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HOUSE BILL 520

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

INTRODUCED BY

Gail Chasey

AN ACT

RELATING TO THE ENVIRONMENT; ENACTING THE CONSOLIDATED ENVIRONMENTAL REVIEW ACT; PROVIDING FOR RULES TO BE ADOPTED BY THE ENVIRONMENTAL IMPROVEMENT BOARD; PROVIDING FOR FEES; MAKING APPROPRIATIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the "Consolidated Environmental Review Act".

Section 2. PURPOSE.--It is the purpose of the Consolidated Environmental Review Act to:

A. develop and maintain a high-quality environment now and in the future and take all action necessary to protect, rehabilitate and enhance the environmental quality of the state;

B. take all action necessary to provide the people

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1 of New Mexico with clean air and water, enjoyment of aesthetic,
2 natural, scenic and historic environmental qualities and
3 freedom from threats to human health, excessive noise and light
4 pollution;

5 C. prevent the contamination, genetic damage or
6 elimination of fish and wildlife species due to human
7 activities; ensure that fish and wildlife populations do not
8 drop below self-perpetuating levels; and preserve for future
9 generations representations of all plant and animal communities
10 of this state;

11 D. ensure that the long-term protection of the
12 environment, consistent with the provision of a suitable living
13 environment for every state resident, shall be the guiding
14 criterion in public decisions;

15 E. create and maintain conditions under which
16 humans and nature can exist in productive harmony to fulfill
17 the social and economic requirements of present and future
18 generations;

19 F. require governmental agencies at all levels to
20 develop standards and procedures necessary to protect
21 environmental quality;

22 G. require governmental agencies at all levels to
23 consider qualitative, technical and economic factors of a
24 proposed project; to consider long-term as well as short-term
25 benefits and costs of a proposed project; to consider the

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1 cumulative impacts of a proposed project; and to consider all
2 reasonable alternatives to proposed actions affecting the
3 environment;

4 H. regulate activities of public agencies that are
5 found to affect the quality of the environment so that major
6 consideration is given to preventing environmental damage in
7 this state;

8 I. deny projects as proposed if there are feasible
9 alternatives or feasible mitigation measures available that
10 would substantially lessen the significant environmental
11 effects of such projects and to assist to identify both the
12 significant effects of proposed projects and the feasible
13 alternatives or feasible mitigation measures that will avoid or
14 substantially lessen such significant effects; and

15 J. promote and encourage diverse public interest
16 and participation in the project determination process and the
17 carrying out of the purposes of the Consolidated Environmental
18 Review Act.

19 Section 3. DEFINITIONS.--As used in the Consolidated
20 Environmental Review Act:

21 A. "applicant" means any person applying for
22 funding from the state for a project or applying for a permit
23 required by law from a public agency pursuant to any law
24 enforced by the public agency;

25 B. "cumulative impact" means the incremental

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1 environmental impacts of an individual project combined with
2 the environmental impacts caused by past projects, the
3 environmental impacts caused by other current projects and the
4 environmental impacts caused by reasonably foreseeable future
5 projects;

6 C. "environment" means the physical conditions that
7 will be affected by a proposed project, including, but not
8 limited to, land, air, water, minerals, flora, fauna, noise,
9 vibration or objects of historic or aesthetic significance,
10 including historic properties listed or eligible for listing on
11 the national register of historic places or the New Mexico
12 state register of cultural properties and traditional cultural
13 properties;

14 D. "environmental assessment" means an
15 informational document prepared by a public agency or that a
16 public agency causes to be prepared for proposed projects and
17 that has as its purpose either to:

18 (1) issue a finding of no significant impact;

19 or

20 (2) determine that further assessment of the
21 project is necessary through preparation of an environmental
22 impact statement;

23 E. "environmental impact statement" means an
24 informational, detailed document setting forth the matters
25 specified in the Consolidated Environmental Review Act that,

