Judicial Council of California · Administrative Office of the Courts

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: April 24, 2012

Title
Appellate Procedure: Review of California Environmental Quality Act Cases Under Public Resources Code Sections 21178–21189.3

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rule 8.497, and amend rules 8.485 and 8.499

Recommended by
Appellate Advisory Committee
Hon. Kathryn Doi Todd, Chair

Agenda Item Type
Action Required

Effective Date
July 1, 2012

Date of Report
April 11, 2012

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Executive Summary

The Appellate Advisory Committee recommends adopting rule 8.497 of the California Rules of Court and amending rules 8.485 and 8.499 to fulfill the Judicial Council's statutory obligation under recently enacted legislation to adopt rules implementing an expedited procedure for review in the Court of Appeal of California Environmental Quality Act claims involving certain large development projects.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective July 1, 2012:

1. Adopt new rule 8.497 to:

   - Specify that a proceeding under the Jobs and Economic Improvement Through Environmental Leadership Act of 2011[1] is instituted by filing a petition for a writ of mandate in the Court of Appeal with geographic jurisdiction over the project;

   - Require that the petition include any other claims by the petitioner that new Public Resources Code section 21185 requires be concurrently filed;

   - Require that the lead agency lodge both an electronic and a paper copy of the administrative record with the Court of Appeal and serve the parties an electronic copy within 10 days after the petition is served on that agency;

   - Require that requests to augment or otherwise change the content of the administrative record be made by motions served and filed within 25 days after the record is served and that any opposition or other response be served and filed within 10 days after the motion is filed;

   - Require that the petitioner immediately notify the court if a matter settles;

   - Require the respondent and any real party in interest to serve and file any response to the petition and any motion challenging the sufficiency of the petition within 25 days after service of the administrative record or as specified by the court;

   - Require that, unless otherwise ordered by the court, the petitioner serve and file its brief within 40 days after service of the administrative record, the respondent and real party in interest serve and file their briefs within 30 days after the petitioner's brief is filed, and the petitioner serve and file any reply brief within 20 days after the respondent's brief is filed;

   - Require that these briefs comply with the general requirements concerning contents, form, and length of briefs in civil appeals in the Court of Appeal;

   - Require that, except as otherwise provided by law, all documents that this rule requires be served on the parties must be served by personal delivery, electronic service, express mail, or other means consistent with Code of Civil Procedure sections 1010, 1011, 1012, and 1013 and reasonably calculated to ensure delivery of the document to the parties not later than the close of the business day after the document is filed or lodged with the court;

[1] Assem. Bill 900 (Buchanan; Stats. 2011, ch. 354). This legislation can be accessed at www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0851-0900/ab_900_bill_20110927_chaptered.pdf.

- Require that, within 10 days of service of the petition on the real party in interest, the person who applied to have the project certified as a leadership project must pay a special $100,000 fee to the Court of Appeal designed to cover court costs associated with the case and that, if this fee is not timely paid, the case may be transferred to the trial court and proceed under normal California Environmental Quality Act review procedures; and

- Provide that the court may order extensions of time for proceedings under this rule only for good cause and in order to promote the interests of justice.

2. Amend rules 8.485 and 8.499 and the heading of Chapter 8 of Title 8, Division 1, to reflect that proposed new rule 8.497 would be placed in Chapter 8.

The text of the proposed new rule and rule amendments is attached at pages 15–20.

Previous Council Action

The Judicial Council has taken no previous action to implement the expedited review procedure established by the Jobs and Economic Improvement Through Environmental Leadership Act of 2011 because this act was just adopted effective January 1, 2012. However, in October 2009, the council adopted new rules, effective January 1, 2010, to provide a standardized format for paper and electronic versions of the administrative record in California Environmental Quality Act (CEQA) actions.

Rationale for Recommendation

Legislation

On September 27, 2011, the Governor signed into law the Jobs and Economic Improvement Through Environmental Leadership Act of 2011. This act added new chapter 6.5, comprising sections 21178–21189.3, to division 13 of the Public Resources Code, the California Environmental Quality Act. This new chapter establishes an expedited procedure for judicial review of certain CEQA claims regarding projects that the Governor has certified as "environmental leadership development projects." Among other things, this act:

- Requires the lead agency to prepare the administrative record regarding such a leadership project concurrently with the administrative process, to post it on a website, and to certify the final administrative record within five days of the agency's approval of the project;

- Requires that actions or proceedings alleging that a public agency has approved or is undertaking such a leadership project in violation of CEQA be filed in the Court of Appeal with geographic jurisdiction over the project;

- Specifically authorizes the Court of Appeal to appoint a special master to assist the court in managing and processing the case;

- Requires the Court of Appeal to issue its decision in the case within 175 days of the filing of the petition; and

- Requires that, on or before July 1, 2012, the Judicial Council adopt rules of court to implement this new chapter.

Proposed Rule Changes

The rule changes proposed in this report are designed to fulfill the Judicial Council's statutory obligation to adopt rules implementing the expedited judicial review procedure established by the act. They were prepared with the help of a working group of judicial officers, court staff, and attorneys with experience in handling CEQA matters. The main implementing provisions are set out in proposed new rule 8.497.

General factors shaping proposed rule 8.497. A number of statutory constraints and other factors shaped the drafting of proposed rule 8.497, including the following:

- Many provisions in CEQA—such as those addressing the time for service of a petition on the respondent public agency and real party in interest, the contents of the administrative record, settlement meetings, and mediation—were not specifically modified by the act. Proposed rule 8.497 is drafted based on the assumption that those general CEQA provisions that are not altered by the act or limited to superior court proceedings apply to proceedings in the Court of Appeal under the act.

- An appellate court has the discretion to deny a petition for an extraordinary writ, such as a writ of mandate, summarily—that is, without issuing an alternative writ or order to show cause, without affording the parties an opportunity for oral argument, and without issuing a written opinion. However, when, as under the act, an extraordinary writ proceeding is the only avenue of appellate review, the reviewing court's discretion is quite restricted: an appellate court may not summarily deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 113–114; *Dowell v. Superior Court* (1956) 47 Cal.2d 483, 486–487). The AB 900 Rules Working Group, the Appellate Advisory Committee, and the council's Rules and Projects Committee (RUPRO) all considered whether proposed rule 8.497 or its accompanying advisory committee comment should address the courts' authority in this regard (see discussion at pages 11-12).

- In most CEQA proceedings in the trial court, the petitioner does not currently seek an alternative writ or order to show cause, but seeks a peremptory writ, and if the petition is not dismissed or denied based on procedural defaults, the trial court hears the matter without first issuing an alternative writ or order to show cause. Proposed rule 8.497 is drafted based on the

assumption that that same practice will be followed in CEQA proceedings in the Court of Appeal.

- To meet the time for issuance of a decision specified in the act, many of the time frames specified in proposed rule 8.497 are extremely short, and many deadlines follow closely on one another. But because the act provides for extensions of time "for good cause" and "to promote the interests of justice," depending on the circumstances in an individual case, some of the deadlines specified in proposed rule 8.497 may be extended by the court.

Application (Proposed 8.497(a)). To help rule users understand the purpose of rule 8.497, proposed subdivision (a)(1) identifies the proceedings to which rule 8.497 applies. Proposed subdivision (a)(2) is intended to clarify that the general review procedures specified in CEQA and implementing regulations apply unless the act or rule 8.497 provides otherwise.

