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From: Terry Olson <TMO@bkslawfirm.com>
Sent: Thursday, March 15, 2018 4:45 PM
To: CEQA Guidelines@CNRA
Cc: Ryan Bezerra; Alan Lilly
Subject: Proposed Guidelines Amendments to Clarify Filing of Notices of Exemption and Determination for Water Projects
Attachments: 2018-03-15 Letter on CEQA Guidelines re NOEs and NODs for water projects (00056887xE2E14).pdf

Good afternoon Mr. Calfee:

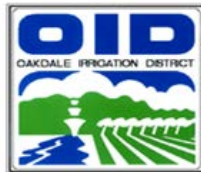
Please see the attached.

Sincerely,

Terry M. Olson, Legal Assistant to Ryan S. Bezerra and Andrew J. Ramos
Bartkiewicz, Kronick & Shanahan, P. C.

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March 15, 2018

Mr. Christopher Calfee
Deputy Secretary and General Counsel
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, California 95814

VIA E-MAIL
CEQA.Guidelines@resources.ca.gov

Re: Proposed Guidelines Amendments to Clarify Filing of Notices of
Exemption and Determination for Water Projects

Dear Mr. Calfee:

The signatories to this letter are water agencies, or representatives of water agencies, who have identified an important ambiguity in the California Environmental Quality Act (CEQA) and the existing Guidelines concerning the filing of notices of exemption and determination (NOEs and NODs, respectively) for water projects. This ambiguity can be resolved through limited amendments to the Guidelines. We propose that the Guidelines be amended as proposed in this letter's enclosure to address the issues discussed below and provide clearer guidance to water agencies and the public that is interested in their projects.

Under CEQA and the current Guidelines, local agencies must file their NOEs and NODs for projects for which they are the lead agencies "with the county clerk of each county in which the project will be located." (Public Resources Code § 21152, subds. (a)-(b); Guidelines §§ 15062, subd. (c)(2); 15094, subd. (d).) Determining in what counties to file NOEs and NODs should be a relatively simple matter for land use projects, which usually will be physically located in one county or, in limited cases, two counties.

This determination, however, is a much different matter for some water projects. Water projects can affect streamflows in many counties. Water transfers encouraged by

state law theoretically could affect not only streamflows in rivers located between the point where an action makes water available for transfer and the downstream point where the transferred water is diverted, but also end uses in counties that are physically distant from both the source of the water and the point at which the water is diverted from a stream. (See Water Code §§ 109, 475 (state policies favoring water transfers.) Moreover, given that the Central Valley Project and the State Water Project are an integrated system, water transfers theoretically can result in different reservoir-storage levels in counties that do not include the points at which transfer water is released, the points at which it is diverted downstream or the points at which it is applied to end use. All of those factors are further complicated by the fact that streams often define counties' boundaries. All of these circumstances, in combination with CEQA's requirements about where NOEs and NODs must be filed, cause significant uncertainty about the counties in which those notices must be filed.

This uncertainty is exacerbated by several elements of CEQA and its interpretation by the courts. First, CEQA requires that NODs must be filed within five working days after the lead agency's approval of the project becomes final. (Public Resources Code § 21152, subd. (a).) This requirement means that, where an NOD for a water project must be filed in several counties, all of those filings must occur in a very short period of time. Second, under CEQA, multiple statute of limitations may begin as of "the date of the filing" of the NOD or NOE. (Public Resources Code § 21167, subds. (b)-(d).) Because it is uncertain in exactly what counties NOEs and NODs must be filed for many water projects, it may result in arguments regarding exactly which filing in which county triggers the statute of limitations. Third, at least in relation to NOEs, the courts have held that CEQA's notice and posting procedures must be strictly followed or the benefit of CEQA's 35-day statute of limitations that is based on a NOE may be lost and the default 180-day statute of limitations may apply. (*Latinos Unidos de Napa v. County of Napa* (2011) 196 Cal.App.4th 1154.)

The attached proposed amendments would clarify these ambiguities. The attached proposed amendments would specify that, for purposes of filing NOEs and NODs, for water projects would be located in the counties where: (1) the lead agency's headquarters is located; and (2) the lead agency has a point of diversion or rediversion that will be utilized by the project. The latter part of this definition is based on Water Code section 1312. Under that statute, the notice of a water-right application to the State Water Resources Control Board must be published in newspapers of general circulation "within the county wherein the point of diversion lies, or, if there are points of diversion in more than one county, in each county in which a point of diversion lies." Applying this standard in the CEQA Guidelines would allow water agencies and the public to understand clearly in what counties NOEs and NODs must be published, while providing notice in the counties that the Legislature already has indicated are appropriate for similar notices for water projects.

Mr. Christopher Calfee
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We appreciate your attention to this matter. If you have any questions, please do not hesitate to contact Ryan Bezerra at Bartkiewicz, Kronick & Shanahan. His telephone number is (916) 446-4254 and his e-mail address is rsb@bkslawfirm.com.