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1 when its preparation is required by that act, is considered by
2 a public agency prior to the agency's approval or disapproval
3 of a project. The environmental impact statement shall provide
4 public agencies and the public with detailed information about
5 the effect that a proposed project is likely to have on the
6 environment, to list and reasonably analyze ways in which the
7 significant effects of such a project might be minimized and to
8 indicate all reasonable alternatives to the proposed project;

9 F. "finding of no significant impact" means a
10 written statement, which may be included in an environmental
11 assessment, that briefly describes the reasons that a proposed
12 project will not have a significant effect on the environment
13 and therefore does not require the preparation of an
14 environmental impact statement;

15 G. "lead agency" means the public agency primarily
16 responsible for the preparation and evaluation of environmental
17 impact statements, environmental assessments or findings of no
18 significant impact;

19 H. "person" means an individual or any other
20 entity, including partnerships, corporations, associations,
21 responsible business or association agents or officers, the
22 state or a political subdivision of the state or any agency,
23 department or instrumentality of the United States and any of
24 its officers, agents or employees;

25 I. "project" means any activity that may cause

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1 either a direct physical change in the environment or a
2 reasonably foreseeable indirect physical change in the
3 environment and that is any of the following:

4 (1) an activity directly undertaken by any
5 public agency;

6 (2) an activity undertaken by a person that is
7 supported, in whole or in part, through contracts, grants,
8 subsidies, loans or other forms of assistance from one or more
9 public agencies; or

10 (3) an activity that involves one or more
11 public agencies issuing a lease, permit, license, certificate
12 or other entitlement;

13 J. "public agency" means any state agency, board,
14 commission or post-secondary educational institution or any
15 regional, county, municipal or local entity responsible for
16 administering state environmental laws; and

17 K. "significant effect on the environment" means a
18 substantial or potentially substantial change in the
19 environment.

20 Section 4. DETERMINATION OF LEAD AGENCY.--

21 A. The public agency with primary responsibility
22 for issuing recommendations or permit or license approvals for
23 a project or proposed project shall be considered the lead
24 agency for the purposes of preparing and evaluating
25 environmental impact statements, environmental assessments or

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1 findings of no significant impact. When more than one public
2 agency is involved in preparing and evaluating environmental
3 impact statements, environmental assessments or findings of no
4 significant impact, only one agency shall act as the lead
5 agency.

6 B. When more than one public agency is involved in
7 preparing and evaluating environmental impact statements,
8 environmental assessments or findings of no significant impact,
9 the public agencies involved, by agreement, shall determine the
10 lead agency based on:

11 (1) the magnitude of each agency's involvement
12 in the project approval process;

13 (2) expertise concerning the project or
14 proposed project's environmental impacts;

15 (3) the duration of each public agency's
16 involvement in the project's approval process, with longer
17 involvement favoring designation of lead agency status; and

18 (4) the sequence of each public agency's
19 involvement.

20 Section 5. ASSESSMENT OF ENVIRONMENTAL IMPACTS OF
21 PROPOSED PROJECTS--SIGNIFICANT EFFECTS--FINDINGS OF NO
22 SIGNIFICANT IMPACT.--

23 A. A public agency shall perform an environmental
24 assessment of any state-funded project under its authority or
25 within its scope of duties, including pursuant to contracts

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1 with political subdivisions, instrumentalities of the state or
2 local governments. The public agency shall determine that the
3 project may have a significant effect on the environment or
4 determine a finding of no significant impact. If the public
5 agency determines that an activity or a project may have a
6 significant effect on the environment, an environmental impact
7 statement shall be prepared by the public agency.

8 B. All public agencies shall require an applicant,
9 as part of a permitting, licensing or certification approval
10 process pursuant to law, to prepare or cause to be prepared by
11 contract the completion of an environmental assessment on all
12 proposed projects. On the basis of substantial evidence in
13 light of the whole record, the public agency shall either
14 determine that the project may have a significant effect on the
15 environment or the public agency shall determine a finding of
16 no significant impact. If there is substantial evidence that a
17 project may have a significant effect on the environment, an
18 environmental impact statement shall be prepared by the
19 applicant. A public agency shall not approve a project, except
20 as provided by the Consolidated Environmental Review Act,
21 without an environmental assessment, an environmental impact
22 statement or a finding of no significant impact.