Service (Proposed 8.497(b)). To reduce delay associated with service of documents, proposed subdivision (b) would require that, unless otherwise provided by law, documents required to be served by rule 8.497 must be served by personal delivery, electronic service, express mail, or other means consistent with Code of Civil Procedure sections 1010, 1011, 1012, and 1013 and reasonably calculated to ensure delivery of the document to the parties not later than the close of the business day after the document is filed or lodged with the court. This language is modeled on language from Code of Civil Procedure section 1005(c), which requires expedited service of papers responding to motions.

Petition (Proposed 8.497(c)). Proposed subdivision (c)(1) is designed to implement the requirement in new Public Resources Code section 21185(a)(1)—part of the act—that actions or proceedings alleging that a public agency has approved or is undertaking such a leadership project in violation of CEQA be "in the Court of Appeal with geographic jurisdiction over the project." By specifying that a proceeding under the act is instituted by filing a petition for a writ of mandate, this provision is intended to reflect and be consistent with the general practice of seeking review of CEQA matters by way of petition for writ of mandate, although currently such petitions are ordinarily filed in the superior court.

Proposed subdivision (c)(2) addresses the contents of the petition for writ of mandate. It would require that the petition include:

- A statement that the project at issue is a leadership project subject to the act and rule 8.497. This statement is intended to ensure that the expedited procedure is applied only when authorized by the act;

- Any other claims involving the project that are required by the act to be concurrently filed. This is intended to implement new Public Resources Code section 21185(a)(2), part of the act, which provides that any party bringing an action or proceeding alleging that a public agency has approved or is undertaking a leadership project in violation of CEQA "shall also

file concurrently any other claims alleging that a public agency has granted land use approvals for the leadership project in violation of the law"; and

- A notice that payment of a fee for the Court of Appeal is required under proposed subdivision (i). This item is intended to help facilitate timely payment of the required fee.

Administrative Record (Proposed 8.497(d)). Proposed subdivision (d)(1) would require that the lead agency lodge the administrative record and serve notice of this lodging on the parties within 10 days after the petition is served on the lead agency. This provision would also require that the parties be served with a copy of the administrative record at the same time. Although CEQA contains general provisions addressing lodging and service of the administrative record, these provisions are tied to the normal CEQA record preparation process, which is inapplicable in proceedings under the act. This rule provision is therefore necessary to fill a gap in the statutes.

Proposed subdivision (d)(2) addresses the form and content of the administrative record. To facilitate the court's review, this provision would require that the court receive the record in both electronic and paper format. The parties' copies of the record would be in electronic format unless otherwise ordered by the court. To maintain consistency of practice, this provision would also require parties to comply with the existing requirements regarding the format of CEQA records in the trial court established by California Rules of Court, rules 3.1365–3.1368. In addition, to avoid any confusion, this provision would specifically require that the record contain the materials currently required to be included in the administrative record under the general CEQA statutes (Pub. Resources Code, § 21167.6).

Proposed subdivision (d)(3) addresses requests to augment or otherwise modify the contents of the administrative record. To facilitate early identification of any potential concerns about the record, this provision would require that these requests be made by motions filed within 25 days after the record is lodged with the court (the same deadline as for filing any answer or other response to the petition). Note that, although this is a short time after the record is lodged, under new Public Resources Code section 21186—part of the act— all the materials in the administrative record will have been posted on and be downloadable from a website and the administrative record will have been certified five days after the project is approved, which will typically be about 45 days before the deadline for lodging the record with the court.

This provision does not specify a time frame for the court to rule on a motion to augment or otherwise modify the contents of the administrative record. Depending on the nature of the motion, it may be appropriate to rule on such a motion early on, before briefing is filed, or to defer ruling on the motion until the matter is submitted. This draft leaves the appropriate timing to the discretion of the court.

Notice of Settlement (Proposed 8.497(e)). To ensure that courts do not unnecessarily expend resources on cases that have been settled, this proposed provision would require the petitioner to

notify the court immediately if a matter settles. There is no provision requiring such notice in the current CEQA statutes.

Response to Petition (Proposed 8.497(f)). Under current statutes relating to proceedings for writs of mandate, in a trial court proceeding in which no alternative writ is sought and the record is not filed with the petition, the respondent and any real party in interest must file any answer to a petition for writ of mandate within 30 days after receipt of a copy of the record. The current statutes do not address proceedings in the Court of Appeal in which no alternative writ is sought. Proposed subdivision (f)(1) would fill that gap by requiring that any response to the petition must be served and filed within 25 days after service of the record. In addition, to allow simultaneous consideration by the court, this provision would require that any motion challenging the sufficiency of the petition, including any request to dismiss the petition, be filed at the same time as any answer or other response to the petition. This provision would also leave room for a court to order a different time frame for the response if, for example, a party sought an order to show cause or alternative writ.

Proposed subdivision (f)(2) specifies the time frame for responding to a motion challenging the sufficiency of the petition.

Briefs (Proposed 8.497(g)). Proposed subdivision (g)(1) sets the time frames for serving and filing briefs. The time frames specified are the same as the times set in rule 8.212 for serving and filing briefs in civil appeals. They are also similar to the times set for filing briefs in Agricultural Labor Relations Board or Public Employment Relations Board proceedings under rule 8.498.

Proposed subdivision (g)(2) establishes the requirements for the contents and form of briefs. To maintain consistency of practice, this provision cross-references the rule establishing the contents and form of briefs in civil appeals in the Court of Appeal. The phrase "must comply as nearly as possible" is taken from rule 8.360(a), which specifies the contents and form of briefs in criminal cases in the Court of Appeal.

Certificate of Interested Entities or Persons (Proposed 8.497(h)). This provision would require that parties in proceedings under the act file a *Certificate of Interested Entities or Persons* (form APP-008) to assist Court of Appeal justices in determining whether they are required to disqualify themselves from the proceeding. With the exception of (h)(2), which addresses when the certificate must be filed, the language of this provision is virtually identical to the provisions about such certificates in rules 8.495, 8.496, and 8.498 addressing writ proceedings regarding Workers' Compensation Appeals Board, Public Utilities Commission, and Agricultural Labor Relations Board or Public Employment Relations Board decisions, respectively.

Court Costs (Proposed 8.497(i)). Proposed subdivision (i)(1) is intended to implement new Public Resources Code section 21183(e), part of the act, which provides that the applicant for certification of the project as a leadership project "agrees to pay the costs of the Court of Appeal in hearing and deciding any case, including payment of the costs for the appointment of a special

master if deemed appropriate by the court, in a form and manner specified by the Judicial Council, as provided in the Rules of Court adopted by the Judicial Council."

Subdivision (i)(1)(A) would require that, within 10 days of service of the petition on the real party in interest, the person who applied to have the project certified as a leadership project pay a special $100,000 fee to the Court of Appeal designed to cover court costs associated with the case.[2] This proposed fee was calculated based on estimates collected from courts about the time spent by judges, justices, research attorneys, and judicial assistants on recent CEQA cases regarding projects of the size eligible for participation in the act's expedited review procedure. The fee assumes that, on average, the following amount of time will be spent on such a case:

- 108 hours by the justice assigned to prepare a draft decision;
- 10 hours by each of the other two justices on the panel;
- 230 hours by research attorneys; and
- 31 hours by judicial assistants.

