Senate
1021 O Street, Suite 8518
Sacramento, CA 95814

The Honorable Phil Ting
Chair, Assembly Budget Committee
1021 O Street, Suite 8230
Sacramento, CA 95814

The Honorable Nancy Skinner
Chair, Senate Budget Committee
1021 O Street, Suite 8630
Sacramento, CA 95814

Sent via email:

June 5, 2023

Re: SUPPORT – Newsom Administration Infrastructure Package: Build California's Clean Future, Faster

To Speaker Rendon, Assemblymember Ting, Senator Pro Tem Atkins, and Senator Skinner:

On behalf of the Almond Alliance, we are writing to express our strong support for the Newsom Administration's proposed infrastructure package to accelerate critical clean infrastructure projects that meet state social, climate, and economic goals. These proposals maintain the integrity of appropriate environmental review, government transparency, and community engagement.

The Almond Alliance is an association that serves as the almond industry's advocacy voice, promoting policy solutions for the sustainability and success of the almond community. The Almond Alliance represents the 7,600 growers and 100+ processors of almonds in California. Virtually 100% of U.S. commercial almond production is in California; this production also represents over 80% of the global supply. Almonds are grown on some 1.6 mill acres within the Central Valley and the 2021 production was 2.9 billion lbs, generating $19.6 billion in revenue to the state and powered by the hundreds of thousands of jobs in our industry and community.

The almond industry has seen firsthand how extreme events caused by climate change, particularly flooding and drought, pose unprecedented challenges to the State's infrastructure. When the state was experiencing drought, the Almond Alliance proactively developed a program by which our farmers could fallow land in near drought-stricken communities to help conserve water to protect the state's shrinking groundwater supply. In times of floods, and as we look towards the "Big Melt," our members pursue techniques to maximize groundwater recharge across our farms and orchards. To avoid continuing **reactive** measures, California needs **permanent** solutions for water scarcity, conveyance, and above and below-ground storage to achieve a sustainable and resilient water management system.

Building a resilient electrical grid, especially in the Central Valley where our farmers are located, is critical for the Almond Alliance. To meet the upcoming requirements in the regulations passed by the California Air Resources Board relative to clean trucks and clean

agricultural equipment such as tractors and harvesters, the Central Valley will need a robust grid to efficiently integrate and distribute the generated electricity.

Transportation infrastructure plays a crucial role in facilitating the movement of agricultural products, including almonds, to ports across the state for export. As leaders in supply chain solutions, pioneering a multimodal strategy, highway and road improvements, rail transportation investments and enhancements, improving intermodal facilities near almond production regions, and the enhancement of port infrastructure are all examples of projects that could improve efficiency, reduce costs, and enhance the competitiveness of almond exports in global markets.

Tackling this climate crisis and continuing California's legacy as a global socio-economic leader necessitate urgent action and deployment of clean projects to meet our world-leading climate goals, build a clean and resilient electric grid, strengthen California's water resiliency, and modernize the state's clean transportation infrastructure.

California has a once-in-a-generation opportunity to leverage federal funding to invest in California's clean infrastructure, grow the state's economy, and create thousands of good-paying jobs. Yet major infrastructure projects are too often bogged down in overly onerous regulatory processes and a siloed approach to permitting approvals, which increases overall costs and delays critical projects. In order to streamline permitting and build infrastructure responsibly and expeditiously, the Administration is proposing thoughtful, common-sense reform measures to streamline regulatory and review processes so projects can be planned, permitted, and built faster while protecting the environment. Importantly, these proposals provide unique streamlining benefits under the California Environmental Quality Act (CEQA) to advance climate-friendly projects without reducing the environmental and government transparency benefits of the environmental review process.

For these reasons, we are in strong support of the Administration's infrastructure package to build California's clean future, faster.

Sincerely,

Aubrey Bettencourt
President & CEO
Almond Alliance

CC:
Asm Transportation Chair, Asm. Laura Friedman
Asm Water, Parks, Wildlife Chair, Asm. Rebecca Bauer-Kahan
Asm Natural Resources Chair, Asm. Luz Rivas
Asm Judiciary Chair, Asm. Brian Maienschein
Sen. Natural Resources and Water Chair, Dave Min
Sen. Judiciary Chair, Tom Umberg
Sen. Transportation, Lena Gonzalez

RCRC

RURAL COUNTY REPRESENTATIVES
OF CALIFORNIA

June 5, 2023

The Honorable Luz Rivas
Chair, Assembly Natural Resources Committee
1020 N Street, Room 164
Sacramento, CA 95814

RE: CEQA Administrative Record Trailer Bill - SUPPORT

Dear Assembly Member Rivas:

On behalf of the Rural County Representatives of California (RCRC), we are pleased to support the Governor's California Environmental Quality Act (CEQA) Administrative Record Trailer Bill. RCRC is an association of forty rural California counties and the RCRC Board of Directors is comprised of elected supervisors from each of those member counties.

The trailer bill: 1) Allows a public agency to prepare the project's administrative record in place of the petitioner; and, 2) Focuses the contents of the administrative record by excluding internal agency communications that were not presented to the final decision-making body. Together, these changes will reduce the timeframe for resolving CEQA litigation by several months and will reduce the complexity and burden of preparing the record of proceedings.

CEQA is a very powerful information dissemination and environmental mitigation tool. Its core functions are to improve the government decision making process and require the disclosure and mitigation of a project's significant impacts on the environment. RCRC strongly supports these objectives and does not discount the value CEQA provides in these contexts. At the same time, we also recognize that since its enactment in 1970, CEQA has expanded into a complex regulatory obligation with serious consequences resulting from procedural or substantive missteps. As such, CEQA is often rightly criticized today as a litigation trap that can be exploited by those seeking competitive gain or to stop projects altogether. Preparation of the administrative record is one avenue for project opponents to increase uncertainty, project costs, and add litigation delays.

Preparation of the Administrative Record

Under existing law, the public agency must prepare and certify the record of proceedings within 60 days; however the plaintiff or petitioner may elect to prepare the

record of proceedings itself. Unfortunately, the option for the petitioner/plaintiff to prepare the record has sometimes resulted in increased costs and lengthy delays, thereby creating even more uncertainty for the public agency and project proponent. Failure of the plaintiff/petitioner to timely prepare and file the record of proceedings has been found to be inadequate grounds for a superior court to terminate a CEQA action in at least one case, thereby opening the door for questions concerning just how much delay a court will tolerate before imposing terminating sanctions. In *Leavitt v. County of Madera* (2004) 123 Cal. App.4th 1502, the Court of Appeal overrode a Superior Court's decision to terminate a CEQA action when the plaintiff failed to timely prepare the record of proceedings. In that case, the plaintiff elected to prepare the record itself at the outset of the action, but then abruptly changed course more than two months later and requested that the county prepare the record. The Court ultimately determined that "a superior court has the discretion to impose a terminating sanction for failure to timely prepare the ROP where the petitioners violated a court order that defined the scope of the ROP or the court has no other means, such as the imposition of lesser sanctions, to bring about compliance with the obligation to prepare the ROP." The court noted that the interest in preparing an adequate record of proceedings was a higher priority than CEQA's other policy goals calling for prompt resolution of CEQA litigation. This has left public agencies and project proponents essentially at the mercy of plaintiffs/petitioners and created another means by which project opponents may seek to delay or increase costs for the project proponent.

This trailer bill maintains the plaintiff/petitioner's authority to prepare the record of proceedings; however, it also allows the public agency to prepare the record at its own expense. This option will create more certainty for project proponents and avoid potentially several months of litigation delays and added costs related to the plaintiff/petitioner preparing the record.

Contents of the Administrative Record

The trailer bill also seeks to focus the scope of what "internal agency communications" must be included in the administrative record. Existing law has been construed to require inclusion of potentially thousands of internal e-mails and messages that were never ultimately presented to the final decision-making body, thereby increasing the complexity and cost of preparing the record of proceedings and cluttering the record before the court. To address this, the trailer bill appropriately specifies that the administrative record is not required to include internal electronic communications that were never presented to the final decision-making body. This strikes the right balance by ensuring that staff memos and other materials that were the basis for the decision are included in the record, but that other electronic communications need not be included.

Other Issues

The changes included in the CEQA trailer bills are just a start. While a step in the right direction, they fall far short of the real, meaningful, comprehensive CEQA reforms that are necessary to address the uncertainty the law creates for project proponents and

to preclude organizations from misusing the law in furtherance of their own competitive and NIMBY objectives.

In the same vein, the CEQA Judicial Streamlining Trailer Bill also has merit (far more so than the many sports arenas given similar treatment), but it merely seeks to compress the timeframe for judicial review of CEQA litigation for a small (but important) universe of projects. It does nothing to address the real underlying issues that add so much time, cost, and uncertainty to the environmental review process.

For the above reasons, RCRC supports CEQA Administrative Record Trailer Bill and urges the Legislature to adopt other CEQA reform measures that preserve the law's original intent while better protecting against misuse. If you should have any questions, please do not hesitate to contact me at jkennedy@rcrcnet.org.