23 Section 6. ENVIRONMENTAL IMPACT STATEMENTS.--

24 A. All public agencies shall prepare or cause to be
25 prepared the completion of an environmental impact statement on

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1 any project that may have a significant effect on the
2 environment.

3 B. All public agencies shall require an applicant,
4 as part of the permitting, licensing or certification process
5 pursuant to law, to prepare or cause to be prepared by contract
6 the completion of an environmental impact statement on any
7 project that the applicant proposes to carry out that the
8 public agency determines may have a significant effect on the
9 environment.

10 C. The environmental impact statement shall include
11 a detailed statement setting forth all of the following:

12 (1) all significant effects on the environment
13 of the proposed project;

14 (2) any significant effect on the environment
15 that cannot be avoided if the proposed project is implemented;

16 (3) any significant effect on the environment
17 that would be irreversible if the proposed project is
18 implemented;

19 (4) any significant effect of the proposed
20 project on human health;

21 (5) the cumulative environmental impact of the
22 proposed project when connected with the environmental impacts
23 of past or current projects or other proposed projects;

24 (6) mitigation measures proposed to minimize
25 significant effects of the proposed project on the environment

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1 and a description of how those measures would be implemented;

2 (7) alternatives to the proposed project,
3 including:

4 (a) a no-action alternative;

5 (b) a description of the significant
6 effects to the environment that would result from each
7 alternative; and

8 (c) the public agency's preferred
9 alternative and proposed course of action;

10 (8) the impacts of the proposed project on
11 cultural and historic resources of the state or Indian tribes
12 or pueblos within the state, including the impacts on historic
13 properties and traditional cultural properties located within
14 the project area identified via pedestrian surveys, archival
15 record searches and consultation with Native American tribes;

16 (9) the impacts upon communities already
17 burdened by previous environmental impacts or existing
18 industries that required water or air quality permits or any
19 federal permit or permits or licenses;

20 (10) the impacts upon the continuing existence
21 or continuous access to archaeological, historic or culturally
22 significant sites, particularly those of continuing
23 significance to indigenous and historically significant
24 communities, including impacts upon the abilities of indigenous
25 and historic inhabitants and communities of New Mexico to

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1 engage in the practices that constitute their ways of life,
2 rituals, ceremonies and other culturally significant practices;
3 and

4 (11) the impacts upon the continuing
5 availability and use of forest and agricultural resources,
6 including subsistence agriculture.

7 D. The environmental impact statement shall
8 contain a brief statement indicating the reasons for
9 determining which various effects on the environment of a
10 project are not significant and consequently have not been
11 discussed in detail in the statement.

12 E. An areawide or overview environmental impact
13 statement may be prepared only when similar actions, viewed
14 with other reasonably foreseeable or proposed actions, share
15 common timing or geography.

16 F. No person may provide contractual services
17 related to the preparation of an environmental assessment or
18 environmental impact statement without certifying under penalty
19 of perjury that the individual or corporate entity has not
20 provided such services or been employed by the project
21 proponent, its predecessors in interest, successors in
22 interest, assigns, heirs, parent corporations, holding
23 companies, partnerships or any other relation for at least
24 seven years and currently has no financial interest of any kind
25 with the project proponent and the individuals and entities

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1 related to it or the project.

2 Section 7. EXEMPTIONS.--Exempted from the provisions of
3 the Consolidated Environmental Review Act are:

4 A. enforcement activities;

5 B. emergency activities to protect public health,
6 safety or the environment;

7 C. purely ministerial actions;

8 D. activities permitted by the office of the state
9 engineer and the interstate stream commission, including water
10 transfers or appropriations, except where they are also
11 permitted by another public agency pursuant to law; and

12 E. actions subject to the federal National
13 Environmental Policy Act of 1969 and its implementing
14 regulations, except that state public agencies shall review the
15 federal agency's or state agencies' final action under the
16 National Environmental Policy Act and may require additional
17 information and evaluation on a project or proposed project
18 before approving any permits, licenses or authorizations
19 required under New Mexico law.