Additional amounts for other staff time, benefits, and overhead were also included in calculating the total fee.

Subdivision (i)(1)(B) would also require the person who applied to have the project certified as a leadership project to pay any costs associated with the appointment of a special master or contract personnel used by the Court of Appeal to work on the case, or to prepay estimates of these costs, as ordered by the court. The costs listed in this subdivision are those that the committee concluded were readily calculable based on invoices or other currently maintained records.

Proposed subdivision (i)(2) specifies that if the required fee or costs are not timely paid, the case may be transferred to the trial court and proceed under normal CEQA review procedures. Given that, under the act, a person who applies to have the project certified as a leadership project must agree to pay these costs in order for the project to be eligible for certification by the Governor and thus eligible for the expedited review procedure, the committee concluded that the most appropriate sanction for failure to pay the required fee would be for the case to be withdrawn from the expedited review procedure.

Extensions of Time (Proposed 8.497(j)). Proposed subdivision (j) addresses extensions of time. The language of this provision is based on new Public Resources Code section 21185(a)(5), part of the act.

Proposed amendments to rules 8.485 and 8.499 and heading of Chapter 8. Proposed new rule 8.497 would be placed in the chapter of the Appellate Rules that now includes rules 8.495, 8.496,

[2] Note that under paragraph (14) of rule 1.6 of the California Rules of Court, the term "'[p]erson' includes a corporation or other legal entity as well as a natural person."

and 8.498 addressing writ proceedings regarding Workers' Compensation Appeals Board, Public Utilities Commission, and Agricultural Labor Relations Board or Public Employment Relations Board decisions. Several differences exist between the procedures established by rules 8.495, 8.496, and 8.498 and the procedure established by proposed rule 8.497, however. For example, rules 8.495, 8.496, and 8.498 generally address proceedings for writs of review. This is reflected in the current title of Chapter 8, "Miscellaneous Writs of Review." Proposed rule 8.497, by contrast, provides for review by petition for writ of mandate. With the placement of rule 8.497 in Chapter 8, the title of Chapter 8 does not accurately reflect the types of writ proceedings covered in that chapter. To better reflect this modified coverage, this proposal would change the title of Chapter 8 to "Miscellaneous Writs." Similarly, rule 8.485(b) currently refers to "petitions for writs of review under rules 8.495–8.498." To better reflect the new coverage of Chapter 8, this reference in rule 8.485(b) would be changed to "petitions for writs under rules 8.495–8.498."

Placing rule 8.497 in chapter 8 would mean that rule 8.499 regarding filing, modification, and finality of decisions and remittitur in proceeding under chapter 8 would apply in proceedings governed by new rule 8.497. However, the language of rule 8.499 currently includes references to writs of review that do not make sense in the context of the mandate proceedings established by proposed new rule 8.497. For example, 8.499(c)(1) currently provides that the denial of a petition for a writ under chapter 8 without issuance of a writ of review is final immediately. Because proposed rule 8.497 provides for a writ of mandate procedure, not a writ of review procedure, a writ of review would never be issued before the denial of a petition under rule 8.497. Under the current language of rule 8.499, this would mean that every denial of a petition under rule 8.497 would be final immediately. The proposed amendments to rule 8.499 are intended to clarify that the references to writs of review in rule 8.499 apply only to proceedings under rules 8.495, 8.496, and 8.498, not to proceedings under proposed new rule 8.497. With these amendments, under the proposed language of rule 8.499(c), decisions denying a petition under rule 8.497 would be final 30 days after filing unless the court sets an earlier finality date under rule 8.499(c)(3). In addition, under the proposed language of rule 8.499(d), the Court of Appeal would issue a remittitur following any denial of a petition under proposed new rule 8.497.

Comments, Alternatives Considered, and Policy Implications

Comments

The proposed rules were circulated for public comment from December 13, 2011, through January 24, 2012. A total of six comments were received. Three of the commentators supported the proposal, one commentator supported some parts of the proposal if modified and did not support other parts of the proposal, and two commentators did not indicate a position on the proposed rules but provided specific comments and suggestions. The full text of the comments received and the committee responses are set out in the attached comment chart at pages 21–34. The main substantive comments and the committee's responses are also discussed below.

Adoption of rules. One commentator questioned the constitutionality of the expedited review procedure established by the act, suggesting that it imposes an unconstitutional restraint on the original mandate jurisdiction of the superior courts and thus renders the proposed rules of court unnecessary. The commentator acknowledged, however, that the Judicial Council does not have the authority to determine the constitutionality of the act nor can the council decline to follow the Legislature's mandate that it adopt rules to implement the act in the absence of a determination that the act is unconstitutional. Given the statutory mandate that the Judicial Council adopt implementing rules by July 1, 2012, the committee did not consider the option of not recommending rules to the council.

Expedited service. The draft rules that were circulated for public comment did not address the method of service to be used by parties, but the invitation to comment specifically requested comments on whether proposed rule 8.497 should require an expedited form of service, such as service by hand, overnight mail, or electronic service. Three commentators provided input on this issue, and all three suggested that the rules provide for some form of expedited service. Based on these comments, the committee revised the proposal to add a new subdivision (b) to proposed rule 8.497. This new subdivision would require that, unless otherwise provided by law, documents required to be served by rule 8.497 must be served by personal delivery, electronic service, express mail, or other means consistent with Code of Civil Procedure sections 1010, 1011, 1012, and 1013 and reasonably calculated to ensure delivery of the document to the parties not later than the close of the business day after the document is filed or lodged with the court.

Please note that this provision would not apply to service of the petition on the respondent and real party in interest because Public Resources Code sections 21167.6 and 21167.6.5 specify the permissible methods of serving the petition on these parties. Section 21167.6 provides that the petition "shall be served personally upon the public agency not later than 10 business days from the date the action or proceeding was filed." Section 21167.6.5 provides that the petition must be served on the real party in interest "by personal service, mail, facsimile, or any other method permitted by law, not later than 20 business days following service of the petition . . . on the public agency." An advisory committee comment accompanying proposed new subdivision (b) has also been added to clarify that this provision does not apply to service of the petition on the respondent public agency or real party in interest.

Notice of settlement. As circulated for public comment, proposed rule 8.497(e) (subdivision (d) in the proposal circulated for comment) would have required that, within five days after the meet-and-confer required by Public Resources Code section 21167.8(a), the petitioner notify the court if a case was settled. One of the commentators pointed out that several other provisions generally require notification of a court immediately upon settlement. Based on this comment, the committee revised the proposal to require the petitioner to notify the court of any settlement, whether in connection with the meet-and-confer or not, and also to make the language more consistent with other similar notification requirements.

Response to the petition. Proposed rule 8.497(f) (subdivision (e) in the proposal circulated for comment) addresses answers to petitions, motions challenging the sufficiency of petitions, and other responses to petitions. One commentator read this provision as permitting pre-answer challenges to a petition for writ of mandate under Assembly Bill 900. The committee's intent was to require that all responses and challenges to the sufficiency of a petition be filed together. To reflect this intent, the committee revised proposed rule 8.497(f) to include a new sentence clarifying that all such responses and challenges from the same party must be filed concurrently.