Sincerely,

JOHN KENNEDY
Policy Advocate

cc: The Honorable Brian Maienschein, Chair, Assembly Judiciary Committee
The Honorable Ben Allen, Chair, Senate Environmental Quality Committee
Assembly Member Steve Bennett, Chair, Assembly Budget Subcommittee 3 on Climate Crisis, Resources, Energy, and Transportation
Senator Josh Becker, Chair, Senate Budget Subcommittee 2 on Resources, Environmental Protection, and Energy
Members of the Assembly Natural Resources Committee
Members of the Assembly Judiciary Committee
Members of the Senate Environmental Quality Committee
Members of Assembly Budget Subcommittee 3 on Climate Crisis, Resources, Energy, and Transportation
Members of Senate Budget Subcommittee 2 on Resources, Environmental Protection, and Energy
Lawrence Lingbloom, Chief Consultant, Assembly Natural Resources Committee
Brynn Cook, Consultant, Senate Environmental Quality Committee
Shy Forbes, Consultant, Assembly Budget Committee
Joanne Roy, Consultant, Senate Budget and Fiscal Review Committee
Casey Dunn, Consultant, Assembly Republican Caucus
Scott Seekatz, Consultant, Senate Republican Caucus

Delta Counties Coalition

Contra Costa County · Sacramento County · San Joaquin County · Solano County · Yolo County

"Working together on water and Delta issues"

May 30, 2023

The Honorable Toni Atkins
President Pro-Tempore
California State Senate

The Honorable Anthony Rendon
Speaker of the Assembly
California State Assembly

The Honorable Nancy Skinner, Chair
Senate Budget Committee
California State Senate

The Honorable Phil Ting, Chair
Chair, Assembly Budget Committee
California State Assembly

The Honorable Josh Becker, Chair
Senate Budget Subcommittee 2
California State Senate

The Honorable Steve Bennett, Chair
Assembly Budget Subcommittee 3
California State Assembly

The Honorable Dave Min, Chair
Senate Natural Resources and Water Committee
California State Senate

The Honorable Rebecca Bauer-Kahan, Chair
Assembly Water, Parks, and Wildlife Committee
California State Assembly

The Honorable Ben Allen, Chair
Senate Environmental Quality Committee
California State Senate

The Honorable Luz Rivas, Chair
Assembly Natural Resources Committee
California State Assembly

Re: Opposition to Governor's Infrastructure Budget Trailer Bills Clearing Way for the Controversial Delta Tunnel

Dear President Pro-Tempore Atkins, Speaker Rendon, Senator Skinner, Senator Becker, Senator Min, Assemblymember Ting, Assemblymember Bennett, and Assemblymember Bauer-Kahan:

The Delta Counties Coalition (DCC), representing the five counties that comprise the California Delta and the millions of Californians who live in our communities, strongly opposes the Administration's inclusion of the Delta Conveyance Project (DCP or Delta Tunnel) in the Infrastructure Trailer Bills.

Dating back to 2009, the Legislature and Administration have consistently and deliberately avoided provisions that facilitate highly controversial and extraordinarily

expensive isolated conveyance projects in the Delta (currently called the Delta Conveyance Project) in final versions of legislation. This has been the case, for example, with proposed resources bonds and exemptions from the California Environmental Quality Act (CEQA) that would facilitate new Delta conveyance.

This was done with purpose. Changing existing laws for the explicit benefit of this highly controversial project would pick "winners and losers" between those living within and near the Delta and those that primarily seek to export more water from the Delta through a new conveyance system built in the north Delta. Disadvantaged and culturally significant communities in the Delta would be gravely and permanently damaged, if not completely destroyed, should the project – which is so large it spans three counties and would take 14 years to construct – move forward. The inclusion of the Delta Tunnel in this proposed package of "reforms" is contrary to the policies the administration and Legislature have espoused in recent years, and is a breach of trust and understanding that has existed for nearly a decade and a half.

For these reasons, the Delta Counties Coalition specifically requests the following changes to the Infrastructure Package released by the Office of the Governor on May 19, 2023:

1) CEQA Judicial Streamlining

The reference to the "Delta Conveyance Project" in section 21189.81(g)(1)(A) must be stricken. The Delta Tunnel would not further California's commitments to reducing greenhouse gas emissions and protect people from the worst extremes of climate change, as claimed in the Fact Sheet for this proposed provision. If built, the project would involve significant greenhouse gas emissions, with construction emissions of 500,000 metric tons of carbon dioxide and operational emissions of 260,000 metric tons of carbon dioxide/year. The automatic designation in section 21189.81(g)(1)(A) does not even require the documentation of "greenhouse gas neutrality" and other special attributes that have been required of other projects receiving judicial streamlining. The Delta Tunnel should not be fast-tracked in this manner.

2) Fully Protected Species Reclassification

This major change in the laws affecting Fully Protected Species (taking up 57 pages of the package) is specifically targeted to ease the species permitting pathway for the Delta Tunnel and must be removed from the package. The take (killing) of Fully Protected Species, such as the iconic Greater sandhill crane, which winter in the Delta and are a major tourism draw for our area, was a major concern with respect to the former version of the Delta Conveyance Project (California WaterFix). Existing law does allow take of Fully Protected Species as part of a Natural Communities Conservation Plan. If Fully Protected Species provisions of state law are to be modified, those changes must occur within the Legislative process with appropriate public and expert input.

Throughout the Delta Tunnel planning process since Governor Newsom took office, local communities have been assured that the project would follow all applicable laws. These provisions of the Governor's Infrastructure package discussed above directly contradict those representations and should be removed. We look forward to working

with the Legislature to honestly address our climate goals without hastily making major changes in law to benefit powerful special interest groups at the expense of the California Delta.

Thank you for your consideration. Feel free to contact us directly or though Elisia De Bord, DCC Coordinator, at 916-874-4627 or deborde@saccounty.gov.

Sincerely,

Patrick Kennedy, Supervisor
Sacramento County

Oscar Villegas, Supervisor
Yolo County

Ken Carlson, Supervisor
Contra Costa County

Mitch Mashburn, Supervisor
Solano County

Tom Patti, Supervisor
San Joaquin County

June 1, 2023

The Honorable Toni Atkins
Senate President pro Tempore
California State Senate

The Honorable Anthony Rendon
Speaker of the Assembly
California State Assembly

The Honorable Nancy Skinner
Senate Budget Committee Chair,
California State Senate

The Honorable Phil Ting Chair,
Chair, Assembly Budget Committee
California State Assembly

The Honorable Josh Becker
Senate Budget Subcommittee 2
California State Senate

The Honorable Steve Bennett Chair,
Assembly Budget Subcommittee 3
California State Assembly

The Honorable Dave Min
Chair, Senate Natural Resources and Water Committee
California State Senate

The Honorable Rebecca Bauer-Kahan
Chair, Assembly Water, Parks, and Wildlife Committee
California State Assembly

The Honorable Ben Allen
Chair, Senate Environmental Quality Committee
California State Senate

The Honorable Luz Rivas
Chair, Assembly Natural Resources Committee
California State Assembly

Subject: Opposition to Trailer Bills – Request to Move Significant Policy in Policy Process

Dear Senate President pro Tempore Atkins, Speaker Rendon, Senator Skinner, Senator Becker, Senator Min, Senator Allen, Assemblymember Ting, Assemblymember Bennett, Assemblymember Bauer-Kahan, and Assemblymember Luz Rivas:

On behalf of the undersigned Stockton-based organizations, NGOs, and Environmental Justice Communities, we strongly oppose the Newsom Administration's use of the budget trailer bill process to move significant and comprehensive environmental policy changes without adequate opportunity for public discussion and debate. The 11-trailer bill package and other recently released trailer bills announced by the Governor will alter environmental permitting and judicial review, jeopardize species protections, remake water law, and degrade transparent community engagement for the Delta Reform Act and other important laws and policies. The bills include a hodgepodge of good and bad policy ideas that offer to streamline some and yet also lengthen some administrative processes without adequate explanation, seemingly muddying the Administration's publicly-stated objective of streamlining environmental and permit process reviews, while also truncating citizens' rights to litigate a broad class of "infrastructure" and private industrial projects. Such abuse of the budget process erodes open discussion of massive policy decisions that could have severe consequences on Stockton and Delta-based communities that they intend to exclude.

The proposed trailer bills are likely to have significant effects on environmental, water, energy, and good government policies. They are used to evade the necessary analysis and review by the public, and by policy and legal experts. It is inappropriate and unwise to move policy changes through the trailer bill process by denying transparent public engagement, except for select stakeholders. Use of the trailer bill process instead precludes inclusive and measured policy hearings, open and public consideration of amendments, and the correctives available from public discussion.

Three brief examples show how there is insufficient time to deal properly with some trailer bills, and that the bills are themselves not fully-baked:

1) We oppose Delta Reform Act trailer bill language because some amendments appear to be unnecessary (Water Code section 85210(k), for example), while others would relax Delta Stewardship Council voting rules that *reduce* Council representation in the transaction of Council business during meetings of low Council member attendance at the cost of accountability to other Council members and the publics they represent. Moreover, other trailer bill language (e.g., Water Code section 85225.20) would actually *lengthen* the time the Council has to decide an appeal from 60 to 90 days, a change

running counter to the Administration's goal of streamlining the Council consistency determination process. Finally, making the holistic Delta Plan severable risks rendering consistency determination processes confused and irrational if one portion of the Plan is judicially severed from the rest.