Kind regards,

YUBA COUNTY WATER AGENCY



By: _____
Ryan S. Bezerra
Attorney for Yuba County Water
Agency

EL DORADO IRRIGATION DISTRICT



By: _____
Jim Abercrombie
General Manager

NORTHERN CALIFORNIA WATER
ASSOCIATION



By: _____
David J. Guy
President

OAKDALE IRRIGATION DISTRICT



By: _____
Steve Knell, P.E.
General Manager

SAN LUIS AND DELTA-MENDOTA



By: _____
Jon Rubin
Interim Executive Director
and General Manager

Proposed Amendments to CEQA Guidelines

Proposed insertions are in blue, underlined text.

Exemptions

§15062. Notice of Exemption

(a) When a public agency decides that a project is exempt from CEQA pursuant to Section 15061, and the public agency approves or determines to carry out the project, the agency may file a Notice of Exemption. The notice shall be filed, if at all, after approval of the project. Such a notice shall include:

(1) A brief description of the project,

(2) The location of the project (either by street address and cross street for a project in an urbanized area or by attaching a specific map, preferably a copy of a U.S.G.S. 15' or 7-1/2' topographical map identified by quadrangle name).

(3) A finding that the project is exempt from CEQA, including a citation to the State Guidelines section or statute under which it is found to be exempt,

(4) A brief statement of reasons to support the finding, and

(5) The applicant's name, if any.

(b) A Notice of Exemption may be filled out and may accompany the project application through the approval process. The notice shall not be filed with the county clerk or the OPR until the project has been approved.

(c) When a public agency approves an applicant's project, either the agency or the applicant may file a Notice of Exemption.

(1) When a state agency files this notice, the notice of exemption shall be filed with the Office of Planning and Research. A form for this notice is provided in Appendix E. A list of all Association of Environmental Professionals 2018 CEQA Guidelines 136 such notices shall be posted on a weekly basis at the Office of Planning and Research, 1400 Tenth Street, Sacramento, California. The list shall remain posted for at least 30 days. The Office of Planning and Research shall retain each notice for not less than 12 months.

(2)(A) When a local agency files this notice, the notice of exemption shall be filed with the county clerk of each county in which the project will be located. Copies of all such notices shall be available for public inspection and such notices shall be posted within 24 hours of receipt in the office of the county clerk. Each notice shall remain posted for a period of 30 days. Thereafter, the clerk shall return the notice to the local agency with a notation of the period it was posted. The local agency shall retain the notice for not less than 12 months.

(B) For purposes of filing a notice of exemption, a local agency's water project is located in the county where the lead agency's headquarters is located and in each county where a local agency has a point of diversion or rediversion that will be used in implementing the project.

(3) All public agencies are encouraged to make postings pursuant to this section available in electronic format on the Internet. Such electronic postings are in addition to the procedures required by these guidelines and the Public Resources Code.

(4) When an applicant files this notice, special rules apply.

(A) The notice filed by an applicant is filed in the same place as if it were filed by the agency granting the permit. If the permit was granted by a state agency, the notice is filed with the Office of Planning and Research. If the permit was granted by a local agency, the notice is filed with the county clerk of the county or counties in which the project will be located.

(B) The Notice of Exemption filed by an applicant shall contain the information required in subdivision (a) together with a certified document issued by the public agency stating that the agency has found the project to be exempt. The certified document may be a certified copy of an existing document or record of the public agency.

(C) A notice filed by an applicant is subject to the same posting and time requirements as a notice filed by a public agency.

(d) The filing of a Notice of Exemption and the posting on the list of notices start a 35 day statute of limitations period on legal challenges to the agency's decision that the project is exempt from CEQA. If a Notice of Exemption is not filed, a 180 day statute of limitations will apply.

(e) When a local agency determines that a project is not subject to CEQA under sections 15193, 15194, or 15195, and it approves or determines to carry out that project, the local agency or person seeking project approval shall file a notice with OPR identifying the section under which the exemption is claimed.

Negative Declarations

§ 15075. Notice of Determination on a Project for Which a Proposed Negative or Mitigated Negative Declaration Has Been Approved.

(a) The lead agency shall file a notice of determination within five working days after deciding to carry out or approve the project. For projects with more than one phase, the lead agency shall file a notice of determination for each phase requiring a discretionary approval.

(b) The notice of determination shall include:

(1) An identification of the project including the project title as identified on the proposed negative declaration, its location, and the State Clearinghouse identification number for the proposed negative declaration if the notice of determination is filed with the State Clearinghouse.

(2) A brief description of the project.