Recovery of the $100,000 fee. As discussed above, to implement new Public Resources Code section 21183(e), proposed rule 8.497(i)(1) (subdivision (h) in the proposal circulated for comment) establishes a $100,000 fee that is to be paid by the person who applied for certification of the project as a leadership project. Two commentators suggested that the rules should specify that this $100,000 fee is not a cost that is recoverable by the prevailing party.

This issue was not addressed in the proposed rule, and the invitation to comment did not seek commentator input on it. Rule 10.22, which addresses the Judicial Council's rule-making process, generally provides that a rule change can be recommended for adoption without first being circulated for public comment only if "the proposal presents a nonsubstantive technical change or correction or a minor substantive change that is unlikely to create controversy." The committee's view is that a provision addressing whether this $100,000 fee is recoverable would be an important substantive change and one that might generate controversy. Furthermore, some questions may arise about whether this issue might best be addressed by statute, rather than by rule. For these reasons, the committee is not recommending adding anything to the rules regarding this issue at this time. Instead, if this issue is not addressed by the Legislature, the committee will consider the possibility of circulating a new proposal regarding this issue in the future.

Alternatives considered

In addition to the alternatives suggested in the public comments, the committee considered adding provisions to rule 8.497 or the accompanying advisory committee comment addressing various other procedural issues, including the following:

- ***Summary denials/written opinions.*** The invitation to comment included information, similar to the information on this topic that appears on page 4 of this report, about the limitations on the court's power to summarily deny petitions for extraordinary writs – i.e. to deny such petitions without holding oral argument or issuing an opinion – when such petitions are the only means of appellate review available. The invitation to comment also specifically sought input on whether the advisory committee comment accompanying rule 8.497 should include any reference to the case law concerning the limits on this power. The committee received two comments on this issue, one that supported including such a reference in the advisory committee comment and one that did not support including it. Given that there was not strong support for this, the committee decided not to include such references in the proposed advisory committee comment.

However, when RUPRO initially reviewed a draft of this report at its March 15 meeting, some members of RUPRO suggested that the advisory committee comment accompanying rule 8.497 should include language encouraging the Courts of Appeal to issue opinions in all cases filed under the act and these proposed implementing rules, i.e. to not summarily deny such petitions. RUPRO did not recommend that such language be included in the advisory committee comment at this time but suggested that the Appellate Advisory Committee consider subsequently recirculating for public comment a revised proposal that included such language.

The views of the members of the Appellate Advisory Committee and the AB 900 Rules Working Group on this suggestion were sought. None of the members of either the Appellate Advisory Committee or the AB Rules Working Group supported recirculating a revised proposal. Although such a recirculation would give stakeholders an opportunity to comment on this potential new advisory committee comment language, members concluded that the costs of and concerns about this option, including the following, outweighed the potential benefit:

- There will be additional costs associated with re-circulating a revised proposal, including additional costs for courts in reviewing the revised proposal; and
- An advisory committee comment of this type is not necessary and may be inadvisable, given that: (1) there is nothing in the act that seeks to impose limitations on the courts' discretion to determine whether to issue a written opinion in these matters; (2) given the nature of these cases and the existing limitations on courts' authority to summarily deny petitions when there is no alternative method of appellate review, it would be rare for these cases not to be decided by written opinion; and (3) provisions suggesting that a written opinion is required in all writ proceedings of a certain type can create or perpetuate confusion about what is an appeal and what is a writ proceeding.

Given RUPRO's concerns, however, members of the Appellate Advisory Committee and the AB 900 Rules Working Group met by conference call to discuss again whether the advisory committee comment accompanying rule 8.497 should include any reference to the case law concerning the limits on the courts' power to summarily deny petitions for extraordinary writs when such petitions are the only means of appellate review available. Although the unanimous view of the members on the conference call was that such a comment was not necessary, they also indicated that they would not object if a reference to this existing case law were added to the advisory committee comment.

The Appellate Advisory Committee's and AB 900 Rules Working Group's views on this issue were shared with RUPRO at its April 11 meeting. Based on this input, the members of RUPRO who originally suggested that the advisory committee comment accompanying rule 8.497 should include language encouraging the Courts of Appeal to issue opinions in all cases filed under the act withdrew this suggestion.

- ***Stays.*** The committee considered including a provision in rule 8.497 addressing the procedures for requesting stays in proceedings under the act. The committee ultimately concluded that this was not something that needed to be addressed in this rule since there did not appear to be anything unique about the authority of parties to seek or courts to grant stays in these proceedings.

- ***Appointment of special masters.*** The committee considered including a provision generally addressing the appointment of special masters in proceedings under the act and specifically sought input in the invitation to comment on whether to include such a provision. The two commentators who addressed this issue expressed differing views. The committee ultimately decided not to include such a provision in this rule because the Courts of Appeal have experience in appointing special masters in other circumstances.

The committee also considered recommending longer time periods for filing certain documents—including motions to augment the record, answers or other responses to the petition, and the petitioner's brief—in order to give parties more time to prepare these documents. The committee modified the proposal to increase the time for filing a motion to augment the record from 20 to 25 days following service of the administrative record, but ultimately decided not to increase the other time frames in the proposed rules. The committee's view was that the court could extend these time periods if necessary in an individual case. The committee was also concerned that any increase in the base time periods would make it more difficult for the court to comply with the statutory deadline for deciding these cases.

Finally, the committee considered various alternate approaches to providing for payment of the Court of Appeal's costs in hearing and deciding cases under the act, including the following:

- ***Requiring payment of fee at time of certification of project.*** The committee considered requiring payment of the proposed $100,000 fee at the time the Governor certified the project as a leadership project. The committee ultimately decided against this approach, however, because this certification might come long before any petition challenging the project was filed and any court costs were incurred.

- ***Requiring posting of bond and calculation of court costs in individual cases.*** The committee considered requiring the posting of a $100,000 deposit or bond, calculating the court's costs for hearing and deciding that particular case at the conclusion of the case, and requiring payment of these costs or collection from the deposit or bond. The committee ultimately decided against this approach, however, because of the administrative burden associated with calculating and collecting these costs in each case and potential difficulties associated with obtaining a bond to cover such costs.

Implementation Requirements, Costs, and Operational Impacts

Implementing the new expedited review procedure will generate costs and operational impacts for the Courts of Appeal. However, the $100,000 fee proposed in rule 8.497(i) should offset these additional costs.

Attachments

1. Cal. Rules of Court, rules, 8.485, 8.497, and 8.499, at pages 15-20
2. Comment chart at pages 21–34

Rule 8.497 of the California Rules of Court is adopted and rules 8.485 and 8.499 are amended, effective July 1, 2012, to read:

Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapter 7. Writs of Mandate, Certiorari, and Prohibition in the Supreme Court and Court of Appeal

Rule 8.485 Application

(a) Writ proceedings governed

Except as provided in (b), the rules in this chapter govern petitions to the Supreme Court and Court of Appeal for writs of mandate, certiorari, or prohibition, or other writs within the original jurisdiction of these courts. In all respects not provided for in these rules, rule 8.204 governs the form and content of documents in the proceedings governed by this chapter.