2) We strongly oppose the drought trailer bill. It will fundamentally reform the water rights system by allowing appropriation of all "flood flows" as designated by the local county agency, beyond jurisdiction of the Water Board. Water right holders could divert flood flows under the pretense of "emergency" to prepare for drought, which would be self-fulfilling prophecy for rivers and streams, and is not permitted under present state water law. There are no definitions in this trailer bill for what constitutes flood water and exactly what is an emergency. The bill also defines storing water as a beneficial use and in effect, would allow water rights holders to take water from streams even when they don't need it just to store it underground and have the right for its use moving forward.[1] It would privatize groundwater basins. Alarmingly, usage of the trailer bill process also completely ignores CEQA regulations and can have serious environmental impacts that would go unmeasured or unaccounted for. Giving water rights holders the power to store flood flows at any time is a major threat to our community subsistence, commercial, and tribal subsistence fisheries, and the water quality and safety of environmental justice communities who rely on Delta waters for subsistence and recreation. We urge you to oppose the drought trailer bill along with the aforementioned bills above, it excludes the public's right to engage and discuss the process and will turn into an environmental threat for fish species and Delta communities alike.

3) We oppose anointing the Delta tunnel project so it will be covered by a 270-day limit within which all litigation against the project would be resolved. This problematic proposal is contained in the Judicial Streamlining trailer bill. We are concerned that 270 days for judicial resolution of litigation against certified infrastructure projects (like the Delta tunnel) is just not an adequate timeframe in the Judicial Streamlining trailer bill for judges and their clerk staffs to try cases and craft well-considered decisions; we are likely to get bad judicial consideration as a result on such a massive water project with many significant and unavoidable Delta environmental and community impacts. Expediting such a case also may clog already jammed court dockets. While the trailer bill claims to provide funds for additional court staff to address potential backlogs, there has been no time allotted for legislators and interested parties to assess the adequacy of resources for judicial streamlining: Are these resources adequate? More time and careful attention is required to decide this question on such a controversial and potentially destructive water project.

Gutting CEQA will prematurely hasten carbon capture/storage (CCS) projects (which are also singled out for tunnel-like special treatment in these trailer bills), pipelines for the oil

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[1] In other words, this would legalize a "dog in the manger" approach by private water users to acquiring additional water rights and would be contrary to the "due diligence" principle in appropriative water rights law. Such a massive change to state water rights law must be treated through the legislative policy process, not in budget trailer bills.

and gas industry in the Delta, and potentially air polluting projects at the Port of Stockton and the Delta without robust public oversight. Removing CEQA protections in California will potentially further endanger public health and species here for the largest environmental justice community percentage-wise (that is, the Delta region).

Not only would the Administration's trailer bill infrastructure package fast-track the Delta tunnel and numerous other potential industrial threats and dangers—it would remove California Endangered Species Act protections for Sandhill cranes, an unacceptably unilateral proposal from this Administration.

We sympathize with other potential CEQA reforms—particularly for streamlining permitting processes for urban and suburban affordable infill housing—but not for large scale industrial projects that threaten public and environmental health, good in-channel and drinking water quality, and declining fisheries and wildlife. Such projects are often the starting points for disproportionate impacts on Delta and other California environmental justice communities.

Given the prospect of current budget shortfalls, it is neither good practice nor good government to use the budget process to resolve shortfalls *and* simultaneously press for complicated environmental policy reforms – all within the next few short weeks. That is not how good and durable public policies are made.

No one in California seriously disputes that our planet faces a climate crisis that must be dealt with quickly with the proper climate infrastructure. Gutting CEQA, rushing unconsidered deregulation of water rights acquisition and the destructive tunnel project, and relaxing of Delta Stewardship Council voting rules are inappropriate policy proposals to ram through the budget process. Instead, these and the other infrastructure trailer bill ideas should be vetted through regular legislative and budgetary processes and committees. This administration should trust those processes rather than contrive these bills based on climate change. We are prepared to engage with and discuss policy bills via transparent processes so that all parties have the right to debate, review, and compromise on policies that will impact natural resources, cultural resources, subsistence fisheries, environmental justice communities, the Delta estuary, and its surrounding communities.

Furthermore, our organizations have spent thousands of work hours engaging with state and federal agencies since 2018 communicating the protective environmental policies needed to improve environmental and public health outcomes for our region's large environmental justice population. We have communicated on numerous occasions to state agencies that more engagement is needed with impacted communities to work through project planning processes in a just and equitable manner. The proposals contained in these trailer bills will instead undercut essential community engagement when collaboration is key to building a just future for the Delta region as part of climate change mitigation strategies.

We thank you for considering our input on these trailer bills. We look forward to working with the Legislature to address our water and environmental justice goals in an open, deliberatively meaningful, separate, and less confusing policy and budget processes. If you have any questions, please do not hesitate to contact us.

Sincerely,

Barbara Barrigan-Parrilla
Executive Director
Restore the Delta

Councilmember Kimberly Warmsley
City of Stockton
District 6

Oussama Mokeddem
Director of State Policy
Public Health Advocates

Nik Howard
Executive Director
Reinvent Stockton Foundation

Tama Brisbane
Executive Director
With Our Words

Dillon Delvo
Executive Director
Little Manila Rising

Ann Rogan
Chief Executive Officer
Edge Collaborative

Ector Olivares
Environmental Justice Program Director
Catholic Charities Diocese of Stockton

RC Thompson
RC Thompson
Executive Director
Reinvent South Stockton Coalition

Reatha Hardy-Jordan
Reatha Hardy-Jordan
Director
Black Urban Farmers Association (BUFA)

Dr. Nancy Huante-Tzintzin
Co-Director
Nopal Stockton

Reverend Nelson Rabell
Pastor
Iglesia Luterana Santa María Peregrina

Phillip Merlo
Chair of the Stockton Cultural Heritage
Board and Historian Community Educator

"A Voice for Salmon"
365 Days a Year

May 31, 2023

The Honorable Toni Atkins
President pro Tempore
California State Senate

The Honorable Anthony Rendon
Speaker of the Assembly
California State Assembly

The Honorable Nancy Skinner, Chair
Budget Committee
California State Senate

The Honorable Phil Ting, Chair
Budget Committee
California State Assembly

The Honorable Josh Becker, Chair
Budget Subcommittee 2
California State Senate

The Honorable Steve Bennett, Chair
Budget Subcommittee 3
California State Assembly

The Honorable Dave Min, Chair
Natural Resources and Water Committee
California State Senate

The Honorable Rebecca Bauer-Kahan, Chair
Water, Parks and Wildlife Committee
California State Assembly

The Honorable Ben Allen, Chair
Environmental Quality Committee
California State Senate

The Honorable Luz Rivas, Chair
Natural Resources Committee
California State Assembly

Re: **Opposition to Water-Related Infrastructure Budget Trailer Bills**

Dear President pro Tempore Atkins, Speaker Rendon, Senator Skinner, Assemblymember Ting, Senator Becker, Assemblymember Bennett, Senator Min, Assemblymember Bauer-Kahan, Senator Allen and Assemblymember Rivas:

I am writing on behalf of the Golden State Salmon Association to oppose a package of water related infrastructure budget trailer bills. GSSA represents the California salmon fishing community, including commercial and recreational fishermen and women, party boats, marinas, fish brokers, restaurants, equipment manufacturers and retails and tribal members.

When healthy, California's salmon fishing industry supports $1.4 billion in annual economic activity, along with 23,000 jobs. However, our industry is completely shut down in 2023, imposing economic hardships on communities from the Central Coast and the Bay Area, along inland rivers and up the North Coast, into Oregon.

PO Box 320096, San Francisco, CA 94132
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This shutdown has been caused by irresponsible water management decisions during a drought. To rebuild our salmon runs, we must reverse failed policies that have created lethal flow and temperature conditions in salmon rivers, particularly in the Central Valley. Unfortunately, several bills in the Administration's package of infrastructure trailer bills double down on these failed policies.

These water related infrastructure trailer bills include:

- Administrative Records Review
- CEQA Judicial Streamlining
- Fully Protected Species Reclassification
- Progressive Design Build Authority for Caltrans and DWR
- Delta Reform Act Streamlining

Salmon runs and the salmon fishing industry are fighting for survival. So are many Bay-Delta species. These bills would significantly threaten our future. We urge you to oppose these trailer bills and offer the following specific concerns:

All of the water related trailer bills are policy bills. None address legitimate budget issues. These bills raise a wide range of serious problems. Passing these trailer bills would bypass the committees with the jurisdiction and expertise to address these problems. Budget committee staff are busy working to pass a budget. As a result, it is very difficult for them to engage effectively with concerned stakeholders. As a result, passing this legislation through the budget process would deny the public an opportunity to be fully involved in legislation with many potential damaging impacts. Passing this legislation through the budget process would also reduce the effectiveness of California's elected legislators and the legislative process. We urge you to oppose these bills in the budget committees and forward them to the relevant policy committees.

This package continues the Administration's practice of catering to powerful industry voices and refusing to engage with those who bear the impacts of environmental degradation prior to the release of important proposals. GSSA and our colleagues in the environmental, environmental justice, tribal and fishing communities were not provided an opportunity to engage on these trailer bills prior to their release. This pattern of excluding a wide range of interests unnecessarily and unproductively increases the division and conflict among water stakeholder groups.