- (3) The agency's name, the applicant's name, if any, and the date on which the agency approved the project.
- (4) The determination of the agency that the project will not have a significant effect on the environment.
- (5) A statement that a negative declaration or a mitigated negative declaration was adopted pursuant to the provisions of CEQA.
- (6) A statement indicating whether mitigation measures were made a condition of the approval of the project, and whether a mitigation monitoring plan/program was adopted.
- (7) The address where a copy of the negative declaration or mitigated negative declaration may be examined.
- (c) If the lead agency is a state agency, the lead agency shall file the notice of determination with the Office of Planning and Research within five working days after approval of the project by the lead agency.
- (d)(1) If the lead agency is a local agency, the local agency shall file the notice of determination with the county clerk of the county or counties in which the project will be located within five working days after approval of the project by the lead agency. If the project requires discretionary approval from any state agency, the local lead agency shall also, within five working days of this approval, file a copy of the notice of determination with the Office of Planning and Research.
- [\(2\) For purposes of filing a notice of determination, a local agency's water project is located in the county where the lead agency's headquarters is located and in each county where a local agency has a point of diversion or rediversion that will be used in implementing the project.](#)
- (e) A notice of determination filed with the county clerk shall be available for public inspection and shall be posted by the county clerk within 24 hours of receipt for a period of at least 30 days. Thereafter, the clerk shall return the notice to the local lead agency with a notation of the period during which it was posted. The local lead agency shall retain the notice for not less than 12 months.
- (f) A notice of determination filed with the Office of Planning and Research shall be available for public inspection and shall be posted for a period of at least 30 days. The Office of Planning and Research shall retain each notice for not less than 12 months.
- (g) The filing of the notice of determination pursuant to subdivision (c) above for state agencies and the filing and posting of the notice of determination pursuant to subdivisions (d) and (e) above for local agencies, start a 30-day statute of limitations on court challenges to the approval under CEQA.
- (h) A sample Notice of Determination (Rev. 2011) is provided in Appendix D. Each public agency may devise its own form, but the minimum content requirements of subdivision (b) above shall be met.

Public agencies are encouraged to make copies of all notices filed pursuant to this section available in electronic format on the Internet. Such electronic notices are in addition to the posting requirements of these guidelines and the Public Resources Code.

Environmental Impact Reports and Negative Declarations

§ 15094. Notice of Determination.

- (a) The lead agency shall file a Notice of Determination (Rev. 2011) within five working days after deciding to carry out or approve the project.
- (b) The notice of determination shall include:
- (1) An identification of the project including the project title as identified on the draft EIR, and the location of the project (either by street address and cross street for a project in an urbanized area or by attaching a specific map, preferably a copy of a U.S.G.S. 15' or 7-1/2' topographical map identified by quadrangle name). If the notice of determination is filed with the State Clearinghouse, the State Clearinghouse identification number for the draft EIR shall be provided.
 - (2) A brief description of the project.
 - (3) The lead agency's name, the applicant's name, if any, and the date on which the agency approved the project. If a responsible agency files the notice of determination pursuant to Section 15096(i), the responsible agency's name, the applicant's name, if any, and date of approval shall also be identified.
 - (4) The determination of the agency whether the project in its approved form will have a significant effect on the environment.
 - (5) A statement that an EIR was prepared and certified pursuant to the provisions of CEQA.
 - (6) Whether mitigation measures were made a condition of the approval of the project, and whether a mitigation monitoring plan/program was adopted.
 - (7) Whether findings were made pursuant to Section 15091.
 - (8) Whether a statement of overriding considerations was adopted for the project.
 - (9) The address where a copy of the final EIR and the record of project approval may be examined.
- (c) If the lead agency is a state agency, the lead agency shall file the notice of determination with the Office of Planning and Research within five working days after approval of the project by the lead agency.
- (d)(1) If the lead agency is a local agency, the local lead agency shall file the notice of determination with the county clerk of the county or counties in which the project will be located, within five working days after approval of the project by the lead agency. If the

project requires discretionary approval from any state agency, the local lead agency shall also, within five working days of this approval, file a copy of the notice of determination with the Office of Planning and Research.

(2) For purposes of filing a notice of determination, a local agency's water project is located in the county where the lead agency's headquarters is located and in each county where a local agency has a point of diversion or redirection that will be used in implementing the project.

(e) A notice of determination filed with the county clerk shall be available for public inspection and shall be posted within 24 hours of receipt for a period of at least 30 days. Thereafter, the clerk shall return the notice to the local lead agency with a notation of the period during which it was posted. The local lead agency shall retain the notice for not less than 12 months.

(f) A notice of determination filed with the Office of Planning and Research shall be available for public inspection and shall be posted for a period of at least 30 days. The Office of Planning and Research shall retain each notice for not less than 12 months.

(g) The filing of the notice of determination pursuant to subdivision (c) above for state agencies and the filing and posting of the notice of determination pursuant to subdivisions (d) and (e) above for local agencies, start a 30-day statute of limitations on court challenges to the approval under CEQA.

(h) A sample notice of determination is provided in Appendix D. Each public agency may devise its own form, but any such form shall include, at a minimum, the information required by subdivision (b). Public agencies are encouraged to make copies of all notices filed pursuant to this section available in electronic format on the Internet. Such electronic notices are in addition to the posting requirements of the Guidelines and the Public Resources Code.

Proposed New Definition

§ 15387. Water Project

For purposes of sections 15062, 15075 and 15094, a "water project" means an activity undertaken pursuant to Sections 1011, subdivision (b), 1011.5, subdivision (d), and 1211 of Chapter 2 (commencing with Section 1250), Chapter 6.6 (commencing with Section 1435), Chapter 10 (commencing with Section 1700), and Chapter 10.5 (commencing with Section 1725) of Part 2 of Division 2 of, the Water Code.