20 Section 8. BEST AVAILABLE ALTERNATIVE--MITIGATION.--Each
21 public agency shall choose the best available alternative to a
22 proposed project that, to the maximum extent practicable,
23 minimizes or avoids adverse environmental effects and shall
24 incorporate that alternative in the conditions of a permit,
25 license or other authorization for the proposed project issued

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1 pursuant to law.

2 Section 9. ENVIRONMENTAL IMPROVEMENT BOARD--PREPARATION
3 AND DEVELOPMENT OF RULES--FEES--APPROPRIATIONS.--The
4 environmental improvement board, in consultation with the
5 department of environment, the energy, minerals and natural
6 resources department, the department of health, the department
7 of transportation, the historic preservation division of the
8 cultural affairs department and the office of the governor,
9 shall adopt rules by July 1, 2010 for the implementation of the
10 Consolidated Environmental Review Act by public agencies. The
11 rules shall include:

12 A. objectives and criteria for the orderly
13 evaluation of projects and the preparation of documents,
14 including provisions for accepting environmental assessments
15 and environmental impact statements prepared pursuant to
16 federal law to be accepted for compliance with the Consolidated
17 Environmental Review Act;

18 B. criteria and thresholds for public agencies to
19 follow in determining whether or not a proposed project
20 requires preparation of an environmental assessment or
21 environmental impact statement, including areawide or overview
22 environmental impact statements, as a component in the
23 permitting process pursuant to law. The criteria shall require
24 a finding that a project may have a significant effect on the
25 environment if:

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1 (1) a proposed project has the potential to
2 degrade substantially the quality of the environment or to
3 interfere substantially with proper ecosystem functioning in
4 the environment;

5 (2) the possible effects of a project are
6 individually limited but cumulatively considerable; or

7 (3) the environmental effects of a project may
8 cause substantial adverse effects on human beings or plant and
9 animal species, habitats or the ecological systems necessary
10 for the survival of such plants and animals;

11 C. where no administrative appeals process for
12 environmental determinations exists, an administrative appeals
13 process for challenging a determination by a public agency
14 regarding the necessity of an environmental assessment or an
15 environmental impact statement;

16 D. if a public agency has an existing procedure for
17 appeals of the agency's environmental determinations, the
18 procedure shall at a minimum include the following for appeals
19 of environmental assessments or environmental impact statements
20 or findings of no significant impact:

21 (1) allow no more than one agency appeal
22 proceeding on each procedural determination, the adequacy of a
23 determination of significance or nonsignificance or of a final
24 environmental impact statement;

25 (2) consolidate an appeal of procedural issues

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1 and of substantive determinations made under the Consolidated
2 Environmental Review Act, such as a decision to require
3 particular mitigation measures or to deny a proposal, with a
4 hearing or appeal on the underlying governmental action by
5 providing for a single simultaneous hearing before one hearing
6 officer or body to consider the agency decision or
7 recommendation on a proposal and any environmental
8 determinations made pursuant to the Consolidated Environmental
9 Review Act, with the exception of an appeal of a:

10 (a) determination of significance;

11 (b) procedural determination made by an
12 agency if the agency is a project proponent or is funding a
13 project and chooses to conduct its review pursuant to the
14 Consolidated Environmental Review Act, including any appeals of
15 its procedural determinations, prior to submitting an
16 application for a project permit; or

17 (c) procedural determination made by an
18 agency on a nonproject action;

19 (3) provide for the preparation of a record
20 for use in any subsequent appeal proceedings that consists of
21 findings and conclusions, testimony under oath and a taped or
22 written transcript. An electronically recorded transcript may
23 suffice for purposes of review under this subsection; and

24 (4) if a person aggrieved by a public agency's
25 action has the right to judicial appeal, and if that agency has

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1 an administrative appeal procedure, the person shall, prior to
2 seeking a judicial review, use the agency's administrative
3 appeal procedure, unless expressly provided otherwise by law;