The Administrative Records Review trailer bill would allow agencies to hide illegal activities from courts. This trailer bill would make internal electronic communications inadmissible in court. This is an effort to prevent agencies from being held accountable in court, even when internal communications demonstrate that agency actions violate the law and ignore science. During the Trump Administration, the ability of fishing and environmental groups to introduce internal agency communications in court was a key - perhaps the key - to blocking some Trump rollbacks. This trailer bill is an effort to insulate

state agencies from judicial review - even when internal communications show clearly illegal activity. Transparency and accountability are hallmarks of functioning liberal governments. This is an attack on both.

The Design Build trailer bill would allow the Department of Water Resources to privatize the design and construction of the proposed Delta tunnel. Such an approach to this facility is not allowed under current law – for good reason. The Delta community is united in opposition to the Delta tunnel project. Environmental, fishing and tribal interests share that position. It would be inequitable and irresponsible for the State to allow DWR to hand control over this multi-billion dollar facility to a private contractor and – likely – also to a handful of water agencies with whom they collaborate closely. It is worth noting that none of those export water agencies are located in the Delta community in which the facility would be built. This proposal is particularly objectionable and inequitable given that the affected communities include communities of color and tribes. If DWR chooses to pursue this controversial facility, DWR should take full responsibility for that process and engage directly with the affected communities. We have similar concerns regarding the potential use of Design Build for other water infrastructure projects. We urge the legislature to oppose this effort to privatize the design and construction process for the Delta tunnel and other water facilities.

The legislature should not slash regulatory requirements for a Delta tunnel facility that has major environmental problems and little financial support. The CEQA, Delta Reform Act, Administrative Records and Fully Protected Species trailer bills all appear to be intended in significant part to weaken regulatory requirements for the Delta tunnel. Analysis to date has clearly shown that this facility could cause a broad range of environmental impacts, including to salmon runs, the fishing industry and fishing jobs. If the Administration wishes to pursue the Delta tunnel, they should demonstrate that they can responsibly avoid or mitigate environmental impacts and meet current legal requirements.

Further, the majority of export water interests have expressed either a reluctance[1], or a complete unwillingness[2]. to finance this multi-billion dollar facility. (The Delta Reform Act requires water users to finance any new Delta conveyance facility.) It would be particularly inappropriate for the state legislature to pass a package of budget bills to slash the regulatory process for a facility that appears to be on such shaky financial ground.

Together, this package of bills – and the trailer bill process proposed by the Administration - represent an assault on the environment reminiscent of those of the Trump Administration. We urge you to oppose them as trailer bills and refer them to the appropriate policy committees.

---

[1] Los Angeles Times, "Report urges Metropolitan water District to abandon Newsom's $16- billion delta tunnel plan," May 10, 2023. https://www.latimes.com/environment/story/2023-05-10/water-advocacy-group-blasts-newsom-delta-tunnel-project

[2] Los Angeles Times, "Water district vote deals major blow to California's delta tunnel project." Sept. 19, 2017. https://www.latimes.com/local/lanow/la-me-westlands-tunnels-20170919-story.html

Thank you for considering our views.

Sincerely,

Scott Artis
Executive Director

GOLDEN STATE SALMON ASSOCIATION

"A Voice for Salmon"
365 Days a Year

May 16, 2023

Chairman Josh Becker
Senate Budget Subcommittee 2
1020 N Street, Room 502
Sacramento, CA 95814

Chairman Steve Bennett
Assembly Budget Subcommittee 3
1021 O Street, Suite 8230
Sacramento, CA 95814

Re: **Drought and Flood Streamlining Trailer Bill - Oppose**

Dear Chairmen Becker and Bennett:

I am writing on behalf of the Golden State Salmon Association to express our strong opposition to the Administration's Drought and Flood Streamlining budget trailer bill. GSSA represents the California salmon fishing community, including commercial and recreational fishermen and women, party boats, restaurants, fish brokers, marinas, restaurants, equipment manufacturers and retailers, tribal interests and more. We urge you to oppose this bill, and to refer it to the water policy committees, where it belongs.

It is inappropriate for this bill to be considered as a budget trailer bill. It is clearly a policy bill that should be considered by the committees with both the jurisdiction and the expertise to address the many complex problems contained in this proposal. We agree with the LAO, which has recently stated that the legislature may "want to defer some of these decisions to the policy process."

This bill would dramatically reduce state regulation of diversions from California rivers during high flow periods. High river flows are essential to support California's salmon runs during the juvenile outmigration period. Periods of high spring flows dramatically increase the survival of juvenile salmon. In fact, the lack of such high flows in many years is a major cause of the decline of salmon in the Bay-Delta watershed and elsewhere in California. High flows also provide other important environmental benefits including supporting chemical, biological and physical processes such as maintaining water quality and facilitating sediment movement.

As a result of low populations of returning fall run Chinook adults, the 2023 California salmon fishing season has been closed for just the second time in state history. This human-made disaster has put thousands of Californians out of work and imposed severe hardships on fishing families and communities. In addition, the Central Valley winter and spring run Chinook salmon are both at risk of extinction. That risk is particularly acute for spring-run salmon. Initial counts of 2023 adult Central Valley spring run Chinook are catastrophically low.

The State of California should strengthen protections for salmon runs, not weaken them.

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The trailer bill includes a long list of serious flaws, including the following:

No Definition of Flood: The bill includes no meaningful definition of a flood. To the contrary, it refers vaguely to "imminent risk of flooding and inundation of land, roads, or structures." Clearly, even moderate flow events that fail to meet the traditional definition of a serious flood could result in "inundation of land" – including floodplains and bypass lands designed to safely avoid flood damage. In fact, the bill would allow nearly unregulated diversions not just in floods, but also when floods are "imminent." This term is also undefined. The bill would allow hundreds of local agencies to declare a flood or an imminent flood – triggering nearly unregulated diversions. The bill also does not define when a flood or imminent flood period is over. Nor does it require local agencies to rescind the flood determinations that would trigger additional diversions.

No Protection of Flows Needed for Salmon: The bill does not include any requirement to distinguish high flows that are needed for the outmigration of salmon and the rebuilding of salmon runs, including listed and commercially important species, from truly excess flood flows. In fact, the State Water Board has never adopted a spring outmigration flow requirement to protect salmon, despite abundant evidence linking the decline of salmon to poor flow conditions. The current failed Bay-Delta flow standards were adopted in 1995. In short, the State Board has no standard to distinguish environmentally important high flows from flows that can be diverted with little environmental harm. Rather than facilitating additional diversions, the legislature should limit additional diversions and new water rights until the State Board updates and fully implements the Bay-Delta Water Quality Control Plan.

No Limit on the Number or Size of Diversions: The bill places no limit on the number or size of diversions that would be authorized. Were this provision to become law, water agencies would be likely to plan and invest to maximize these nearly unregulated diversions, with serious potential environmental impacts.

No Meaningful Screening Requirement: The bill requires "simple screens" to "minimize the impacts of diversion to salmon and other aquatic life." The term "simple screens" is undefined. Fish screens are sophisticated technology. Their effectiveness is driven by factors such as location in a river and approach velocities to keep fish from being pinned against the screens and killed. In addition, screens often fail to prevent the entrainment of juvenile or larval fish. Without a meaningful screening requirement, this provision might do little to protect salmon and the environment.

No Monitoring: The bill includes no monitoring requirement to detect environmental impacts, including cumulative impacts. As a result, the serious harm that this bill could authorize might go undetected.

No Termination Provision: There is no provision to terminate this authorization if it is found to lead to environmental damage.

Existing Executive Order: The Governor's flood diversion executive order (N-4-23), on which this bill is modelled, is still in effect. As of May 11, 67 new water diversions have been reported

under this EO over less than 2 months, with individual diversions as high as 34,732 acre feet. This EO will remain in effect until June 1. To date, there appears to have been no analysis to determine what, if any, environmental impacts have been caused by these diversions. It is worth noting that, if this EO is made permanent, future years could see a far higher level of diversions. It is also worth noting that the entities declaring a flood under the current EO include groundwater sustainability agencies, a sheriff and irrigation districts, raising questions about whether all of the agencies declaring floods have adequate flood expertise. Finally, the fact that the current EO is still in effect demonstrates that there is no urgent need to rush this bill through the legislature.

Designation of Recharge as a Beneficial Use: By changing state water rights law to consider recharge a beneficial use, with no requirements regarding the ultimate use of that water, the bill could create a new demand for millions of acre-feet of water. This provision could accelerate environmental impacts and exacerbate the existing overallocation of the state's surface waters.

Elimination of the Requirement for an Appropriative Water Right: The bill would eliminate the requirement for a water right to divert water during floods. This could also accelerate environmental impacts, exacerbate the existing overallocation of the state's surface water and further privatize a public resource.

CEQA and Streambed Alternation Agreement Waivers: The bill would waive existing CEQA and Streambed Alternation Agreements, creating more potential for environmental harm.

We urge you to oppose this bill, and to refer it to the water policy committees. California's salmon fishing communities are fighting for survival – as are the salmon runs we depend on. On behalf of our thousands of members, we urge you to support stronger protections for salmon – not efforts to weaken them. Thank you for considering our views.