(b) Writ proceedings not governed

These rules do not apply to petitions for writs of mandate, certiorari, or prohibition in the appellate division of the superior court under rules 8.930–8.936, petitions for writs of supersedeas under rule 8.116, petitions for writs of habeas corpus except as provided in rule 8.384, or petitions for writs ~~of review~~ under rules 8.495–8.498.

Chapter 8. Miscellaneous Writs ~~of Review~~

Rule 8.497. Review of California Environmental Quality Act cases under Public Resources Code sections 21178–21189.3

(a) Application

(1) This rule governs actions or proceedings in the Court of Appeal alleging that a public agency has approved or is undertaking an environmental leadership development project in violation of the California Environmental Quality Act. As used in this rule, an "environmental leadership development project" or "leadership project" means a project certified by the Governor under Public Resources Code sections 21182–21184.

(2) Except as otherwise provided in Public Resources Code sections 21178–21189.3 and this rule, the provisions of the Public Resources Code and the CEQA Guidelines adopted by the Natural Resources Agency (Cal. Code Regs., tit. 14, § 15000 et seq.) governing judicial actions or proceedings to attack, review, set aside, void, or annul

acts or decisions of a public agency on the grounds of noncompliance with the California Environmental Quality Act apply in proceedings governed by this rule.

(b) Service

Except as otherwise provided by law, all documents that this rule requires be served on the parties must be served by personal delivery, electronic service, express mail, or other means consistent with Code of Civil Procedure sections 1010, 1011, 1012, and 1013 and reasonably calculated to ensure delivery of the document to the parties not later than the close of the business day after the document is filed or lodged with the court.

(c) Petition

(1) *Service and filing*

A person alleging that a public agency has approved or is undertaking a leadership project in violation of the California Environmental Quality Act must serve and file a petition for a writ of mandate in the Court of Appeal with geographic jurisdiction over the project.

(2) *Form and contents*

In addition to any other applicable requirements, the petition must:

(A) State that the project at issue was certified by the Governor as a leadership project under Public Resources Code sections 21182–21184 and is subject to this rule;

(B) Provide notice that the person or entity that applied for certification of the project as a leadership project must make the payments required by (h);

(C) Include any other claims required to be concurrently filed by the petitioner under Public Resources Code section 21185; and

(D) Be verified.

(d) Administrative record

(1) *Lodging and service*

Within 10 days after the petition is served on the lead public agency, that agency must lodge the certified final administrative record with the Court of Appeal and serve on the parties a copy of the certified final administrative record and notice that the record has been lodged with the court.

(2) *Form and contents*

(A) Unless otherwise ordered by the Court of Appeal, the lead agency must lodge with the court one copy of the record in electronic format and one copy in paper format and serve on each party one copy of the record in electronic format. The record in electronic format must comply with rules 3.1365 and 3.1367. The record in paper format must comply with rules 3.1365 and 3.1368.

(B) A party may request the record in paper format and pay the reasonable cost or show good cause for a court order requiring the lead agency to serve the requesting party with one copy of the record in paper format.

(C) The record must include all of the materials specified in Public Resources Code section 21167.6.

(3) *Motions regarding the record*

(A) Any request to augment or otherwise change the contents of the administrative record must be made by motion in the Court of Appeal. The motion must be served and filed within 25 days after the record is served.

(B) Any opposition or other response to the motion must be served and filed within 10 days after the motion is filed.

(C) The Court of Appeal may appoint a special master to hear and decide any motion regarding the record. The order appointing the special master may specify the time within which the special master is required to file a decision.

(e) Notice of settlement

The petitioner must immediately notify the court if the case is settled.

(f) Response to petition

(1) Within 25 days after service of the administrative record or within the time ordered by the court, the respondent and any real party in interest must serve and file any answer to the petition; any motion challenging the sufficiency of the petition, including any motion to dismiss the petition; and any other response to the petition. Any such answer, motion, or other response from the same party must be filed concurrently.

(2) Any opposition or other response to a motion challenging the sufficiency of the petition must be served and filed within 10 days after the motion is filed.

(g) Briefs

(1) *Service and filing*

Unless otherwise ordered by the court:

(A) The petitioner must serve and file its brief within 40 days after the administrative record is served.

(B) Within 30 days after the petitioner's brief is filed, the respondent public agency must—and any real party in interest may—serve and file a respondent's brief.

(C) Within 20 days after the respondent's brief is filed, the petitioner may serve and file a reply brief.

(2) *Form and contents*

The briefs must comply as nearly as possible with rule 8.204.

(h) Certificate of Interested Entities or Persons

(1) Each party other than a public agency must comply with the requirements of rule 8.208 concerning serving and filing a *Certificate of Interested Entities or Persons*.

(2) The petitioner's certificate must be included in the petition. Other parties must include their certificate in their brief, or if the party files an answer or other response to the petition, a motion, an application, or an opposition to a motion or application in the Court of Appeal before filing its brief, the party must serve and file its certificate at the time it files the first answer, response, motion, application, or opposition. The certificate must appear after the cover and before any tables.

(3) If a party fails to file a certificate as required under (1) and (2), the clerk must notify the party by mail that the party must file the certificate within 10 days after the clerk's notice is mailed and that failure to comply will result in one of the following sanctions:

(A) If the party is the petitioner, the court will strike the petition; or

(B) If the party is the real party in interest, the court will strike the document.

(4) If the party fails to comply with the notice under (3), the court may impose the sanctions specified in the notice.

(i) Court costs

(1) In fulfillment of the provision in Public Resources Code section 21183 regarding payment of the Court of Appeal's costs:

(A) Within 10 days after service of the petition on the real party in interest, the person who applied for certification of the project as a leadership project must pay a fee of $100,000 to the Court of Appeal.

(B) If the Court of Appeal incurs any of the following costs, the person who applied for certification of the project as a leadership project must also pay, within 10 days of being ordered by the court, the following costs or estimated costs:

(i) The costs of any special master appointed by the Court of Appeal in the case; and

(ii) The costs of any contract personnel retained by the Court of Appeal to work on the case.

(2) If the fee or costs under (1) are not timely paid, the Court of Appeal may transfer the case to the superior court with geographic jurisdiction over the project, and the case will proceed under the procedures applicable to projects that have not been certified as leadership projects.

(j) Extensions of time

The court may order extensions of time only for good cause and in order to promote the interests of justice.

Advisory Committee Comment

Subdivision (b). This provision does not apply to service of the petition on the respondent public agency or real party in interest because the method of service on these parties is set by Public Resources Code sections 21167.6 and 21167.6.5.

Subdivision (c). Under this provision, a proceeding in the Court of Appeal is initiated by serving and filing a petition for a writ of mandate as provided in rule 8.25, not by filing a complaint and serving a summons and the complaint.

Subdivision (d)(3)(C). Public Resources Code section 21185 provides that the court may appoint a master to assist the court in managing and processing cases subject to this rule. Appointment of a special master to hear and decide motions regarding the record is just one example of when a court might make such an appointment.

Subdivision (f). A party other than the petitioner who files an answer, motion, or other response to a petition under (e) may be required to pay a filing fee under Government Code section 68926 if the

answer, motion, or other response is the first document filed in the proceeding in the reviewing court by that party. See rule 8.25(c).