4 E. directions to public agencies for the
5 consolidation of permit reviews and environmental impact
6 statement processes to reduce the regulatory burden on
7 applicants while fulfilling the purposes of the Consolidated
8 Environmental Review Act;

9 F. a fee structure for each public agency to
10 recover from applicants no more than the actual costs for
11 implementing the Consolidated Environmental Review Act. Those
12 fees shall be appropriated to the respective agencies to carry
13 out the provisions of the Consolidated Environmental Review
14 Act; and

15 G. procedures for granting variances from the
16 requirements of the Consolidated Environmental Review Act.

17 Section 10. ENVIRONMENTAL ASSESSMENTS AND ENVIRONMENTAL
18 IMPACT STATEMENTS--DEADLINES.--

19 A. Each public agency shall adopt rules for time
20 limits that do not exceed the following:

21 (1) six months for completing environmental
22 assessments and adopting findings of no significant impact; and

23 (2) one year for completing and certifying
24 environmental impact statements.

25 B. The time limits specified in this section shall

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1 apply only to those circumstances in which a public agency is
2 the applicant. The rules may establish different time limits
3 for preparing environmental assessments, environmental impact
4 statements or findings of no significant impact for different
5 types or classes of projects, but all limits shall be measured
6 from the date on which an application requesting approval of
7 the project is received and accepted as complete by the public
8 agency.

9 C. Rules adopted pursuant to this section may
10 provide for a reasonable extension of the time period in the
11 event that compelling circumstances justify additional time and
12 the project applicant consents.

13 Section 11. NOTICE--OPPORTUNITY TO COMMENT--AVAILABILITY
14 TO LEGISLATURE AND GENERAL PUBLIC.--

15 A. Whenever a public agency determines that an
16 environmental assessment or an environmental impact statement
17 should be prepared for a project, a notice of the project's
18 environmental assessment, environmental impact statement or
19 finding of no significant impact shall be:

20 (1) provided by certified mail to:

21 (a) the owners of record, as shown by
22 the most recent property tax schedule, of all properties: 1)
23 within one hundred feet of the property on which the project or
24 proposed project is located or proposed to be located if the
25 project or proposed project is or will be in a class A or H

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1 class county or a municipality with a population of more than
2 two thousand five hundred persons; or 2) within one-half mile
3 of the property on which the project or proposed project is
4 located or proposed to be located if the project or proposed
5 project is or will be in a county or municipality other than
6 those specified in item 1) of this subparagraph; and

7 (b) all municipalities and counties in
8 which the project or proposed project is or will be located and
9 to the governing body of any county, municipality, Indian tribe
10 or pueblo when the boundary of the territory of the county,
11 municipality, Indian tribe or pueblo is within a ten-mile
12 radius of the property on which the project or proposed project
13 is proposed to be constructed, operated or closed;

14 (2) published once in a newspaper of general
15 circulation in each county in which the property on which the
16 project is proposed to be constructed, operated or closed is
17 located. This notice shall appear in either the classified or
18 legal advertisements section of the newspaper and at one other
19 place in the newspaper calculated to give the general public
20 the most effective notice and, when appropriate, shall be
21 printed in both English and Spanish; and

22 (3) posted in at least four publicly
23 accessible and conspicuous places, including the project
24 entrance on the property on which the project is located or is
25 proposed to be located.

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1 B. Any member of the general public may secure a
2 copy of an environmental assessment or environmental impact
3 statement by requesting a copy from the public agency.

4 C. The requirements of this section represent
5 minimum notice requirements. The environmental improvement
6 board or a public agency may, by regulation, impose additional
7 notice procedures consistent with existing law.