Sincerely,

Scott Artis
Executive Director

Cc: Senate Natural Resources and Water Committee
Assembly Water Parks and Wildlife Committee

ECOS
ENVIRONMENTAL
COUNCIL
OF SACRAMENTO
Post Office Box 1526 | Sacramento, CA 95812-1526

May 21, 2023

The Honorable Toni Atkins
President Pro-Tempore
California State Senate

The Honorable Anthony Rendon
Speaker of the Assembly
California State Assembly

The Honorable Nancy Skinner
Chair, Senate Budget Committee
California State Senate

The Honorable Phil Ting
Chair, Assembly Budget Committee
California State Assembly

The Honorable Josh Becker
Chair, Senate Budget Subcommittee 2
California State Senate

The Honorable Steve Bennett
Chair, Assembly Budget Subcommittee 3
California State Assembly

The Honorable Dave Min
Chair, Senate Natural Resources and Water Committee
California State Senate

The Honorable Rebecca Bauer-Kahan
Chair, Assembly Water, Parks, and Wildlife Committee
California State Assembly

The Honorable Ben Allen
Chair, Senate Environmental Qual. Committee
California State Senate

The Honorable Luz Rivas
Chair, Assembly Natural Resources Committee
California State Assembly

Re: Opposition to Trailer Bills – Request to Move Significant Policy in Policy Process

Dear President Pro-Tempore Atkins, Speaker Rendon, Senator Skinner, Senator Becker, Senator Min, Assemblymember Ting, Assemblymember Bennett, and Assemblymember Bauer-Kahan:

The Environmental Council of Sacramento (ECOS) strongly opposes the Administration's excessive use of the budget trailer bill process to move environmental policy. The Governor has just announced an 11-trailer bill package – in addition to other recently released trailer bills -- that will significantly change judicial review, environmental permitting, imperiled species protections, water law, and community engagement among other important laws and policies.

This abuse of the budget process eliminates an open and transparent discussion of policy decisions. We request that the Legislature decline the Governor's invitation to move policy measures in the budget process and instead move these proposals through the regular legislative process.

These proposed trailer bills are likely to have a significant impact on environmental, energy, water, and good government policies. It is inappropriate to move sweeping policy changes through the trailer bill process because the budget process will not provide for the necessary analysis and review by the public and policy and legal experts. It is important to note that there is less than one month – even if we work every day – to draft, review, debate and pass the trailer bills.

The trailer bill process does not provide for inclusive and measured policy hearings, open and public consideration of amendments, or the ability of public discussion. Indeed, the trailer bill process is the quintessential "behind closed doors" process that cuts out any meaningful public engagement or transparency except for chosen stakeholders. It is exclusive rather than inclusive.

We agree that our state – indeed the planet – is facing a climate crisis. And we agree that we need to move forward with climate infrastructure quickly. However, there is no reason why legislation to tackle these important issues must be moved through the trailer bill process instead of through the regular process and enacted in January. ECOS stands ready to engage with the Legislature and Administration to discuss and draft policy bills – in an open and transparent process so that ALL parties have an opportunity to review, debate and compromise critical policies that affect communities, natural resources, and cultural resources.

Moreover, given the state's current budget situation, we do not believe that it is good practice or good governance for the Legislature to be asked to resolve the current budget shortfall and the related complicated issues around the budget while also moving a huge package of major policy changes – all within 25 days. Again, this is why there is a bifurcated process in which we move budget and policy separately.

We thank you for the opportunity to provide our input on this important matter and look forward to working with the Legislature to address our climate goals while providing the public the opportunity to participate in a meaningful policy process. If you have any questions, please do not hesitate to contact us.

Sincerely,

Susan Herre AIA AICP
President of the Board of Directors
office@ecosacramento.net

June 6th, 2023

The Honorable Luz M. Rivas
Chair, Assembly Committee on Natural Resources
1021 O Street, Room 164
Sacramento, CA 95814

The Honorable Brian Maienschein
Chair, Assembly Committee on Judiciary
1021 O Street, Room 104
Sacramento, CA 95814

Re: Administration's Policy Package on California Environmental Quality Act Judicial Review (Record of Proceedings) – OPPOSE

Dear Chairs Rivas and Maienschein,

We are writing to express our opposition to Governor Newsom's proposal to amend the record of proceedings provisions in the California Environmental Quality Act (CEQA). The proposal included in the trailer bill package on May 19th would allow agencies to unilaterally exclude internal agency communications from the record of proceedings (also known as "administrative record") while allowing agencies to co-opt preparation of the record from petitioners if it is not completed within a certain timeframe. As explained below, this proposal would erode public trust in state and local government, undermine transparency in the decision-making process, and frustrate the public's fundamental right to access to information concerning the people's business set forth in the California Constitution and California Public Records Act.

This proposal is a stealth attack on the California Constitution and California Public Records Act.

The California Constitution declares that "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and ***the writings of public officials and agencies shall be open to public scrutiny***." (Cal. Const., Art. I § 3(b)(1).) Likewise, the California Public Records Act ("CPRA") includes a legislative declaration that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Cal Gov Code § 7921.000.) The Governor's proposal limits the public's access to "writings of public officials and

agencies" and gives agencies legal "cover" to block disclosure and review of such documents by claiming they are not part of the "administrative record" and/or are protected by a privilege. Agencies already often seek to evade full disclosure of such materials in response to public record act requests or as part of CEQA litigation, and this proposal will give them a legal justification to avoid producing any of them, or to simply "cherry-pick" communications favorable to the agency's or developer's views. As such, this proposal frustrates access to information regarding the people's business—the enforcement of California's landmark environmental law—and blocks courts from considering such information in enforcing CEQA.

This proposal would undermine unbiased and transparent decision-making in projects affecting the environment and public health.

Internal emails and other agency communications sometimes reveal developer attorneys or their lobbyists or consultants attempting to pressure agencies to downplay the environmental or public health harms of a project in CEQA documents such as an environmental impact report (also known as "EIR"). Currently CEQA allows the court to consider these communications and assess whether the EIR is based on solid science, or whether developer influence inappropriately shaped or changed that analysis. This proposal would frustrate informed decision-making, public trust, and transparency in the CEQA process by blocking consideration and review of these materials by the court. Internal emails can also reveal expert agency staff raising issues with the adequacy or accuracy of the environmental analysis, which can sometimes be brushed aside and not included in the final public environmental documents due to developer pressure. This proposal will shield such unbiased expert opinions from the decision-maker and court, undermining public accountability and trust. It would also allow an agency either on its own or in coordination with the developer/applicant to cherry-pick emails to include in the record, while excluding unfavorable emails.

This is particulalry problematic because existing CEQA case law already allows the developer and its consultants or lawyers to prepare the EIR as long as the agency signs off on the final product (*see Friends of La Vina v. County of L.A.*, 232 Cal. App. 3d 1446, 1452-1458) even though preparers of environmental documents make crucial decisions on close calls regarding whether an impact is "significant" or a mitigation measure "feasible" (*Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 918). And these conclusions in the EIR—even if they were drafted by the developer's consultants —are already afforded great deference by the courts under the "substantial evidence" standard (*Federation of Hillside and Canyon Assns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1259). This proposal would further limit transparency and accountability by shielding communications regarding how the EIR was prepared from from the public and courts. Courts and the public would never know if critical issues raised by agency staff were dismissed, because the agency could decline to produce them, or only produce favorable communications.

CEQA already provides for a streamlined litigation process and this proposal would not meaningfully expedite that process.

CEQA already has a streamlined litigation process as compared to general civil litigation. Civil litigation is governed by the Civil Discovery Act and allows for time-consuming and sometimes-burdensome discovery such as form interrogatories, special interrogatories, requests for admission, physical exams, production of documents, emails, and text messages, depositions of key persons and "persons most knowledgeable," as well as document and deposition subpoenas of third parties. This process can take years to complete before a case goes to trial. In contrast, CEQA already limits the "administrative record" to a smaller set of documents than is appropriate for discovery in a normal civil litigation lawsuit.

The proposal would not meaningfully decrease the length of CEQA litigation. A developer-side CEQA law firm predicts this proposal would only shorten the overall litigation length by "several months."[1] Given that large-scale projects often take years to study and obtain approvals, shaving a few months off the post-approval litigation process is a drop in the bucket. More importantly, such a minor decrease in the time to resolve litigation is not worth the significant erosion in public transparency and accountability resulting from this proposal.

At the same time, this proposal allows agencies to "take over" preparation of the record if a petitioner does not complete the record within 60 days of receiving the documents from the agency. The proposal is silent on who would bear the cost at that juncture and thus incentivizes agencies to take over that process, assert the petitioner has made errors in compiling it, and then demand the petitioner pay for the record if the petitioner loses the case. Agencies and developers already routinely assert cost bills between $30,000 and $100,000 for record preparation, which could financially cripple or even bankrupt small community organizations who bring CEQA litigation but are unsuccessful. This proposal would give agencies a powerful tool to co-opt preparation of the record and then seek such cost bills against small community groups.

CEQA and its judicial review provisions ensure protection of California communities and the environment.

Large-scale discretionary developments subject to CEQA often have significant impacts on public health, wildlife, and communities. CEQA results in the improvement of development proposals, inclusion of mitigation measures, and reduction of pollution and other harms to communities. For vulnerable communities, CEQA is often the only tool available to provide input on the environmental and public health impacts of development proposals and enforce CEQA through its judicial review provisions. Research demonstrates that CEQA is not a major barrier to housing development and instead helps protect the health and safety of communities.[2] There are indeed numerous substantial barriers to affordable housing in this state such as real estate speculation, construction costs, inequitable zoning in existing communities, and lack of tenant protections. This proposal will address none of these.