Subdivision (g). On application of the parties or on its own motion, the court may set different briefing periods. For example, if a motion to augment or otherwise modify the contents of the record is filed, the court might order that petitioner's brief be filed within a specified time after that motion is decided.

Rule 8.499. Filing, modification, and finality of decision; remittitur

(a)–(b) * * *

(c) Finality of decision

(1) A court's denial of a petition for a writ under ~~this chapter~~ rule 8.495, 8.496, or 8.498 without issuance of a writ of review is final in that court when filed.

(2) Except as otherwise provided in this rule, a decision in a writ proceeding under this chapter is final in that court 30 days after the decision is filed.

(3) If necessary to prevent mootness or frustration of the relief granted or to otherwise promote the interests of justice, the court may order early finality in that court of a decision granting a petition for a writ under this chapter or, except as provided in (1), a decision denying such a petition ~~after issuing a writ of review~~. The decision may provide for finality in that court on filing or within a stated period of less than 30 days.

(4)–(5) * * *

(d) Remittitur

A Court of Appeal must issue a remittitur in a writ proceeding under this chapter except when the court denies the petition under rule 8.495, 8.496, or 8.498 without issuing a writ of review. Rule 8.272(b)–(d) governs issuance of a remittitur in writ proceedings under this chapter.

W12-01

Appellate Procedure: Review of California Environmental Quality Act Cases Under Public Resources Code Sections 21178–21189.3 (adopt Cal. Rules of Court, rule 8.497 and amend rules 8.485 and 8.499)

	Commentator	Position	Comment	Advisory Committee Response
1.	California Planning and Conservation League By Antonio Rossman Counsel	AM, N	These comments are submitted by the California Planning and Conservation League (PCL), the state's principal advocate before judicial and legislative bodies to enforce and implement the California Environmental Quality Act (CEQA). PCL served as the principal sponsor for CEQA's enactment and in most of the statute's beneficial amendments since. PCL has periodically served as a party in major CEQA litigation, and more frequently before appellate courts as amicus curiae. To the very limited extent made possible by the Legislature's process at the end of the 2011 session, PCL commented on AB 900 and advocated its rejection for the first of the reasons stated in this comment. The proposed rule of court ignores the elephant in the bathtub, namely that AB 900 imposes an unconstitutional restraint on the original mandate jurisdiction of the superior courts, thus rendering the proposed rule of court unnecessary. Two cases have held that similar statutes, purporting to deny appellate jurisdiction to the Court of Appeal, are "patently unconstitutional." *(California Commerce Casino v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1417-1418; *Hollywood Park Land Co. v. Golden State Transportation Financing Corp.* (2009) 178 Cal.App.4th 924, 940-941.) In the former case, "the Attorney General makes no effort to uphold the constitutionality of' the provision eliminating the Court of Appeal's jurisdiction. (146	As the commentator acknowledges, the Judicial Council does not have the authority to determine the constitutionality of AB 900 nor can the council decline to follow the Legislature's mandate that it adopt rules to implement AB 900 in the absence of a determination that this legislation is unconstitutional.

	Commentator	Position	Comment	Advisory Committee Response
			Cal.App.4th at p. 1418. fn. 8.) For reasons articulated in those cases, AB 900's effort to eliminate the original mandate jurisdiction of the superior court cannot stand. PCL appreciates that the Judicial Council cannot pronounce a measure unconstitutional, nor can the council decline to follow the Legislature's mandate in the absence of a determination of unconstitutionality. PCL has publicly and privately urged the new session of the Legislature to cure immediately the constitutional flaw in AB 900 (and its progenitor, SB 292), by deleting the assignment of these CEQA cases to the Court of Appeal in the first instance. We nonetheless believe that the Judicial Council's most constructive approach would publicly call on the Legislature to remove the offending provisions from AB 900 and SB 292, by urgency legislation separate from other CEQA measures that have been proposed or are being considered this session. Leaving measures on the books that the Attorney General would "make no effort" to defend, as in *Commerce Casino*, only invites piecemeal litigation as these measures are engaged, and causes the Judicial Council to struggle with proposed rules of court that could moderate, but not eliminate, the delay that engendered enactment of these statutes in the first instance.	

	Commentator	Position	Comment	Advisory Committee Response
			Turning to concerns and objections with the proposed rules themselves, PCL offers this guidance in the event the Legislature does not act to eliminate their need by 1 July 2012. The council's task is made vexatious by the fact that AB 900 was available for less than 24 hours of public comment between its introduction in enacted form, and the final (and only) committee hearing on it. The enactment of this legislation occurred under the undesirable circumstance of insufficient (i.e., virtually no) public review in which to discern and correct its flaws. *Electronic service*. Virtually all CEQA cases among established practitioners follow this procedure at trial and on appeal. To prevent renegade counsel from abusing the trust of those who provide such service voluntarily, it should be made mandatory. *Venue.* Subdivision (b)(1) follows the legislation by specifying venue "in the Court of Appeal with geographic jurisdiction over	Based on this and other comments, the committee has revised the proposal to provide that, unless otherwise provided by law, documents required to be served by rule 8.497 must be served by personal delivery, electronic service, express mail, or other means consistent with Code of Civil Procedure sections 1010, 1011, 1012, and 1013, and reasonably calculated to ensure delivery of the document to the parties not later than the close of the business day after the document is filed or lodged with the court. This provision would not apply to service of the petition on the respondent and real party in interest, however, because Public Resources Code sections 21167.6 and 21167.6.5 specify the permissible methods of serving the petition on these parties. The committee concluded that addressing this issue is beyond the scope of these rules.

	Commentator	Position	Comment	Advisory Committee Response
			the project." The council could clarify whether or not when a state agency is respondent, and makes its project approval decision in Sacramento for a project located in a different appellate district, the Sacramento Court of Appeal or any district in which the Attorney General maintains an office thereby also gains jurisdiction. The cases have been inconsistent, often trying to focus on whether the action complained of is that of commission or omission. The council could eliminate the uncertainty with a bright line rule that venue in Sacramento or other districts always lies, when being claimed on a respondent's state agency status. *Administrative record.* Subdivision (c)(3) appears oblivious to the realities of contemporary CEQA practice, where some petitioners and respondents often equally deserve the stigmata of a practice of gamesmanship over the record. The one positive element of AB 900 – requiring the agency to maintain a contemporary electronic record and making that available to the court on short order – actually conforms (but for the electronic element) to the requirements of existing law. In approving a project by filing its CEQA notice of determination, the public agency now certifies that it has maintained its record and that the record can be located at its offices. Few agencies so comply. Often the agency succeeds in levying a vast preparation charge on petitioners for enabling the agency	As noted by the commentator, addressing parties' compliance with existing CEQA requirements regarding preparation of the record is beyond the scope of these rules.