8 Section 12. ENFORCEMENT--COMMENCEMENT OF ACTIONS OR
9 PROCEEDINGS.--

10 A. A person having an interest that is or may be
11 adversely affected by a project or proposed project may
12 commence a civil action to compel compliance with the
13 Consolidated Environmental Review Act. That civil action may
14 be brought against:

15 (1) a public agency with primary
16 responsibility for requiring an environmental impact statement,
17 environmental assessment or finding of no significant impact
18 under the Consolidated Environmental Review Act;

19 (2) a person who is alleged to be in violation
20 of a rule, regulation, order or permit issued pursuant to the
21 Consolidated Environmental Review Act; or

22 (3) a public agency alleging a failure to
23 perform any nondiscretionary act or duty required by the
24 Consolidated Environmental Review Act; provided, however, that
25 no action pursuant to this section shall be commenced if the

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1 public agency has commenced and is diligently prosecuting a
2 civil action in a court of this state or an administrative
3 enforcement proceeding to require compliance with the
4 Consolidated Environmental Review Act. In an administrative
5 proceeding or court action commenced by a public agency, a
6 person whose interest may be adversely affected and who has
7 provided notice pursuant to Subsection B of this section prior
8 to the initiation of the action may intervene as a matter of
9 right.

10 B. No action pursuant to this section shall be
11 commenced prior to sixty days after the plaintiff has given
12 written notice to the appropriate public agency, the attorney
13 general and the alleged violator of the Consolidated
14 Environmental Review Act; provided, however, when the violation
15 or order complained of constitutes an immediate threat to the
16 health or safety of the plaintiff or would immediately and
17 irreversibly impair a legal interest of the plaintiff, an
18 action pursuant to this section may be brought immediately
19 after notification of the proper parties.

20 C. Except as otherwise provided, suits against a
21 public agency shall be brought in the district court of Santa
22 Fe county. Suits against only project or proposed project
23 applicants shall be brought in the district court where the
24 project or proposed project is located. If an action is
25 brought against a public agency and the project or proposed

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1 project applicant, the applicant may apply for a change of
2 venue to the judicial district in which the project or proposed
3 project is located. If not already a party, a project or
4 proposed project applicant may intervene, upon a showing that
5 the action relates primarily to a dispute regarding the project
6 or proposed project, and apply for such a change of venue. The
7 district court shall grant a change of venue upon a showing
8 that the action relates primarily to a dispute regarding the
9 project or proposed project and a showing that a forum non
10 conveniens analysis suggests that the location of the project
11 or proposed project is a superior venue.

12 D. In an action brought pursuant to this section,
13 the lead agency may intervene.

14 E. The court, in issuing a final order in an action
15 brought pursuant to this section, may award costs of
16 litigation, including attorney and expert witness fees, to a
17 party whenever the court determines such award is appropriate.
18 The court may, if a temporary injunction or preliminary
19 injunction is sought, require the filing of a bond or
20 equivalent security in accordance with the rules of civil
21 procedure.

22 Section 13. JUDICIAL REVIEW.--

23 A. Except as otherwise provided in the Consolidated
24 Environmental Review Act, a person who is adversely affected by
25 a project or proposed project subject to the Consolidated

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1 Environmental Review Act or who participated in a permitting
2 action or appeal of a certification before a public agency and
3 who is adversely affected by such action may appeal to the
4 court of appeals for further relief. All such appeals shall be
5 upon the record made before the public agency and shall be
6 taken to the court of appeals within thirty days after the
7 public agency certifies that an environmental impact statement,
8 environmental assessment or a finding of no significant impact
9 or the final agency permitting, funding, certification or
10 licensing decision, whichever comes last.

11 B. Upon appeal, the court of appeals shall set
12 aside the public agency's action only if it is found to be:

13 (1) arbitrary, capricious or an abuse of
14 discretion;

15 (2) not supported by substantial evidence in
16 the record; or

17 (3) otherwise not in accordance with law.

18 C. After a hearing and a showing of good cause by
19 the appellant, a stay of the action being appealed may be
20 granted pending the outcome of the judicial review. The stay
21 of the action may be granted by the commission or by the court
22 of appeals if the commission denies a stay within ninety days
23 after receipt of the application.

24 Section 14. SEVERABILITY.--If any part or application of
25 the Consolidated Environmental Review Act is held invalid, the

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1 remainder or its application to other situations or persons
2 shall not be affected.

3 Section 15. EFFECTIVE DATE.--The effective date of the
4 provisions of this act is July 1, 2010.

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