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[1] *A Practical Guide to Gov. Newsom's May 2023 Budget-Revised CEQA Trailer Bills* (May 23, 2023); https://www.hklaw.com/en/insights/publications/2023/05/a-practical-guide-to-gov-newsoms-may-2023-budgetrevised-ceqa

[2] *California's Living Environmental Law: CEQA's Role in Housing, Environmental Justice, & Climate Change* (2021); https://rosefdn.org/wp-content/uploads/CEQA-California_s-Living-Environmental-Law-10-25-21.pdf

While every law needs occasional refinement, this bill would undermine transparency and accountability in decision-making processes that deeply affect California communities. Unlike many other states that have succumbed to conservative campaigns to undermine laws designed to protect public health and the environment, California remains an environmental leader because we view environmental laws not as merely "permitting" or "clearances," but as reflections of our values that we should take a close look at the impacts and risks of development before moving forward. This proposal would allow agencies to brush over inconvenient facts and opinions, and hide them from view of the public and the judiciary. We urge you to reject it.

Sincerely,

J.P. Rose
Policy Director, Urban Wildlands Program
Center for Biological Diversity

Matthew Baker
Policy Director
Planning & Conservation League


SIERRA CLUB CALIFORNIA
MONO LAKE COMMITTEE
Advocates for the Environment
CALIFORNIA ENVIRONMENTAL VOTERS
FORMERLY CLCV
Azul
Battle Creek Alliance
SAN FRANCISCO BAY
CITIZENS COMMITTEE TO COMPLETE THE REFUGE
CALIFORNIA COASTAL PROTECTION NETWORK
CLIMATE ACTION CALIFORNIA
CALIFORNIA NATIVE PLANT SOCIETY
MARIN CONSERVATION LEAGUE
Protecting Marin Since 1934
Catholic Charities Diocese of Stockton
Environmental Justice Program
CALIFORNIA COASTKEEPER ALLIANCE
SYRCL
Friends of Rose Canyon
RURAL ALLIANCE
Friends Committee on Legislation of California
LOS ANGELES WATERKEEPER
MONTEREY WATERKEEPER
Santa Barbara CHANNELKEEPER
SAFRR
State Alliance for Firesafe Road Regulations
MOUNT SHASTA BIOREGIONAL ECOLOGY CENTER
PETALUMA RIVER COUNCIL
PROTECT SAN ANTONIO VALLEY
ALTA PEAK CHAPTER
Know your Environment. Protect your Health. ewg
Escondido Creek Conservancy
BANNING RANCH CONSERVANCY
SONOMA LAND TRUST
NATIONAL PARKS CONSERVATION ASSOCIATION
Save Our Seashore
LOS CERRITOS WETLANDS LAND TRUST
Tuolumne River TRUST
DEFEND BALLONA WETLANDS
RUSSIAN RIVERKEEPER
NEIGHBORHOOD COALITION
Valley Eco
The RIVER PROJECT
VOTE SOLAR
EHL
SAVE OUR HERITAGE ORGANISATION SOHO FOUNDED 1969
PRESERVE RURAL SONOMA COUNTY
SAN FRANCISCO BAYKEEPER
SURFRIDER FOUNDATION
SIERRA NEVADA ALLIANCE
PDA PROGRESSIVES FOR DEMOCRACY IN AMERICA
ENVIRONMENTAL LAW FOUNDATION
PLANNING AND CONSERVATION LEAGUE
TRUST FOR PUBLIC LAND
CALIFORNIA SPORTFISHING PROTECTION ALLIANCE CSPA Since 1983
friends of GRIFFITH PARK
DEFENDERS OF WILDLIFE
SOCAL 350 CLIMATE ACTION
Hills For Everyone
LOS PADRES FORESTWATCH
Wildlands NETWORK
Gaviota Coast Conservancy
FRIENDS OF THE INYO SINCE 1968
RESTORE THE DELTA
CITIZENS FOR LOS ANGELES WILDLIFE CLAW
ORANGE COUNTY COASTKEEPER
MBCA morongo basin conservation association
Inland Empire WATERKEEPER
ROSE FOUNDATION FOR COMMUNITIES & THE ENVIRONMENT
California Institute for Biodiversity
HUMBOLDT BAYKEEPER
FORESTS FOREVER
green foothills
GREENSPACE
Social Eco Education
COACHELLA VALLEY WATERKEEPER
SCVAS Santa Clara Valley Audubon Society
R4RD Residents for Responsible Desalination
epic
Wineswaterwatch.org
Friends of Harbors, Beaches and Parks
Friends of the River since 1973
BALLONA INSTITUTE
CENTER FOR FOOD SAFETY
CLEAN WATER ACTION
SAN DIEGO COUNTY DEMOCRATS FOR ENVIRONMENTAL ACTION
CLEVELAND NATIONAL FOREST FOUNDATION

June 3, 2023

The Honorable Gavin Newsom
Governor, State of California
State Capitol
Sacramento, CA 95814

The Honorable Mike McGuire
The Honorable Ben Allen
The Honorable Josh Becker
The Honorable Anna Caballero
The Honorable Monique Limon
The Honorable Dave Min
The Honorable Nancy Skinner

California State Senate
Sacramento, CA 95814

The Honorable Rebecca Bauer-Kahan
The Honorable Steve Bennett
The Honorable Laura Friedman
The Honorable Eduardo Garcia
The Honorable Gregg Hart
The Honorable Luz Rivas
The Honorable Phil Ting
The Honorable Carlos Villapudua

California State Assembly
Sacramento, CA 95814

Re: Sweeping Trailer Bill Package Warrants Full Legislative Review and Substantial Changes to Ensure Equity and Meaningful Environmental Protections

Dear Governor Newsom, Senators, and Assemblymembers,

In the most recent release of a package of proposed infrastructure trailer bills, the Administration has continued the practice of proposing the budget process as a means of short-circuiting the regular legislative process for new significant policy proposals. This practice excludes the public and stakeholders and avoids open and transparent deliberation of important and complicated policies. Several current proposed trailer bills include legal and policy issues that should be moved through the legislative process, including holding hearings and public votes in both houses, and not as part of the budget. We thank the Senate and Assembly Budget committees for rejecting this package for budget consideration.

The Administration has justified these infrastructure trailer bill proposals by citing the need to secure federal funds and build infrastructure expeditiously. However, these specific proposals do not need to be enacted by July – instead of January 2024 – to secure federal funding or ensure rapid construction. Moreover, the proposed trailer bills below will significantly change – and not for the better – judicial review, environmental permitting, imperiled species protections, water law, and community engagement among other important laws and policies.

The following proposed bills should be moved through the regular legislative process and must be substantially amended to address serious flaws described briefly below:

- **Administrative Record Trailer Bill:** This proposal is aimed at making it prohibitively expensive and difficult to ensure compliance with California environmental review requirements by raising the cost to assemble an administrative record, making judicial remedy something only the rich can afford and thereby creating an inequitable process. The proposal also would cherry-pick what information can go into an administrative record, excluding any evidence of concerns raised by scientists and others within agencies.

- **Judicial Review Trailer Bill:** This proposal reduces application of environmental review to a large category of major, complex infrastructure projects, and creates a CEQA carve-out for an unlimited number of poorly defined water-related projects, including the controversial Delta Conveyance, and specific transportation projects, without including any of the previous protections and guardrails found within AB 900/SB 7.

- **Fully Protected Species Trailer Bill:** This proposal would substantially change and reduce protections for the statutorily created fully protected species list, which include such iconic species as sea otters, sandhill cranes, California condors, desert bighorn sheep and golden eagles. The proposal would also create a CEQA exemption for decisions on future changes to listings of the 37 fully protected species, thus eliminating public review and participation in these listing decisions.

- **Delta Reform Act Trailer Bill:** This proposal would change the current threshold from a majority vote to a majority of the quorum, which would allow for controversial items to be passed with less than a majority of Commission members. It also changes the statute of limitations. Given the importance of the Delta Reform Act, changes to this law should be discussed fully and allow for the input by tribes and Delta communities.

- **Design Build Trailer Bill:** This proposal is specifically designed to circumvent the existing statutory prohibition on the use of design-build by the Department of Water Resources for the Delta Conveyance project.

- **Direct Contracting Public-Private Partnership Authority I-15 Wildlife Crossings Trailer Bill:** This proposal raises several concerns and questions around why this trailer bill is necessary and its failure to codify essential provisions, currently non-binding, that are outlined in the recent state agreement to construct three wildlife crossings over the proposed Brightline West High Speed Rail project to mitigate the permanent and complete blockage of critical wildlife movement areas.

- **Flood/Drought Trailer Bill:** This proposal would fundamentally undermine existing law to benefit large water rights holders, enabling them to increase water diversions, hoard water underground and sell at a profit in future droughts, increasing the privatization of California's groundwater basins and harming California's rivers and the environment. The proposal also fails to adequately

ensure water quality can be protected from recharge projects on contaminated soil, putting drinking water quality at risk. Further, the proposal lacks adequate planning and environmental safeguards for how to manage flood flows and instead includes provisions that simply waive all the rules.