	Commentator	Position	Comment	Advisory Committee Response
			to reconstruct its record after the fact, rather than have done as its notice of determination represents. (In a recent state-court CEQA case the Attorney General and Department of Water Resources claimed in excess of $600,000 in record "preparation" costs for a state record in which the Federal Energy Regulatory Commission (FERC) required maintenance of a nearly-identical publicly-available federal online administrative record; virtually all the costs were assertedly incurred by outside consultants or staff counsel reviewing privilege.) Addressing this conundrum is probably beyond the Judicial Council's power, given the existing and overbroad text of Public Resources Code section 21167.6 The Legislature and council need together and comprehensively to address revisions to CEQA's statutory record preparation provisions; PCL will propose yet again such an address in the coming session. Pending such comprehensive address of the issue, subdivision (c)(3) is only going to work in the best of circumstances. As an inducement to the agency's maintenance of an electronically-available contemporaneous record in the administrative hearings, the 20-day deadline in subdivision (3)(A) should be augmented to provide "or 45 days after the record is lodged in the Court of Appeal, whichever later occurs."	As circulated for public comment, proposed rule 8.497(c)(3)(A) provided that any request to augment or otherwise change the contents of the administrative record must be made by motion served and filed within 20 days after the record is lodged in the Court of Appeal. Under Public Resources Code section 21185 and proposed rule 8.497(i), the Court of Appeal may order extensions of this and other time periods for good cause and in order to promote the interests of justice. The committee therefore does not think it is necessary to modify the 20-day period specified

	Commentator	Position	Comment	Advisory Committee Response
				in 8.497(c)(3)(A) as suggested by the commentator. However, the committee has modified to proposal to increase the time for filing such augmentation requests to 25 days after the record is lodged and served.
			Response to the petition. Subdivision (e) contemplates pre-answer challenges to the petition. That will be an invitation to further delay, or duress, or both, particularly if a motion requiring petitioner's response is filed during the time in which petitioner is also obligated to prepare its opening brief. The best provision would require that a single response include the respondent's expressions of all possible defenses, and that briefing of all of them be accomplished in the respondent's plenary brief. Thus, for example, a defense of inadequate standing or failure to exhaust would be resolved concurrently with any resolution of the merits, as would be the case in a normal appellate review. This procedure, generally followed in CEQA matters in the years before respondents adopted "take no prisoners" litigation tactics, would eliminate the need for separate response by the petitioner. The petitioner's response would come in its plenary reply brief.	The committee's intent was to require that any such challenges be filed concurrently with the answer or other response to the petition. To clarify this, the committee has revised to proposal to include a specific requirement that any such answer, motion, or other response from the same party must be filed concurrently.
			Applications for stays or other injunctive relief. The proposed rule does not seem to anticipate such applications, which should be required as soon as the record is lodged, and anticipate a single up-or-down vote by the	The committee considered including a provision in rule 8.497 addressing the procedures for requesting stays in proceedings under the act. However, the committee ultimately concluded that this was not necessary since there did not appear

	Commentator	Position	Comment	Advisory Committee Response
			Court that would govern for the remainder of the Court of Appeal's jurisdiction over the case. Emergency applications at the moment of commencing the proceeding should also be contemplated, however.	to be anything unique about the authority of parties to seek or courts to grant stays in these proceedings that needed to be addressed in this rule.
			Timing of opening brief. Subdivision (f)(1)(A) tracks the legislation in timing the opening brief to the serving of the administrative record. To its credit, the advisory committee comment (f) observes that this time limit could be extended on motion in the event a record modification motion remains undecided. But rather than require yet one more application by petitioner in these circumstances, the proposed rule itself should specify that the brief be due "the later of 40 days after serving of the administrative record, or 30 days after resolution of any pending motions concerning the record [or other pre-answer challenges, if they are allowed]". That formula will charge the petitioner with ten days of brief preparation in advance of any non-merits motions, but also, discourage such motions that would otherwise burden or delay the petitioner's brief preparation.	Given the court's authority under both AB 900 and the proposed rules to grant extensions of time, the committee concluded that a specific extension for this time period was not necessary.
			Court costs. Subdivision (h) enforces and quantifies AB 900's terms that the applicant for the leadership project "agrees to pay the costs of the Court of Appeal in hearing and deciding" the case. These costs far transcend the traditional costs of court that can be awarded against the project challenger in a	The committee appreciates this suggestion. However, Adding a provision addressing whether these court costs are recoverable would be an important substantive change that was not included in the proposal circulated for comment. Under rule 10.22, substantive changes to the rules of court generally cannot be recommended for

	Commentator	Position	Comment	Advisory Committee Response
			normal appeal. Subdivision (h) should specify, lest this provision categorically discourage meritorious challengers who are unable to assume the risk of $100,000 adjudicatory costs, that these costs are "unconditionally assumed by the applicant and not awarded against another party pursuant to rule 8.278." The Planning and Conservation League thanks the council for this opportunity to comment and the council's consideration of these comments. To reiterate PCL's principal comment, the Judicial Council should primarily work in concert with PCL and others to effect the Legislature's and Governor's immediate repeal of the unconstitutional mandatory Court of Appeal original jurisdiction, thereby rendering the proposed rules unnecessary.	adoption without first being circulated for public comment. Furthermore, there may be some questions about whether this issue might best be addressed by statute, rather than by rule. For these reasons, the committee is not recommending adding anything to the rules regarding this issue at this time. Instead, if this issue is not addressed by the legislature, the committee can consider the possibility of circulating a new proposal regarding this issue at some point in the future.
2.	Committee on Appellate Courts State Bar of California By Paul R. Johnson Chair	A	The Committee generally supports this proposal. With respect to the four items for which specific comments were requested, the Committee comments as follows: Expedited service requirement. The Committee favors the addition of an expedited service requirement and believes one is necessary to satisfy both the 175-day statutory time frame and the various time limits imposed by the proposed rule. The Committee also favors proposing a provision that offers the parties the option of hand, overnight mail or	Based on this and other comments, the committee has revised the proposal to provide that, unless otherwise provided by law, documents required to be served by rule 8.497 must be served by personal delivery, electronic service, express mail, or other means consistent with Code of Civil Procedure sections 1010, 1011, 1012, and 1013, and reasonably calculated to ensure delivery of the document to the parties not later than the close

	Commentator	Position	Comment	Advisory Committee Response
			electronic service. Including an expedited service requirement also has the benefit of resolving a potential conflict that could arise when non-CEQA claims having differing service requirements (e.g., those under the Subdivision Map Act) are raised in the petition with CEQA claims. Additional special master requirements. Though the Committee understands the reasons behind avoiding too much specificity in the rules regarding special masters, it believes the possibility of appointing a special master to resolve record issues raises a host of questions. For example, will there be a designated pool of special masters who have expertise in CEQA leadership development projects, akin to the requirement in Public Resources Code section 21167.1? Is there a process for a party to challenge a special master, akin to Code of Civil Procedure section 170.6? Is it necessary to specify that a special master has a duty to disclose an actual conflict or other grounds for potential disqualification? Aside from being able to challenge an appointment, the Committee does not believe that the parties should be involved in the appointment of a special master. Proposed $100,000 fee for court costs. While the Committee does not question the manner in which the $100,000 was calculated, it	of the business day after the document is filed or lodged with the court. This provision would not apply to service of the petition on the respondent and real party in interest, however, because Public Resources Code sections 21167.6 and 21167.6.5 specify the permissible method of serving the petition on these parties. The committee appreciates these comments. However, the committee ultimately concluded that it was not necessary to include any additional provisions regarding appointment of special masters in this rule since the Courts of Appeal have experience in appointing special masters in other circumstances. The committee appreciates these comments and this suggestion. However, adding a provision addressing whether these court costs are recoverable would be an important substantive

