



October 9, 2015

Ken Alex, Director
Governor's Office of Planning and Research
CEQA.Guidelines@resources.ca.gov

Re: 2015 Proposed Updates to the CEQA Guidelines

Dear Mr. Alex,

Thank you for the opportunity to comment on the 2015 Proposed Updates to the CEQA Guidelines. Center for Food Safety (CFS) is a national non-profit public interest and environmental advocacy organization working to protect human health and the environment by curbing the use of harmful food production technologies and by promoting organic and other forms of sustainable agriculture. CFS has more than 500,000 members and offices in San Francisco; Portland, Oregon; Honolulu; and Washington, D.C.

CFS is currently lead counsel in several major CEQA cases, including one, *Central Delta Water Agency v. Department of Water Resources* (Third Appellate District Case No. C078249), in which remedies in general, and Public Resources Code section 21168.9 and a court's equitable discretion in particular, are key issues. These comments are based on the knowledge and experience gained from this litigation as well as years of prior CEQA experience of CFS senior attorneys.

Proposed Section 15234(c)

Proposed Section 15234 seeks to reflect the language of Public Resources Code section 21168.9 and the caselaw that has interpreted that section, and to help agencies and the public understand the effect of a court's remand on a project's implementation.

However, Proposed Section 15234(c) significantly departs from the language of Public Resources Code section 21168.9 and existing caselaw. The proposed language confuses a court's equitable discretion to permit a project to continue pending new environmental review with "leaving the project approvals in place." A court's equitable discretion regarding project approvals is severely constrained by section 21168.9, but Proposed Section 15234(c) does not accurately reflect that fact.

Proposed Section 15234(c) states as follows:

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(c) An agency may also proceed with a project, or individual project activities, during the remand period where the court has exercised its equitable discretion to leave project approvals in place or in practical effect during that period because the environment will be given a greater level of protection if the project is allowed to remain operative than if it were inoperative during that period.

The reference to a court's "equitable discretion to leave project approvals in place" is problematic, as it fails to recognize the significant restriction on a court's discretion regarding *project approvals*. The implication of the proposed language is that courts have broad discretion to leave project approvals in place, even when those approvals are based on noncompliance with CEQA that has been found to constitute a prejudicial abuse of discretion.

In fact, under section 21168.9, if a court finds that an agency's noncompliance with CEQA is a prejudicial abuse of discretion, a court may leave the agency's project approval (or a portion of an approval) in place *only* if the approval satisfies three requirements: (1) it must be severable from whatever has been found to violate CEQA; (2) severance of the approval must not prejudice "complete and full compliance" with CEQA; and (3) the part of the approval that remains after severance must be found to be in compliance with CEQA. (Pub. Resources Code § 21168.9(b); *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 287 ("*Preserve Wild Santee*").) This is an express limitation on a court's equitable discretion to fashion a remedy. (*POET, LLC v. California Air Resources Board* (2013) 218 Cal.App.4th 681, 758.) And this limitation has specific consequences for project approvals.

The essence of the rule is that while a court does have discretion to fashion a "limited writ" under section 21168.9(a) and leave a project approval or a portion of an approval in place, it may do so only if the approval or portion of the approval that remains fully complies with CEQA, *and* only if leaving the approval in place will not prejudice future full and complete compliance with CEQA.

CEQA prohibits post hoc environmental review; an agency must "ascertain the environmental consequences of a project *before giving approval to proceed.*" (*Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549, 564-565 (emphasis added); *LandValue 77, LLC v. Board of Trustees of California State University* (2011) 193 Cal.App.4th 675, 683; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1221; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 672.) "[U]nless a public agency can shape the project in a way that would respond to concerns raised in an EIR, or its functional equivalent, environmental review would be a meaningless exercise." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 117.)