- **Western Joshua Tree Trailer Bill:** This proposal would undermine the California Endangered Species Act and allow of the destruction of hundreds of thousands of acres of Western Joshua tree woodlands but would result in the protection of only hundreds of acres of habitat, setting a disastrously low mitigation standard for an imperiled species.

We agree that California needs to move forward expeditiously to address our climate needs. We also agree that we can – and should – make changes in how we build projects to provide clean energy, clean transportation, and a sustainable and reliable water supply. However, the infrastructure proposals noted above are missing important policies that should also be examined and discussed such as improved planning and siting of projects, more robust upstream community engagement, increased investments in permit staffing at agencies, and more coordinated and efficient approvals of transmission and other key infrastructure needs that are essential to our climate resilient future.

Therefore, we strongly urge you to move the above-identified trailer bill proposals through the regular legislative policy process in both houses, allowing for ample public review and comment, full discussion of solutions, and transparent consideration of amendments to address the serious issues raised above.

Sincerely,

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NRDC

June 6, 2023

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Assembly Speaker Anthony Rendon
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Assembly Member Phil Ting, Chair
Assembly Budget Committee
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Senator Nancy Skinner, Chair
Senate Budget & Fiscal Review Committee
1020 N Street, Room 502
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RE: Infrastructure Budget Trailer Bills

Dear Governor Newsom, President Pro Tempore Atkins, Speaker Rendon, Senator Skinner and Assembly Member Ting:

On behalf of Natural Resources Defense Council (NRDC) and NRDC Action Fund, we are writing to express our views on several of the infrastructure budget trailer bills that were released on May 19. We urge the Legislature to consider these trailer bills in the policy committee process where they can have a full hearing with input from all stakeholders rather than in the budget process. We outline below our initial positions on several of these new trailer bills and note that we are still reviewing details and consulting with our partners.

NRDC recognizes the need to advance the construction of renewable energy projects to address the climate crisis, and we support efforts to coordinate permitting processes and increase agency budgets to meet staffing and technology needs for faster permitting. The Inflation Reduction Act provides $625 million for federal agencies to support efficient environmental and permitting reviews, and we urge the Legislature and Governor to ensure that state agencies have adequate resources and staffing to process permits and environmental reviews. In addition, in recent years, the State has undertaken efforts to improve interagency coordination, partnerships, processes and policies for restoration permitting. Improved interagency coordination, a focus on staffing and increased efficiency could help improve permitting of clean energy development without harmful legislative precedents that could be applied to environmentally damaging projects.

Provisions of the infrastructure trailer bills propose dramatic changes to existing law that are largely unconnected to advancing clean energy projects, including those that would fundamentally undermine government accountability and good governance, and provisions that unnecessarily weaken protections for Sandhill Cranes, California Condors, and other imperiled species. Therefore, we urge the Legislature to reject all or part of the following trailer bills:

Administrative Records Review Trailer Bill

This trailer bill unreasonably amends existing law to exclude "staff notes" and most internal agency emails from administrative records under CEQA, seeking to overturn the Court of Appeals decision in *Golden Door Properties v. Superior Court*, 53 Cal.App.5th 733 (2020). This provision would fundamentally weaken government accountability and good governance, giving agencies unreasonable discretion to exclude agency emails that raised concerns or undermined the agency's final decision. Moreover, this approach is contrary to federal law, which generally requires internal emails be included in the administrative record; indeed, in litigation against the Trump Administration in 2020, the State argued that staff emails and notes must be included in the administrative record, recognizing that many of these emails documented political interference and scientific misconduct. *See, e.g.,* Letter from Daniel Fuchs, California Dept. of Justice, to Lesley Lawrence-Hammer and Nicole Smith, U.S. Dept. Of Justice, in re *CNRA et al. v. Ross et al.,* Case No. 1:20-cv-00426-DAD-EPG (Nov. 4, 2020). These provisions of the trailer bill should never be enacted into law.

In addition, this trailer bill is objectionable because it allows the lead agency to take over preparation of the administrative record if the petitioner does not complete it within 60 days, without specifying that the lead agency must assume the cost of the record in that circumstance. This provision could make litigation under the California Environmental Quality Act unaffordable to many groups.

Fully Protected Species Trailer Bill

This trailer bill unnecessarily seeks to weaken protections for California Condors, Sandhill Cranes, Sea Otters, and other fully protected species. Existing law allows for incidental take of fully protected species as part of a Natural Communities Conservation Plan, which includes a more protective legal standard for listed species than would apply to incidental take permits under the California Endangered Species Act and requires coordinated planning to avoid and minimize impacts to the species, rather than haphazard permitting on a case-by-case basis. The trailer bill would undermine the conservation and recovery of these 37 imperiled species. In addition, the bill would exempt from the California Environmental Quality Act any future changes in listings for these 37 species, thereby eliminating meaningful public participation on these critical issues.

California Environmental Quality Act Trailer Bill

This trailer bill proposes to apply the expedited judicial review provisions of AB 900 for specific projects, including environmentally destructive projects like the Delta Conveyance Project or Sites Reservoir project, without requiring that these projects meet the prerequisites required by AB 900, such as paying prevailing wages and no net increase in greenhouse gases. *See* Cal. Pub. Contracting Code § 21183. Earlier this year the Senate rejected legislation to expedite judicial review of all water storage projects proposed under Proposition 1, as is now being proposed by the trailer bill. *See* SB 861 of 2023. Moreover, several of the provisions regarding the scope of the administrative record should be rejected, including those that limit the scope and that appear to allow the agency to recover the costs of preparing the administrative record if they prevail in litigation.

Trailer Bills and the Delta Conveyance Project

Finally, several of these trailer bills appear intended to facilitate permitting of the environmentally destructive Delta Conveyance Project. In addition to the trailer bills above, the **design-build budget trailer bill** appears intended to circumvent the explicit statutory prohibition on DWR using design-build for the Delta Conveyance Project. *See* Cal. Pub. Contract Code § 10204(a)(2)). In addition, the **Delta Reform Act trailer bill** would allow for approval of the Delta Conveyance Project without a majority of the full Delta Stewardship Council and would establish a very short statute of limitations for litigation challenging the Delta Stewardship Council's approval of this or other projects. The Delta Conveyance Project is widely opposed by Tribal, environmental justice, fishing, and conservation communities, including NRDC. Recently, the chair of the board of directors of the Metropolitan Water District of Southern California expressed significant concerns about the financial feasibility of the project, and it will be several years before the State completes water rights hearings and could even obtain a federal Endangered Species Act permit that would allow for construction.

In conclusion, NRDC recognizes the need to advance clean energy projects, but several of the proposed trailer bills would fundamentally undermine environmental protections in California law. We therefore urge the Legislature to consider these bills in the policy committee process, and we look forward to working with you to address these significant concerns with the trailer bills as proposed. Working together, we can find the right balance.

Sincerely,

Victoria Rome
California Government Affairs Director

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The Honorable Toni Atkins
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The Honorable Anthony Rendon
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May 31, 2023

RE: Concerns regarding the Infrastructure Trailer Bill Package—CEQA Judicial Streamlining and Administrative Record Review

Dear Governor Newsom, President Pro-Tempore Atkins, Speaker Rendon, Senator Skinner, and Assemblymember Ting:

The California Environmental Justice Alliance (CEJA) and the undersigned organizations

write to respectfully share our concerns related to the Governor's Infrastructure Package. For one, we are extremely concerned that this process to move such expansive policy ideas lacks transparency and does not provide sufficient time and space for meaningful public engagement and policy debate. As stated in a letter signed by 75 organizations including CEJA, we strongly oppose the Administration's use of the budget process to move voluminous and broad-reaching environmental policy forward as this eliminates an open and transparent discussion of monumental policy decisions.

As a statewide and community-led alliance, CEJA supports a Just Transition from an extractive and fossil-fuel based energy system to one that is powered by 100% clean, renewable, reliable, and affordable energy. This requires the development of distributed clean energy and storage, clean microgrids, energy efficiency, demand response, and other community-scale resources in a manner that prioritizes the retirement of fossil gas plants and other polluting infrastructure in the State's environmental justice communities. As we build out the clean energy infrastructure and resources needed to safely and reliably phase out polluting resources, it is imperative that we do not continue, exacerbate, or begin a new legacy of harm and abuse. This requires honoring community leadership and expertise, protecting and mitigating against false energy solutions and practices, and ensuring real benefits and investments flow to Environmental Justice (EJ) communities, aligning with the core principles and objectives that the California Environmental Quality Act fundamentally upholds..

Furthermore, our state's premier environmental law is important for environmental justice community members who rely on the current law to have a voice in local land use planning decisions in order to protect their environmental health. By establishing the rights of frontline EJ communities to protections that promote clean air, water, and soil, and providing opportunities for community member input to be meaningfully considered in planning processes, the California Environmental Quality Act (CEQA) plays a vital role in safeguarding the well-being of overburdened populations and communities across the state. While we understand the desire to create greater certainty and faster timelines for CEQA-related lawsuits, such policies can lead to disproportionate harm amongst low-income neighborhoods and Black, Indigenous, and people of color (BIPOC) communities, as well as cause further damage to the environment if implemented poorly and distract us from the real solutions to our environmental and housing challenges. This dynamic is also complicated by the fact that low-income and BIPOC communities often have fewer resources and limited access to the lawyers that they need to advocate for their rights compared to well-resourced industry and other privileged special interest groups—not to mention public agencies which often seek to push through projects that harm EJ

communities.