	Commentator	Position	Comment	Advisory Committee Response
			is split on the question of whether to support the inclusion of a $100,000 fee in the proposed rule. Proponents of the fee believe that it is reasonable in light of the dollar amount of the project and bears a reasonable relationship to the ability to resolve the matter directly in the Court of Appeal. Opponents believe the fee is too high. The Committee unanimously agreed, however, that the proposed rule should clarify that the $100,000 fee is not intended to be a recoverable cost. Limitation on court's discretion. The Committee does not believe it is necessary to include an additional provision relating to limits on the Court of Appeal's discretion to summarily deny a petition.	change that was not included in the proposal circulated for comment. Under rule 10.22, substantive changes to the rules of court generally cannot be recommended for adoption without first being circulated for public comment. Furthermore, there may be some questions about whether this issue might best be addressed by statute, rather than by rule. For these reasons, the committee is not recommending adding anything to the rules regarding this issue at this time. Instead, if this issue is not addressed by the legislature, the committee can consider the possibility of circulating a new proposal regarding this issue at some point in the future. The committee appreciates this input. Given that there were only two comments addressing this issue and those comments were split about whether to include such a provision in the advisory committee comment, the committee did not revise the proposal to include such a comment. However, the committee's report to the Judicial Council does address this issue.
3.	Reuben Ginsburg Los Angeles	NI	I agree with the proposed new and amended rules in W12-01 except as noted below. 1. Public Resources Code section 21185, subdivision (a)(4) provides for the appointment of "a master to assist the court in managing and processing the case." It appears that a special master appointed under this provision is not necessarily limited to deciding motions regarding the administrative record, as in	The committee did not intend proposed rule 8.497(c)(3)(C) as a limitation on the court's authority under Public Resources Code section 21185 to appoint a special master. The committee has revised the proposal to include an Advisory Committee comment clarifying this.

	Commentator	Position	Comment	Advisory Committee Response
			proposed rule 8.497(c)(3)(C). I suggest that the rules include a provision for a more general appointment of a special master. Also, as suggested in the request for specific comments, I believe that the rules should provide for the parties to request a special master. 2. Public Resources Code section 21167.8, subdivision (a) requires a settlement conference to be held within 45 days after service of the petition or complaint. Rule 8.244(a) of the California Rules of Court requires the appellant to "immediately serve and file a notice of settlement in the Court of Appeal" if a civil case settles after the filing of a notice of appeal. Rule 3.1385 similarly requires a plaintiff in the superior court to "immediately file written notice of settlement" if the case settles. Rule 8.244(a) would require immediate written notice if the settlement meeting required under Public Resources Code section 21167.8, subdivision (a) resulted in the settlement of a CEQA case on appeal from the superior court. And rule 3.1385 would require immediate written notice if the settlement meeting resulted in the settlement of a CEQA case pending in the superior court. I believe that the rule should be the same in a CEQA case filed in the Court of Appeal in the first instance. The Court of Appeal should be informed immediately so as to avoid wasted effort, and the notice should be in writing for greater certainty. Accordingly, I suggest that proposed rule 8.497(d) be revised to state that	The committee appreciates these comments. However, the committee ultimately concluded that it was not necessary to include any additional provisions regarding appointment of special masters in this rule since the Courts of Appeal have experience in appointing special masters in other circumstances. Based on this comment, the committee has revised the proposal to require that the petitioner immediately notify the court if the case is settled.

	Commentator	Position	Comment	Advisory Committee Response
			the petitioner must immediately file a written notice of settlement in the Court of Appeal if the case settles. 3. I believe that proposed rule 8.497 should require expedited service of all documents to avoid delays caused by service by regular mail and to facilitate the Court of Appeal's resolution of the case within 175 after the petition is filed, as required by Public Resources Code section 21185, subdivision (a)(3). Service of petitions and other documents apart from the administrative record could be required by hand delivery or electronic service, while service of the record could be required by overnight delivery. 4. It would be helpful if the advisory committee comment accompanying proposed rule 8.497 cited case authority on the limits of the Court of Appeal's discretion to summary deny a writ petition where such a petition is the only avenue for judicial review. (*Southern California Edison Co. v. Public Utilities Com.* (2006) 140 Cal.App.4th 1085, 1096.)	Based on this and other comments, the committee has revised the proposal to provide that, unless otherwise provided by law, documents required to be served by rule 8.497 must be served by personal delivery, electronic service, express mail, or other means consistent with Code of Civil Procedure sections 1010, 1011, 1012, and 1013, and reasonably calculated to ensure delivery of the document to the parties not later than the close of the business day after the document is filed or lodged with the court. This provision would not apply to service of the petition on the respondent and real party in interest, however, because Public Resources Code sections 21167.6 and 21167.6.5 specify the permissible method of serving the petition on these parties. The committee appreciates this input. Given that there were only two comments addressing this issue and those comments were split about whether to include such a provision in the advisory committee comment, the committee did not revise the proposal to include such a comment. However, the committee's report to the Judicial Council does address this issue.
4.	Michael Maurer	NI	Rule 8.497 (c) Administrative Record. (1) Lodging and service. Comment #1: The term "certified" is used in	The reference to certification of the record in

	Commentator	Position	Comment	Advisory Committee Response
			this rule, but is not defined by CEQA, the Guidelines or the rule. An issue for the drafters is whether to include language as to the form of certification and the particulars of what is certified. For what it's worth, the Fifth District has a pending matter that involves the issue of what constitutes a legally proper certification of the record of proceedings. The dispute concerns what assertions must be included in the certification—such as the assertions that (i) the *copies are correct* copies of the original, (ii) the *record is complete* or contains the documents described in CEQA section 21167.6, subdivision (e) and (iii) the person providing the certification has access to information or personal knowledge that allows him or her to make the factual assertions contained in the certificate. Another question about the form of the certification concerns whether it should be made under penalty of perjury, like the form of certification set forth in Code of Civil Procedure section 2015.5—"I certify (or declare) under penalty of perjury that the foregoing is true and correct." Alternatively, the submission of a certified record of proceeding might be accomplished when the certification is of the type referenced in Evidence Code sections 1530 and 1531. The Law Revision Commission Comments to section 1530 provides useful background by discussing the meaning of the terms "attest" and "certify" under preexisting California law. Evidence Code section 1531	proposed rule 8.497 is based on language from Public Resources Code section 21186(g), which provides that "the lead agency shall certify the final administrative record within five days of its approval of the project." The committee concluded that it is beyond the scope of these rules to define what constitutes certification of the record by the lead agency under this statute.

	Commentator	Position	Comment	Advisory Committee Response
			provides in full: For the purpose of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be." Comment #2: This is a nit concerning the removal of "the" from the phrase "record of the proceedings" appearing in the draft of rule 8.497(c)(1). Public Resources Code section 21167.6 uses the phrase "record of proceedings." Therefore, to conform the rule to the statute, the word "the" before "proceedings" should be deleted from the rule.	To address this concern, the committee has revised the proposal to replace the reference to "record of the proceedings" with "the certified final administrative record". This phrase more closely track the language of Public Resources Code section 21186, the statute addressing record preparation in connection with leadership projects.
5.	Orange County Bar Association By Dimetria Jackson President	A		No response required.
6.	Superior Court of California, County of San Diego By Michael Roddy Executive Officer	A		No response required.