In most circumstances, a writ that leaves an approval in place after finding its underlying environmental review to be prejudicially defective would require an agency to engage in

post hoc environmental review. Because such post hoc review is prohibited under CEQA, it is not possible for a court to issue such a writ. Not only would the approval itself not comply with CEQA (as it would not be based on valid environmental review), but leaving such an approval in place would prejudice future compliance with CEQA. (Pub. Resources Code § 21168.9(b).)

Just as “an agency has no discretion to define approval so as to make its commitment to a project precede the required preparation of an EIR,” (*Save Tara*, supra, 45 Cal.4th at 132), so too a court has no discretion to fashion a remedy that permits an approval to remain in place after the underlying environmental review has been found to prejudicially violate CEQA. (Pub. Resources Code § 21168.9(b); see *POET*, supra, 218 Cal.App.4th at 759-60 [discussing the Supreme Court’s use of mandatory language for voiding approvals in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 143, while determining that it “is a question we need not decide” because the circumstances of that case required voiding all approvals].)

There are good reasons for Public Resources Code section 21168.9(b) to effectively require, in almost all circumstances, the voiding of project approvals. Permitting a project approval to stand alone, after striking its underlying environmental review, would be antithetical to the purpose of CEQA:

The CEQA process is intended to be a careful examination, fully open to the public, of the environmental consequences of a given project, covering the entire project, from start to finish. This examination is intended to provide the fullest information reasonably available upon which the decision makers and the public they serve can rely in determining *whether or not to start the project at all, not merely to decide whether to finish it*. The EIR is intended to furnish both the road map and the environmental price tag for a project, so that the decision maker and the public both know, *before the journey begins*, just where the journey will lead, and how much they—and the environment—will have to give up in order to take that journey. As our Supreme Court said in *Bozung v. Local Agency Formation Com.* (1975) 13 Cal. 3d 263, 283 [118 Cal. Rptr. 249, 529 P.2d 1017], ‘[t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind.’

(*Natural Resources Defense Council v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 271 [quoting an amicus curiae brief filed by the California Attorney General] [emphasis added]; *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 135-136.)

A project approval needs a hook on which to hang its hat, and without valid environmental review, there is no hook.

The most likely scenario in which a court may leave a project approval in place involves severable project components, and thus severable project approvals. For instance, in *Anderson First Coalition v. City of Anderson*, the court severed a gas station from the rest of a

development project, allowing the bulk of the project to continue and its approvals to remain in place while enjoining the gas station portion pending compliance with CEQA. ((2005) 130 Cal.App.4th 1173, 1179.) The remedy was based firmly on section 21168.9, and the court made the requisite findings regarding severability and CEQA compliance required by section 21168.9(b). (*Id.*) Importantly, the reason portions of the project approvals were allowed to remain in place was because they fully and completely complied with CEQA, being based on an environmental review that was found to comply with CEQA. (Pub. Resources Code § 21168.9(b).)

Allowing an agency's approval of a severable project component to remain in place is very different than allowing a project approval to remain in place after that approval's underlying environmental review is found to have violated CEQA. The former is within a court's discretion, while the latter is not, as it fails to comply with Public Resources Code section 21168.9.

Thus, Proposed Section 15234(c) should not include a reference to a court's equitable discretion to leave *project approvals* in place, without clarifying that any such discretion is significantly constrained by section 21168.9. But because that limitation on discretion is already described by both section 21168.9 and the other proposed language in Proposed Section 15234, the reference to "project approvals" should simply be deleted.

We therefore proposed the following edit to Proposed Section 15234(c), with additions in italics and deletions in strike-through:

(c) An agency may also proceed with a project, or individual project activities, during the remand period where the court has exercised its equitable discretion to *permit project activities to proceed* ~~leave project approvals in place or in practical effect~~ during that period because the environment will be given a greater level of protection if the project is allowed to remain operative than if it were inoperative during that period.

Thank you again for this opportunity to comment on the 2015 Proposed Updates to the CEQA Guidelines.

Sincerely,



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