CEJA and CEJA member organizations would like to share specific concerns regarding the California Environmental Quality Act (CEQA) Judicial Streamlining trailer bill and the Administrative Record Review trailer bill. While we appreciate the Governor and the Legislature's intent to meet our state's critical clean energy and infrastructure needs, we are concerned that these two broadly defined trailer bills, as currently written, will not achieve their intended goals and could even cause greater harm to overburdened EJ communities across the state. The bills may also cause severe challenges for the courts that would have to work overtime to meet the unrealistic judicial review timelines and requirements of the law.

CEQA Judicial Streamlining

This trailer bill would allow certain legal challenges under CEQA to be eligible for expedited judicial review benefits if they are a qualified water, transportation, clean energy, and semiconductor or microelectronic projects. However, we would like to share the following concerns and provide additional questions for further clarification and definition:

- **Requiring a court to resolve an action within 270 days to the extent feasible is harmful to low-income and EJ communities.** Litigation is oftentimes one of the only ways in which low-income and EJ communities can create greater accountability in order to protect public health and wellbeing. Unfortunately, these types of expedited judicial timelines could further disadvantage EJ petitioners if they lack the high-level resources to meet such shortened briefing and filing timelines. Many residents of EJ communities face significant barriers to securing legal representation in the first place, and expedited timelines further challenges their legal right to pursue a claim. EJ communities' legal counsel, also, frequently encounter limited resources when pursuing litigation, in contrast to law firms representing agencies and developers who may have the capacity to retain multiple in-house and external counsel to defend their decisions. Furthermore, requiring projects to be resolved within 270 days may not only hurt low-income and EJ communities, it could also give preference to CEQA-related cases over other cases—including violent crimes and other more serious offenses.

- **Requiring a court to resolve an action within 270 days to the extent feasible is also logistically impractical[1] and legally unnecessary, as CEQA lawsuits already receive**

[1] Dillon, Liam. (January 24, 2017). "A key reform of California's landmark environmental law hasn't kept its promises." Los Angeles Times. Retrieved from: https://www.latimes.com/politics/la-pol-sac-environmental-law-reform-failures-20170124-story.html

priority in court. Courts require significant time to deliberate over complex legal issues regarding projects that may bring decades of environmental and public health harms. It is essential to preserve, and not create additional hurdles to, the courts' ability to thoughtfully and accurately deliberate on cases. Furthermore, we are concerned about the feasibility of this judicial review policy proposal and are unsure if the state budget will allocate sufficient funding for additional CEQA judges that would be necessary to handle the increased caseloads.

- **The bill's broadly defined list of proposed clean energy projects for a streamlined CEQA judicial review process may include harmful energy systems and approaches that increase pollution and extraction in EJ communities.** We are specifically concerned about the possibility of expediting review processes for lithium extraction and production, hydrogen, biofuels, carbon capture and storage, among others, and would urge that these be especially excluded from the list.

- **The bill would allow judicial streamlining for a number of specific energy and resource projects that are controversial and deserve to undergo a robust process.** In recent years, different agencies, decision-makers, and politically powerful individuals have been able to provide CEQA streamlining processes to a variety of individually hand-picked projects. We are very concerned with this approach of selecting favorite projects to undergo special benefits in ways that are inequitable and unjust. We are especially concerned about projects that include lithium extraction/production and battery generation facilities which threaten harmful impacts on disadvantaged communities.

- **Overall, it is unclear whether or not CEQA streamlining for large clean energy projects is the best solution for moving faster on our clean energy goals.** In fact, our preferred equitable energy solution of community solar and storage has yet to be funded through the state budget. Many energy professionals and advocates alike do not believe that delays in clean energy progress are attributed to extended CEQA judicial review timelines, but instead due to other more prominent factors including what the market has defined as post-COVID pandemic supply chain issues, the lack of staffing devoted to addressing interconnection queue delays, and the under-investment in local and community-scale resources. In addition, local clean energy resources can secure more benefits for EJ communities, reduce impacts to land and the environment, and protect community members from paying for costly transmission buildout and upgrades through their rates. For years, CEJA has advocated for the State to prioritize local and community-scale clean resources–including community solar and storage, community microgrids, energy efficiency, electrification, and demand response—yet the State has stalled. In the

California Public Utilities Commission's Integrated Resource Plan (IRP) proceeding, CEJA has also advocated for utilities to procure a sufficient amount of clean energy and storage resources to meet climate and air quality commitments, and to site resources in local reliability areas in order to retire polluting gas plants sooner. This year, the Governor has yet to propose *any* funding for equitable community solar and storage access, as requested by environmental justice advocates. Instead, he unveiled a "Clean Energy Transition Plan Roadmap" focused on accelerating transmission and utility-scale procurement, including potential procurement of false energy solutions, while neglecting to include a plan for building or investing in community-scale resources.

Administrative Record Preparation

This trailer bill aims to reduce litigation timelines by streamlining processes related to the preparation of the public record for CEQA-related legal challenges. While some of the bill's provisions appear to be reasonable and feasible for shortening legal timelines, we are concerned about the bill's main provisions that create barriers for low-income and EJ communities from adhering to the profound changes.

- **This bill would allow a public agency to take over the preparation of the record if a petitioner initially elects to do so, but either fails to complete it within 60 days or fails to obtain an extension.** If the agency assumes responsibility for preparing the Administrative Record, there is no language stating that the agency would cover the costs of compiling the record. This could potentially lead agencies to hastily take over the record preparation process, alleging that the petitioner caused delays or made mistakes, and subsequently burdening the petitioner with a substantial bill. This change would place EJ communities and public interest petitioners at a comparative disadvantage to their defendants and potentially chill important litigation to enforce EJ communities' rights, because they are typically far less resourced than respondents.

- **This bill would allow the lead agency to elect to prepare the record, provided the agency notifies the petitioner within 10 days of filing the action.** In the case where an agency elects to prepare the record, petitioners may not have access to the record documents until the agency officially certifies the Administrative Record. This poses barriers for petitioners who are unable to examine the evidence and information contained in the Administrative Record.

- **The bill's narrowly defined scope of "internal agency communications" is concerning to community-serving lawyers and local residents who are often denied access to important government records and correspondence.** Community-based

environmental justice organizations have traditionally relied on those communications as a critical component of the body of evidence. Internal emails can provide a window into the environmental analysis done by expert agency staff and important communications between staff and developers regarding the project scope and impacts. This change is particularly problematic given that most communications are now done electronically. As a result, these proposed amendments threaten to dilute CEQA's role as a sunshine statute that promotes transparency and accountability in government decision-making and therefore its role in leveling the playing field for vulnerable communities which often lack insider access in that process.

A Step to Address the Environmental Injustices

The state's persistent efforts to weaken CEQA and undermine its role in addressing the harmful effects of polluting and hazardous activities on disadvantaged communities highlights the urgent necessity for the state to establish safeguards that protect these communities from the ongoing clustering of polluting and hazardous facilities in areas already burdened with environmental challenges. We strongly urge prioritizing policies that establish guardrails in the State Planning and Land Use Law. These guardrails would ensure that City and County general plans prioritize environmentally sustainable land uses, equitable community development, and prevent the concentration of polluting facilities near residential areas and sensitive locations in overburdened communities. These measures are crucial for achieving state air quality and climate goals while addressing disparities and promoting vibrant, equitable communities per California's obligations under its civil rights laws. We would be happy to talk more specifically with your office about our proposal.

Lastly, in addition to our concerns regarding the CEQA Judicial Review and Administrative Record trailer bills, we are disappointed that the Infrastructure Trailer Bill package largely omits any mention of equity and labor standards. California has a long history of racist infrastructure policies and investment decisions that have cemented socioeconomic inequities in housing, education, economic opportunity, health, and environmental pollution. Last year, CEJA and various environmental justice, climate, and labor groups supported AB 2419 (Bryan), the California Justice40 Act. Despite strong and diverse support for AB 2419, the legislation died in a bitter failure to deliver on environmental justice and economic justice. Advocates were hopeful that state action would include equity standards as a central component of the state's infrastructure plan; however, the Governor's proposal reveals that equity is not sufficiently being prioritized by this Administration.

* * * * * *

Thank you for your time and for your consideration of these comments. The California Environmental Justice Alliance looks forward to having additional conversations with the current administration and leaders of the Legislature to identify appropriate solutions for increasing clean energy resources and infrastructure in our state without sacrificing the ability of low-income and BIPOC community members from having their fair day in court.

Sincerely,

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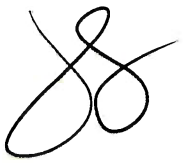
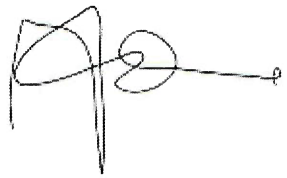
Marven Norman, Policy Coordinator
Center for Community Action and Environmental Justice

Grecia Orozco, Staff Attorney
Center for Race, Poverty, & the Environment



Jennifer Ganata, Senior Staff Attorney
Communities for a Better Environment



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